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Constitutional Law - Civil Rights - Right of Jehovah's Witnesses to Distribute and Sell Their Literature Upon the Streets of an Unincorporated, Privately-Owned Community

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Notes

CONSTITUTIONAL LAW—CIVIL RIGHTS—RIGHT OF JEHOVAH'S WITNESSES TO DISTRIBUTE AND SELL THEIR LITERATURE UPON THE STREETS OF AN UNINCORPORATED, PRIVATELY-OWNED COMMUNITY—The appellant, a member of the Jehovah's Witnesses sect, was engaged in distributing religious literature on the streets of an unincorporated community owned by the Gulf Shipbuilding Corporation. She was arrested and charged with violating a state statute[1] which made it a crime to enter or remain on the premises of another after having been properly warned. *Held,* an application of the statute would deprive the appellant of her constitutional rights to freedom of press and religion as guaranteed by the Fourteenth Amendment to the Constitution. Liberty of press and religion overrode the technical proprietary interests involved. *Marsh v. State of Alabama,* 66 S.Ct. 276 (U.S. 1946).

On the same day the court handed down another decision involving facts similar to those in the *Marsh* case. However, this case involved the use of the streets of a village owned by the federal government to house defense workers. Applying the rule of the *Marsh* case, the same result was reached. *Tucker v. State of Texas,* 66 S.Ct. 274 (U.S. 1946).[2]

One with an elementary knowledge of constitutional law is aware of the great mass of cases that have been brought by the Jehovah's Witnesses to protect and maintain their interest in going about the country preaching their gospel and selling their literature.[3] Various statutes and ordinances have been employed in an attempt to regulate and police the coast-to-coast activities of these colporteurs, but the constitutional axe, as wielded by the Supreme Court, has greatly limited their effect.

These ordinances take various forms. Some require a license to be issued either without cost or upon payment of a nominal fee but in the discretion of a municipal officer. This type of regu-

1. Ala. Code Ann. (1940) tit. 14, § 426.

2. It is interesting to note that the appeal to the United States Supreme Court was direct from the County Court of Medina County, Texas. As this was the highest Texas court which, under Texas procedure, had authority to hear the case, direct appeal was allowed to the United States Supreme Court based on the federal question involved.

3. Waite, The Debt of Constitutional Law to Jehovah's Witnesses (1944) 28 Minn. L. Rev. 209.

latory measure has uniformly been held invalid.[4] Others require the payment of a license tax for the privilege of soliciting or peddling and this has been found to be a tax on a constitutional privilege and consequently invalid.[5] Reasonable regulation, designed to keep the streets and other public areas clear and free of disturbance, has been sustained[6] as an exercise of the police power. The test of reasonableness is seemingly a matter to be decided according to the facts of each case and no absolute criterion has been laid down. The courts have experienced little difficulty in sustaining regulation which involved commercial advertising.[7] It is interesting to note that the dissent in *Murdock v. Pennsylvania*[8] classified the activities of Jehovah's Witnesses as commercial. Adoption of such an interpretation could have the effect of overruling all the decisions that have upheld their sales activities under the guise of religious freedom.

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4. Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); Schneider v. Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943); Kennedy v. City of Moscow, 39 F. Supp. 26 (D.C. Idaho 1941); Borchert v. City of Ranger, 42 F. Supp. 577 (D.C. Tex. 1941); State ex rel. Hough v. Woodruff, 147 Fla. 299, 2 So. (2d) 577 (1941); Village of South Holland v. Stein, 373 Ill. 472, 26 N.E. (2d) 868 (1940); Township of Maplewood v. Albright, 13 N.J. Misc. 46, 176 Atl. 194 (C.P. 1934); Dziatkiewicz v. Township of Maplewood, 115 N.J. Law 37, 178 Atl. 205 (1935); Borough of Edgewater v. Cox, 123 N.J. Law 212, 8 A. (2d) 375 (1939).

