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CONSTITUTIONAL LAW-FREEDOM OF THE PRESS-FREEDOM OF SPEECH AND ASSEMBLY-POLICE POWER

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CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—FREEDOM OF SPEECH AND ASSEMBLY—POLICE POWER—The recent decision by the federal district court in the case of *Committee for Industrial Organization v. Hague*[1] has brought the civil liberties issue to the forefront again. Acting under a city ordinance, defendant's mayor, director of public safety, and chief of police refused to issue a permit to plaintiff labor union to distribute circulars, hold public meetings, or display placards in Jersey City, and excluded plaintiff's members from the city, acting under the belief that their doctrines were "un-American," and that their presence and activities were likely to provoke the city's inhabitants to breaches of the peace. It was conceded by defendants that no previous circulars, placards or speeches of plaintiff had been of a nature other than peaceful, and that they had not consisted of incitements to violence.

The court, though it did not hold the ordinance itself to be invalid, granted to plaintiff an injunction restraining defendants from further deportations, requiring defendants to permit the distribution of circulars[2] and display of placards, and to permit meetings in the city parks, subject only to the city's right to arrange convenient times and places for the meetings. The actions of defendants were held to constitute a deprivation without due process of plaintiff's liberty as guaranteed by the Fourteenth Amendment to the Federal Constitution, because the restrictions imposed on that liberty were unreasonable. The court recognized realistically that the problem is one of balancing constitutional rights against necessary regulation under the police power, and that the ultimate question is one of extra-jurisprudential evaluation, namely, what is reasonable regulation? The court easily disposed of the depor-

[1] (D. C. N. J. 1938) 25 F. Supp. 127. Affd. (C. C. A. 3d, 1939) 6 U. S. LAW WEEK 701.

[2] The court dismissed as mere pretext the contention of defendants that the distribution of circulars would litter the streets, clog the sewers, cause fire and disease, and frighten horses.

tations as an arbitrary invasion of personal freedom of locomotion, and further as a power possessed only by the ultimate sovereign. Likewise, prevention of circular distribution and placard showing, without cause, was deemed an invasion of the liberties of speech and of the press. As for public metings, the court thought it reasonable not to allow them in the streets, but indispensable to allow them some place, particularly as it was claimed that defendants had induced owners of private halls not to rent them to plaintiff. Public parks of a general recreational nature were held to be a suitable place.

State courts have not agreed as to the constitutionality of ordinances requiring a permit from the mayor, city council or police in order to make a public speech,[3] to hold an assembly or parade,[4] or to distribute circulars.[5] Nor have they agreed upon the validity of ordinances totally prohibiting circulars,[6] or qualifiedly prohibiting circulars or assemblies.[7]

[3] Upholding the ordinance: People ex rel. Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364 (1921), writ of error dismissed 261 U. S. 590, 43 S. Ct. 410 (1923); People v. Smith, 263 N. Y. 255, 188 N. E. 745 (1934), appeal dismissed 292 U. S. 606, 54 S. Ct. 775 (1934); Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793 (1904); Commonwealth v. Abrahams, 156 Mass. 57, 30 N. E. 79 (1892); Harwood v. Trembley, 97 N. J. L. 173, 116 A. 430 (1921) (delightful dissent); Burkitt v. Beggans, 103 N. J. Eq. 7, 142 A. 181 (1928). *Contra*: State v. Coleman, 96 Conn. 190, 113 A. 385 (1921).

[4] Upholding the ordinance: Davis v. Massachusetts, 167 U. S. 43, 17 S. Ct. 731 (1897), affirming 162 Mass. 510, 39 N. E. 113 (1895) (involving the use of Boston Common); Wilson v. Eureka City, 173 U. S. 32, 19 S. Ct. 317 (1898) (dictum); Love v. Judge of Recorder's Court, 128 Mich. 545, 87 N. W. 785 (1901) (distinguishing Re Frazee, infra, as applying only to parades, not meetings).

