Constitutional Law-Freedom of Speech and Press-Municipal Ordinances Restricting Distribution of Printed Matter

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effect only to an intent not contrary to its own laws.\textsuperscript{15} It would therefore seem to follow that the presumed intention must be supplied by the Indiana lapsed legacy law. By it the bequest to the brother and sister lapsed and the husband as residuary legatee or sole heir took the real estate as real estate, there being no equitable conversion.

To apply the doctrine of equitable conversion to this will is not in accordance with Indiana law.\textsuperscript{16} It can be invoked only by reference to the Ohio law of lapsed legacies under which the bequest of the proceeds would not lapse and the heirs of the beneficiaries would take the proceeds of the sale of the real estate. The court applied equitable conversion to give effect to the testatrix’s intention. But any intention to pass personally to the heirs of the brother and sister must be implied and it can be implied only under the Ohio lapsed legacy law. The court refers to Ohio law to justify a reference to Ohio law. The propriety of any reference to Ohio law is questionable in the light of the authorities.\textsuperscript{17}

The decision stated in summary appears to be: To determine the character of an interest in Indiana real estate the intention implied by a foreign law to a testator of a foreign will is given effect although not in accord with Indiana law. Thus stated we have a new proposition of conflict of laws without cited or known precedent.\textsuperscript{18} Such a conclusion hardly follows from the propositions in the decision whereas the opposite result can easily be reached and supported logically.

R. B. W.

\textbf{CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND PRESS—MUNICIPAL ORDINANCES RESTRICTING DISTRIBUTION OF PRINTED MATTER.—Ordinances were passed in three cities prohibiting the distribution of handbills and other similar printed matter in the streets. A fourth city prohibited canvassing, soliciting, and the distribution of circulars from house to house without first having secured a permit from the Chief of Police, in whose discretion such permit was to be issued. In each of the first three cities, petitioners were convicted of distributing handbills and leaflets to pedestrians on the street, and in the fourth, petitioner was convicted of canvassing and soliciting money contributions without a permit. Held, convictions reversed, for all these ordinances are void, as applied to petitioners’ conduct, as being in violation of the Fourteenth Amendment.}

\textsuperscript{15} Smith v. Bell (1832), 6 Pet. U. S. 68; Blatt v. Blatt (1926), 79 Colo. 57, 243 Pac. 1099, 57 A. L. R. 221 where it is said, “All the authorities that speak on the subject declare that the laws of the state where the testator lived at the time he made his will will not, in the courts of another state, where the will is probated, be controlling or conclusive or be followed in so far as it concerns the intention of the testator or as bearing on the effect and operation of the will, if it is contrary to the public policy or the statutes of the state where the will is probated.” THOMPSON, CONSTRUCTION OF WILLS (1928), § 48 and cases cited.

\textsuperscript{16} Burns Ind. Stat. Ann. (1933), § 7-417, “Foreign wills—Filing and recording in Indiana—Effect.—Such will . . . shall have the same effect as if it had been originally admitted to probate and recorded in this state.”; § 7-709, lapsed legacy statute.

\textsuperscript{17} Lemmon v. Peo. (1860), 20 N. Y. 562, quoted from in footnote 10, supra; Holcomb v. Wright (1894), 5 App. (D. C.) 76; Clarke’s Appeal (1898), 70 Conn. 195, 483, 39 Atl. 155; Story on Conflict of Law (5th ed., 1883), 447.

\textsuperscript{18} Cf. Clarke’s Appeal, 70 Conn. 195, 483, 39 Atl. 155.

The Federal Constitution and all of the state constitutions contain provisions against abridging the freedom of speech or of the press. The Supreme Court has extended the scope of the Fourteenth Amendment to include federal protection of freedom of speech or press as guaranteed in the First Amendment against impairment by the states. Since the police powers of the State may be delegated to municipal corporations created by the State, to be exercised for the health, safety, morals, and welfare of the public, it is clear that such powers are in turn limited by the constitutional restrictions against the abridgment of freedom of speech and press.

This guarantee of freedom of speech and press is not absolute. Certain regulations are valid under the police power, but the exercise of such power is prohibited when its resulting regulations violate constitutional rights, though it is apparently being used for the public interest. The problem of the courts would seem to be to define a compromise between the exercise of individual rights and liberties and the use of the police power of the State. The test should be one of reasonableness. But to solve the problem through the test of reasonableness necessarily involves the definition by the court of the term "freedom of speech and press" as used in the First Amendment and the term "police power" as it may be exercised by the states. There are almost as many definitions and interpretations of these terms as there are cases considering them. A reasonable compromise between the two can be little more than a guess to be ultimately passed upon by the Supreme Court.

The provisions of the federal constitution and of the state constitutions which guarantee the freedom of speech and of the press do not create those rights, but protect existing rights from abridgment or interference. The First Amendment was intended to preclude the federal government, and the constitutional restrictions against the other states do not create any new rights for citizens of the United States.

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1 U. S. Const. Amend. I: "Congress shall make no law ... abridging the freedom of speech or of the press; ..."


3 U. S. Const. Amendment XIV: "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ..."


Note that as late as 1922, the Supreme Court held that "... neither the Fourteenth Amendment nor any other provision of the constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence' ..." Prudential Insurance Co. of America v. Cheek, 259 U. S. 539, 42 S. Ct. 516, 66 L. Ed. 1044. The question had been specifically left undecided in Patterson v. Colorado (1907), 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879.


