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Constitutional Law—Freedom of Press and Religion—License Tax on Periodicals

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would be an illusion. Efficient productivity is more likely to arise when employees are operating through a union which they want to represent them than when they are forced to accept a union which no longer has their support. The solution seems to lie in a change in the concept of the collective bargaining contract. Such a contract should run with the majority of the employees in a given collective bargaining unit instead of with the union obtaining the contract.³²

H. M. F.

CONSTITUTIONAL LAW—FREEDOM OF PRESS AND RELIGION—LICENSE TAX ON PERIODICALS—[Arizona].—Appellant was convicted of selling religious periodicals without having paid for a license as required by municipal ordinance. *Held*: The ordinance did not violate constitutional guarantee of freedom of religion or freedom of speech and press. *State v. Jobin*.¹

Freedom of speech, press, and religion are protected against invasion by state action by the 14th Amendment to the United States Constitution extending the restrictions of the 1st Amendment to the states. These rights are, of course, subject to the reasonable exercise of the state's police power.² In recent years many cases have arisen testing state and municipal power to restrict the distribution of handbills, pamphlets, and other literature. The requirement of a permit from a designated public official for the distribution of literature has been held to be unconstitutional as a violation of freedom of speech and press.³ However, where the issuance of the permit is *non-discretionary* in the public official and is merely for the purpose of reasonable regulation and insuring obedience to the general laws, the

the existence of a contract would be effectively stifled by the contracting union through discharges obtained by the time the contract expired, and meanwhile disaffection would break out into industrial strife if employees would have to deal with the employer through representatives who do not represent them. It must be remembered that collective bargaining does not end with the signing of a contract. Negotiation as to grievances is part of the process of collective bargaining. The grievance machinery would sputter and halt if the employees had no confidence in their representatives."

32. Rosenfarb, *The National Labor Policy and How It Works* (1940) 275.

1. (Ariz. 1941) 118 P. (2d) 97.

2. *Davis v. Beason* (1890) 133 U. S. 333 (polygamy); *Ex parte Westellison* (1927) 38 Okla. Crim. Rep. 207, 259 Pac. 873, (unnecessary noise in announcing contents of newspapers in selling); but cf. *De Jonge v. Oregon* (1937) 299 U. S. 353, (criminal syndicalism); *Herndon v. Lowry* (1937) 301 U. S. 242 (attempt to incite insurrection).

3. *Lovell v. City of Griffin* (1938) 303 U. S. 444; *Schneider v. State of New Jersey* (1939) 308 U. S. 147; *State ex rel. Wilson v. Russell* (Fla. 1941) 1 So. (2d) 569; *Village of South Holland v. Stein* (1940) 373 Ill. 472, 26 N. E. (2d) 868, 127 A. L. R. 957; *Commonwealth v. Pascone* (1941) 308 Mass. 591, 33 N. E. (2d) 522; *Harder v. Shahadi* (1940) 125 N. J. L. 153, 14 A. (2d) 475; *Star Co. v. Brush* (1918) 172 N. Y. S. 320, 104 Misc. 404. *Accord*: *Hague v. C. I. O.* (1939) 307 U. S. 496; *Cantwell v. Connecticut* (1940) 310 U. S. 296, 128 A. L. R. 1352.

ordinance has been upheld.⁴ It is also a violation of free speech and press for the state or municipality to prohibit absolutely the distribution of literature in the public streets,⁵ or house to house solicitation and distribution,⁶ or the carrying and display of placards and signs in public places.⁷ However, the state or town may impose reasonable regulations on these rights, such as fixing reasonable hours for canvassing and solicitation or designating certain areas where hawkers and peddlers may stop.⁸ The validity of statutes such as these, which affect solicitation of funds or distribution of literature for religious purposes, is governed by similar principles as respects the constitutional guaranty of freedom of religion.⁹

The principal case involves freedom of speech and press as affected by the taxing power of the state. The press as such is not immune to general forms of taxation.¹⁰ However, in the case of *Grosjean v. American Press*,¹¹ the United States Supreme Court invalidated a 2% tax on gross receipts of all publications selling advertising and with a circulation of over 20,000 copies per week as a violation of freedom of the press, since it would tend to limit the free circulation of ideas. The court was greatly influenced by the peculiar nature of the tax and the surrounding circumstances, stating: "It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information."¹² If the *Grosjean* case is interpreted as holding that the determining factor of the validity of a tax on the publication or distribution of literature is the tendency of the tax to limit circulation, then any tax directly affecting the cost of publication or distribution would be invalid.¹³ The method of applying the tax would be the court's criterion in determining which taxes were too direct and which were valid. The court in the instant case, however, interpreted the *Grosjean* case as holding that the surrounding circumstances determine the validity

4. *City of Manchester v. Leiby* (C. C. A. 1, 1941) 117 F. (2d) 661, cert. den. (1941) 313 U. S. 562.