5. Jones v. City of Opelika, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691 (1942); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); Follett v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944); Busey v. District of Columbia, 138 F. (2d) 592 (App. D.C. 1943); State ex rel. Singleton v. Woodruff, 153 Fla. 84, 13 So. (2d) 704 (1943); Thomas v. City of Atlanta, 59 Ga. 520, 1 S.E. (2d) 598 (1939); City of Blue Island v. Kozul, 379 Ill. 511, 41 N.E. (2d) 515 (1942); People v. Gage, 38 N.Y.S. (2d) 817 (Cy. ct. 1942); McConkey v. City of Fredericksburg, 179 Va. 556, 19 S.E. (2d) 682 (1942).

6. See Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); Mickey v. Kansas City, 43 F. Supp. 739 (D.C. Mo. 1942); City of Chicago v. Rhine, 363 Ill. 619, 2 N.E. (2d) 905 (1936); Almassi v. City of Newark, 8 N.J. Misc. 420, 150 Atl. 217 (Cy. Ct. 1930), as examples of reasonable regulation and a valid exercise of the police power. Practically all the Supreme Court decisions dealing with this question contain dicta to the effect that reasonable regulation is valid.

7. Schneider v. Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Town of Green River v. Fuller Brush Co., 65 F. (2d) 112 (C.C.A. 10th, 1933); Cook v. City of Harrison, 180 Ark. 546, 21 S.W. (2d) 966 (1929); where religious book salesmen were held to be subject to a tax on commercial peddlers, Reuben H. Donnelley Corp. v. City of Bellevue, 283 Ky. 152, 140 S.W. (2d) 1024 (1940).

8. "In our judgment, however, the plan of national distribution by the Watch Tower Bible & Tract Society, with its wholesale prices of five or twenty cents per copy for books, delivered to the public by the witnesses at twenty-five cents per copy, justifies the characterization of the transaction as a sale. . . . The quid pro quo is demanded." 319 U.S. 105, 119, 63 S.Ct. 891, 87 L.Ed. 1292, 1301 (1943).

A third type of ordinance forbids the uninvited peddler, hawker, or itinerant vendor to go upon private property for the purpose of soliciting or selling. The vendor is forbidden to make house-to-house calls and knock upon the door without express permission. Treatment of this type of ordinance in the various jurisdictions has not been uniform. Presented with a case involving this question, the Supreme Court in 1943 held such an ordinance unconstitutional as applied to Jehovah's Witnesses.[9] However, it indicated that an ordinance whose prohibition was conditioned upon notice to "keep out," given in "suitable fashion" by the owner or occupant, would be valid.[10]

The basic issue in these cases might be termed simply "private property versus religious freedom." In *Martin v. Struthers*[11] the Court found the balancing of the conflicting interests involved to be its major task. The judgment of the community could not be substituted for the judgment of the individual householder or property owner with respect to his interest in the free dissemination of information and ideas. On the other hand, the age-old concept that "a man's home is his castle," still has substance. The homeowner can prevent even one disseminating religious literature from remaining on his premises once he has been ordered off and, if proper notice be given, can exclude the latter in advance.[12]

Is the result to be the same where the property is larger and where the degree of control is less than in the individual home? The court has found that those disseminating religious information are not free to go from room to room in a hotel against the wishes of the owner and remain there after they have been

9. Ordinances ruled out: Schneider v. Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); Zimmerman v. Village of London, 38 F. Supp. 582 (D.C. Ohio 1941).

Ordinances upheld: Town of Green River v. Fuller Brush Co., 65 F. (2d) 112 (C.C.A. 10th, 1933) (commercial soliciting involved); City of Shreveport v. Cunningham, 190 La. 481, 182 So. 649 (1938) (peddlers forbidden to call at residences with certain enumerated exceptions—direct test of constitutionality), noted in (1939) 1 LOUISIANA LAW REVIEW 455; People v. Bohnke, 287 N.Y. 154, 38 N.E. (2d) 478 (1941).

10. Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

11. The court found it must weigh "the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interests of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not." 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313, 1317.

12. Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); De Berry v. City of La Grange, 8 S.E. (2d) 146 (Ga. App. 1940).

ordered out.[13] The degree of control exercised in this case empowers the owner to exclude those who are undesirable.