Contra: Re Frazee, 63 Mich. 396 (1886); Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359 (1891); Rich v. Naperville, 42 Ill. App. 222 (1891); Anderson v. Wellington, 40 Kan. 173, 19 P. 719 (1888). Cf. State v. Bulot, 175 La. 21, 142 So. 787 (1932); People v. Kopezak, 266 N. Y. 565, 195 N. E. 202 (1935). See in general, Jarrett and Mund, "The Right of Assembly," 9 N. Y. UNIV. L. Q. REV. 1 (1931); 47 YALE L. J. 404 (1938).

[5] Upholding the ordinance: Commonwealth v. Kimball, (Mass. 1938) 13 N. E. (2d) 18, 114 A. L. R. 1440 at 1446; Almassi v. Newark, 8 N. J. Misc. 420, 150 A. 217 (1930). Cf. Fifth Avenue Coach Co. v. New York, 221 U. S. 467, 31 S. Ct. 709 (1911). *Contra*: Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938).

[6] Upholding the ordinance: In re Anderson, 69 Neb. 686, 96 N. W. 149 (1903); Dziatkiewicz v. Maplewood, 115 N. J. L. 37, 178 A. 205 (1935). *Contra*: Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938); Chicago v. Schultz, 341 Ill. 208, 173 N. E. 276 (1930); People v. Armstrong, 73 Mich. 288, 41 N. W. 275 (1889); Re Thornburg, 55 Ohio App. 229, 9 N. E. (2d) 516 (1937); Ex parte Pierce, 127 Tex. Crim. 35, 75 S. W. (2d) 264 (1934).

[7] Upholding ordinance prohibiting distribution of circulars so as to litter the streets: Wettengel v. Denver, 20 Colo. 552, 39 P. 343 (1895); International Textbook Co. v. District of Columbia, 35 App. D. C. 307 (1910); Coughlin v. Sullivan, 100 N. J. L. 42, 126 A. 177 (1924) (dictum); Milwaukee v. Kassen, 203 Wis. 383,

In the past, when such ordinances have been invalidated, it has usually been because the restrictions were held to amount to an unreasonable exercise of the police power, but sometimes it has been on the basis of unconstitutional, because arbitrary, discretion vested in the authorizing official, or because of discrimination (unequal treatment) in the ordinance itself.[8] In recent years, notably in *Lovell v. Griffin*,[9] the United States Supreme Court has sanctioned a new ground, denial of due process through arbitrary deprivation of the "liberty" guaranteed by the Fourteenth Amendment. This broad legal term was formerly thought to cover only liberty of the person and of occupation.[10] Now it has been held to include all "fundamental rights," such as freedom of speech,[11] freedom of assembly,[12] and freedom of the press.[13]

In the *Lovell* case, an ordinance requiring a permit to distribute circulars was held to be an arbitrary deprivation of freedom of the press, hence unconstitutional. But this case does not rule out the possibility of valid ordinances where qualified so as to include only advertising matter, or so as to apply only where the distribution is done in

234 N. W. 352 (1931). *Contra*: Chicago v. Schultz, 341 Ill. 208, 173 N. E. 276 (1930).

Construed as applying only to advertisements, not political circulars, and upheld as such: People v. Johnson, 117 Misc. 133, 191 N. Y. S. 750 (1921).

Upholding statute prohibiting election circulars unless the name of the person responsible therefor be printed on them: State v. Babst, 104 Ohio St. 167, 135 N. E. 525 (1922). Circulars advertising illegal goods may be prohibited: Zinn v. State, 88 Ark. 273, 114 S. W. 227 (1908); State v. Davis, 77 W. Va. 271, 87 S. E. 262 (1915).

Upholding ordinances prohibiting meetings which obstruct traffic: Chariton v. Simmons, 87 Iowa 226, 54 N. W. 146 (1893); Tacoma v. Roe, 190 Wash. 444, 63 P. (2d) 1028 (1937).

[8] State ex rel. Garrabad v. Dering, 84 Wis. 585, 54 N. W. 1104 (1893); Elgin v. Winchester, 300 Ill. 214, 133 N. E. 205 (1921).