Fourteenth Amendment the state governments, from adopting any form of previous restraint upon printed publications or their circulation (except a few minor historical exceptions). They were not intended to prevent the subsequent punishment of such as might be deemed contrary to the public welfare. Abuse of the freedom guaranteed is subject to punishment under the police power. The exercise of such power, for example, may be used to punish utterances inimical to the public welfare, or those tending to corrupt public morals, inciting crime, disturbing the public peace, or endangering the foundations of organized government and threatening its overthrow by unlawful means.

Ordinances regulating or prohibiting the distribution of handbills and similar printed matter were held by the great weight of authority to constitute a valid exercise of the police power where distribution was by such means as would ordinarily result in the littering of the streets. Most of the courts held that such a littering of the streets constituted a fire and sanitation hazard, a danger

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9 See Vance, *Freedom of Speech and of the Press* (1918), 2 Minn. L. Rev. 239, 242 in which it is said: "It would seem more reasonable, and far more practicable, to say that the constitutional provision in question prohibits any other previous restraints than those recognized and accepted at the time the constitution was adopted, thus leaving the courts free to exercise their equity powers in accordance with settled principles of justice."


11 "Liberty of circulation is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." Ex parte Jackson (1877), 96 U. S. 727, 733, 24 L. ed. 877. See also, Lovell v. Griffin (1938), 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949; Buxbom v. City of Riverside (1939), 29 F. Supp. 3.


14 The cases on this subject may be classified as follows:


to horses, or as generally increasing the uncleanliness and unsightliness of the municipality.15 The Los Angeles, Milwaukee, and Worcester ordinances considered by the Supreme Court in the principal case were upheld by the respective state courts16 upon the theory that the distribution encouraged or resulted in such littering of the streets as the police power gave authority to prevent. The present holding seems to practically abolish such grounds, at least for totally prohibiting or restricting the right of distribution, yet the decision is apparently applicable only: (1) where the manner of distribution is by handing the printed matter to one willing to receive it,17 and (2) where the contents of the handbills or leaflets deal with some economic, political, social or religious question, upon which information or opinion is being disseminated. Although the ordinances considered in the principal case did prohibit other means of distribution as well as commercial solicitation and canvassing and the distribution of purely advertising matter, the Court made no inference that such regulation is not a reasonable exercise of the police power.18 The Court holds as an abridgment of the constitutional liberty only the prohibition of such activity as bears a "necessary relationship to the freedom to speak, write, print or distribute information or opinion."

The Court thus admits that the exercise of the police power to qualify the freedom of speech and press is proper where reasonable, and holds that

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15 See Anderson v. State (1903), 69 Nebr. 636, 96 N. W. 149.


17 "We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." Schneider v. State of New Jersey, etc. (1939), 60 S. Ct. 146, 151, 54 L. Ed. 115, 121.

18 Many of the courts inquire into the contents of the handbills or circulars in deciding whether they are likely to be cast aside so as to litter the streets. Some ordinances make specific exemption of certain types of circulars which amounts to a legislative declaration as to the kind of handbills which will be permitted. See cases in classification C in footnote 14.
the prohibition of the activities being carried on by the petitioners is unreasonable. But it does not lay down or formulate any rules or standards by which it would be possible to measure or predict in advance what will be considered by the Court a reasonable exercise of such power. Each case involving even a slightly different set of circumstances will have to be taken to the Supreme Court to determine whether, in the particular instance, the exercise of the police power is reasonable.

Constitutional Law—Taxation of Interstate Sales.—The City of New York imposed a tax of 2% upon the receipts from any sale within the city. The statute defines "sale" as any transfer of title or possession or both for a consideration or other agreement therefore. The vendor, who is authorized to collect the tax, is required to charge it to the consumer and pay the same to the city. If the goods are purchased for resale, there is no tax. Defendant, a Pennsylvania corporation, mined coal in Pennsylvania upon specified orders secured by defendant's agents for New York City purchasers. The coal was delivered to purchaser's plant or steamship by the defendant where the purchaser did the unloading. Held, the tax is not an unconstitutional burden on interstate commerce. *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 60 S. C. 388.

State taxation of interstate commerce must hurdle not only the commerce clause but also the equality clause and the due process clause. The general rule is that a state may not unreasonably tax interstate commerce. Any possible state taxation may conceivably have some slight effect upon such commerce thus the scope and refinements of the rule can best be illustrated by stating the holdings of specific decisions.

1 Two companion cases involving the same tax were decided the same day. In *McGoldrick v. Felt and Tarrant Mfg. Co.* (1940), 60 S. Ct. 404, the defendant, an Illinois corporation manufactured and sold comptometers. Agents solicited orders in New York City which were forwarded to Illinois for approval. The order was filled in Illinois by allocating a specific machine designated by a serial number and shipped to defendant's agents in New York City who delivered to the purchaser. Remittances were made by purchaser directly to the Illinois office. Upon authority of the principal case the tax was upheld. In *McGoldrick v. Dugrenier Inc.* (1940), 60 S. Ct. 404, defendant, a Massachusetts corporation, manufactured and sold vending machines. An exclusive sales agent solicited orders in New York City which were forwarded to Massachusetts for approval. If the order was accepted, it was filled by shipping the purchased machine direct to the purchaser who paid the freight. The tax was upheld.

2 Case of *The State Freight Tax* (1872), 15 Wall. (82 U. S.) 232, 21 L. Ed. 146.


5 WILLIS, CONSTITUTIONAL LAW (1936) p. 310.