The Louisiana court, in passing on a phase of this question, ruled that once a representative of Jehovah's Witnesses had been ordered off a plantation, he had no right thereafter to call upon the tenants on the same plantation.[14] The concept of private property is extended here to give the owner full and complete control over all parts of the plantation. The court stated that "guaranties of freedom of religious worship . . . do not sanction trespass in the name of freedom. . . . Personal liberty ends where the rights of others begin."[15]

It has been held that the owner of an apartment house could not prevent members of this sect from calling on those of his tenants who desired an interview and permitted entrance by lifting the lock to the vestibule door in the lobby.[16] Here we have a clash of interests—those of the real owner of the property and the interests of the tenant, who can be likened unto a homeowner. It is well to emphasize the license which the court found the Witnesses had been granted; for the defiance of a property right is not to be found so readily when, in reality, entrance is gained through an easement within the power of the tenant to grant. But why should not the plantation tenants in Louisiana,[17] as occupants of separate houses, be deemed to have within their power the right to grant a similar easement? The right to do so would rest on the protection of their interests to receive the full benefits of freedom of press and religion.[18]

This right of easement possessed by an apartment dweller is in reality only one step removed from the right of the residents of a privately owned, unincorporated community to have the streets open for the general advantage of all inhabitants. As a practical matter, an express license cannot be found; but, if a close analogy were desired, a license could be implied to those who desired the use of the streets for such purposes as have been dealt with here.

13. People v. Vaughan, 150 P. (2d) 964 (Calif. App. 1944).
14. State v. Martin, 199 La. 39, 5 So. (2d) 377 (1941).
15. 199 La. 39, 48, 5 So. (2d) 377, 380.
16. Commonwealth v. Richardson, 313 Mass. 632, 48 N.E. (2d) 678 (1943).
17. State v. Martin, 199 La. 39, 5 So. (2d) 377 (1941).
18. Still more speculation arises over whether or not *Martin v. City of Struthers,* decided two years after this case, has the effect of overruling the Louisiana decision. The Supreme Court in unequivocal words made it plain that "Freedom to distribute information to every citizen *wherever he desires to receive it* is so clearly vital to the preservation of a free society that . . . it must be fully preserved." (Italics supplied.) 319 U.S. 141, 146, 63 S.Ct. 862, 865, 87 L.Ed. 1313, 1319 (1943). The application of such language would, in this writer's opinion, overrule the Louisiana decision in *State v. Martin.*

The instant case extends the principle no further than the court had previously gone in protecting such other interest as that recognized in the right to picket even on the property of the employer[19] and that recognized in allowing an employee to solicit union membership upon the employer's property.[20] The court has experienced no difficulty in preventing this interference.

A distinction is noted between the invasion of private property for commercial ends and an invasion in the furtherance of religious principles. The attitude of the courts makes it clear that the advertiser and Fuller Brush salesman will not be afforded the same protection granted the colporteur and the picketeer.[21] The explanation of this distinction derives from the types of interests being protected.

It remains to be seen to what extent freedom of religion and expression will brush aside private property concepts. The question as it now stands cannot be considered as finally settled, for the Supreme Court is split on this general issue and a change of personnel may bring with it a change in constitutional interpretation with respect to this question.

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CRIMINAL LAW—BURGLARY IN THE NIGHTTIME—Defendant was convicted on a charge of breaking and entering in the nighttime with intent to steal.[1] The sole witness testified that the defendant broke and entered the burglarized apartment "at night" "between six and seven." Upon further interrogation she declared that the breaking and entering was at the time of day when it is "just getting dark." Official records show that the sun set at 8:04 p.m. on the day of the burglary. The supreme court upheld the jury's finding that the crime had been committed after sunset. Chief Justice O'Niell and Justice Higgins dissented on the ground that the witness' testimony clearly showed the breaking and entering to have been in the daytime. *State v. McDonell*, 23 So. (2d) 230 (La. 1945).

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19. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) is illustrative of this right.

20. Republic Aviation Corporation v. National Labor Relations Board, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 914 (1945).

21. See cases cited supra note 6.

1. The offense had been committed prior to the effective date of the Criminal Code; and the prosecution, therefore, was under Section 851 of the Revised Statutes as amended by La. Act 71 of 1926. This statute was superseded by Art. 60, La. Crim. Code of 1942, and the offense is now designated as "burglary in the nighttime."