[9] 303 U. S. 444, 58 S. Ct. 666 (1938), holding that municipal ordinances are state action, and subject as such to the requirements of the Fourteenth Amendment. To the same effect is Chicago, B. & Q. Ry. v. Chicago, 166 U. S. 226, 17 S. Ct. 581 (1897).

[10] See Warren, "The New 'Liberty' under the Fourteenth Amendment," 39 HARV. L. REV. 431 (1926).

[11] Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625 (1925) (dictum); Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 655 (1927); Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532 (1931); Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732 (1937).

[12] DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 (1937); Whitney v. California, 274 U. S. 357, 47 S. Ct. 641 (1927).

[13] Near v. Minnesota, 283 U. S. 697, 51 S. Ct. 625 (1931); Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444 (1936); Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666 (1938). And the press includes circulars, Lovell v. Griffin, supra; People v. Armstrong, 73 Mich. 288, 41 N. W. 275 (1889).

a manner calculated to litter the streets excessively.[14] Whether or not an ordinance is valid in itself, it is clear that arbitrary or discriminatory refusal of a permit under the ordinance is an unconstitutional action. Hence the present ruling, based upon consistently arbitrary action on the part of the municipal officers seems justified. The court's opinion expressly follows and is consistent with the Supreme Court's ruling in the *Lovell* case. Refusal of a permit to a labor union to exercise any of the fundamental rights, merely because the doctrines of the union are unpopular, is plainly "arbitrary," however vague a standard that word may often be. The New Jersey Supreme Court has itself held that peaceful strikers have the right of assembly;[15] so much the more should a non-striking body of workers enjoy that liberty. Where the administrative action is sufficiently oppressive, injunctive remedy is desirable.[16]

A dictum in the case bears some comment:

> "Before refusing the permits the municipal authorities must have proof that the present applicants at least have spoken in the past in such fashion that audiences similar to those to be reasonably expected in Jersey City have indulged in breaches of the peace. If that proof were made, we think that either a copy of the speech to be currently delivered could be required and censored in the light of the reasonable apprehension of disorder of 'firm and courageous' city officials or else the speakers could be bound over to keep the peace and be of good behaviour."

Later the court points out the use of the words "at least" in that quotation and admits that more might well be required, to warrant refusal of a permit or requirement of a bond. It is submitted that more should be required. If fears, based on past experience, that the *audience* might indulge in breaches of the peace, are to be enough to warrant repressive action by the authorities, then all that plaintiff's opponents would need to do to destroy its constitutional rights, would be to hire some thugs to create a disturbance every time plaintiff held a public meeting. Plaintiff should be required to hold orderly meetings itself, but it should not be responsible for the actions of others present. That is the function of the police, and indeed it is their duty to afford protection against disturbances of this kind. In the words of an English

[14] See 5 UNIV. CHI. L. REV. 675 (1938); 13 ST. JOHN'S L. REV. 81 (1938).

[15] State v. Butterworth, 104 N. J. L. 579, 142 A. 57 (1928). Accord: Jones v. State, 170 Ark. 863, 281 S. W. 663 (1926).

[16] New Jersey has held that this remedy is not available for the protection of political rights. Burkitt v. Beggans, 103 N. J. Eq. 7, 142 A. 181 (1928). *Contra*: City of Louisville v. Lougher, 209 Ky. 299, 272 S. W. 748 (1925).

judge, cited with some approval by the court in this case, but quite inconsistent with the above quotation:

> "What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants [Salvation Army] and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, and the question of the justices whether the facts stated in the case constitute the offence charged in the information [unlawful assembly] must therefore be answered in the negative."[17]

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[17] Beatty v. Gilbanks, 9 Q. B. Div. 308 at 314-315 (1882). In accord with this view are American League of Friends of New Germany v. Eastmead, 116 N. J. Eq. 487, 174 A. 156 (1934); and Shields v. State, 187 Wis. 448, 204 N. W. 486 (1925). See CHAFEE, FREEDOM OF SPEECH 183–184 (1920.)