Courts may require at least an application for and a denial of the permit as prerequisite to an injunction suit. *Hannan v. City of Haverhill* (C. C. A. 1, 1941) 120 F. (2d) 87, cert. den. (1941) 62 S. Ct. 81.

5. *Schneider v. State of New Jersey* (1939) 308 U. S. 147. See Comment (1940) 25 WASHINGTON U. LAW QUARTERLY 611.

6. *Schneider v. State of New Jersey* (1939) 308 U. S. 147; *Zimmerman v. Village of London, Ohio* (D. C. S. D. Ohio E. D. 1941) 38 F. Supp. 532.

7. *Schneider v. State of New Jersey* (1939) 308 U. S. 147. Accord: *Commonwealth v. Anderson* (1941) 308 Mass. 370, 32 N. E. (2d) 684; *Commonwealth v. Pascone* (1941) 308 Mass. 591, 33 N. E. (2d) 522.

8. *Commonwealth v. Pascone* (1941) 308 Mass. 591, 33 N. E. (2d) 522. See *Schneider v. State of New Jersey* (1939) 308 U. S. 147, 165.

9. *Cantwell v. Connecticut* (1940) 310 U. S. 296, 128 A. L. R. 1352.

But cf. *Cook v. City of Harrison* (1929) 180 Ark. 546, 21 S. W. (2d) 966; *Commonwealth v. Anderson* (1930) 272 Mass. 100, 172 N. E. 114, 69 A. L. R. 1097.

10. See *Grosjean v. American Press* (1936) 297 U. S. 233, 250.

11. (1936) 297 U. S. 233.

12. (1936) 297 U. S. 233, 250.

13. *Mullaly v. Banks* (1938) 168 Misc. 515, 6 N. Y. S. (2d) 41.

of the ordinance or statute.¹⁴ Thus if, as in the instant case, the intent of the legislative body was merely to raise revenue and not to regulate or limit the distribution of literature in any way, the tax would be valid.

The latter view overlooks the fact that as a practical matter many groups may be denied the opportunity to express and circulate their ideas freely by a tax which exceeds their individual financial resources. Since unrestricted circulation of ideas is largely dependent upon the sale of literature to defray the cost of publication, the suggestion of the present and other courts that the tax may be avoided by giving the literature free of charge¹⁵ is without merit.¹⁶ Therefore it is submitted that in cases involving freedom of speech as affected by a tax, the validity of the tax should depend on its tendency to limit the free circulation of ideas.

D. C.

CRIMINAL LAW—APPEAL IN FORMA PAUPERIS OR IN PROPRIA PERSONA—AFFIRMATIVE DUTY OF JUDGE TO INFORM ACCUSED OF HIS RIGHTS—[Federal].—Within the period allowed for appeal, plaintiff, convicted under the pandering act,¹ wrote a letter to the trial judge from prison stating that he wished to appeal, that he was uncertain of the intentions of volunteer and assigned counsel, and that he requested that these latter proceed with an appeal in his behalf. After the time for noting appeal had expired, the judge notified petitioner that matters of this sort must be taken care of by counsel, and that he was forwarding petitioner's letter to counsel who had represented him. These latter notified petitioner that they did not care to represent him. After further correspondence, the judge called in the former counsel and the district attorney for a conference, at which it was decided that appellant had only a remote chance of reversal; the judge notified the prisoner that as a consequence he did not feel justified in appointing new counsel to prosecute an appeal. Petitioner sought habeas corpus on the ground that the court's action deprived him of the right of appeal in *propria persona* as well as by counsel, solely on account of his poverty, which constituted an unconstitutional discrimination, rendering his conviction, sentence, and further detention invalid. *Held*: Accused was not entitled to immediate freedom on habeas corpus, since an appeal was to be considered as taken and pending. The trial court owed an affirmative duty to petitioner to inform him of his rights. *Boykin v. Huff*.²

The opinion of the appellate court leaves the reader in doubt as to

14. Accord: *Giragi v. Moore* (1936) 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A. L. R. 314.

15. The Arkansas Supreme Court in the recent case of *Cole v. City of Fort Smith* (Ark. 1941) 151 S. W. (2d) 1000, invalidated an ordinance taxing the free distribution of literature while upholding an ordinance taxing the sale of literature.

16. See *Hannan v. Haverhill* (C. C. A. 1, 1941) 120 F. (2d) 87, cert. den. (1941) 62 S. Ct. 81. For a well reasoned opinion by a lower court on this point see *Mullaly v. Banks* (1938) 168 Misc. 515, 6 N. Y. S. (2d) 41.

1. (1910) 36 Stat. 833, c. 404, §3, D. C. Code (1940) tit. 22, §2707.

2. (App. D. C. 1941) 121 F. (2d) 865.