CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936)

Liberty of the press is a fundamental right protected against state aggression by the due process clause of the Fourteenth Amendment. P. 297 U. S. 242.

The fact that, as regards the Federal Government, the protection of this right is not left to the due process clause of the Fifth Amendment, but is guaranteed *in specie* by the First Amendment, is not a sufficient reason for excluding it from the due process clause of the Fourteenth Amendment. P.

297 U. S. 243.

6. A corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. P. 297 U. S. 244.

In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8-10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322-327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against taxation for the purposes of the home government, and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

These duties were quite commonly characterized as "taxes on knowledge," a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them.

That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question, even on the part of

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those who defended the act. May (Constitutional History of England, 7th ed., vol. 2, p. 245), after discussing the control by "previous censure," says:

". . . a new restraint was devised in the form of a stamp duty on newspapers and advertisements -- avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time."

Collett (vol. I, p. 14), says,

"Any man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers."

The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode, and while that occurrence did much to bring about the adoption of the amendment (*see* Pennsylvania and the Federal Constitution, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that, by the words "freedom of the press," the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship, for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that

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law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. *Cf. Continental Illinois Nat. Bank v. Chicago, R.I. & P. Ry. Co.*, 294 U. S. 648, 294 U. S. 668-669. And, obviously, it is subject to the qualification

that the common law rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. *Murray's lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 59 U. S. 276-277; *Waring v. Clarke,* 5 How. 441, 46 U. S. 454-457; *Powell v. Alabama, supra,* pp. 287 U. S. 60-65.

In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that, by the First Amendment, it was meant to preclude the national government, and, by the Fourteenth Amendment, to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well known and odious methods.

This court had occasion in *Near v. Minnesota, supra* at pp. 283 U. S. 713 *et seq.,* to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication, and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (p. 283 U. S. 716), meant "principally, although not exclusively, immunity from previous restraints or [from] censorship."

Judge Cooley has laid down the test to be applied --

"The evils to be prevented were not the censorship of the press merely, but any action of the government by

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means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

2 Cooley's Constitutional Limitations, 8th ed., p. 886.

The word "liberty" contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of ***all his faculties*** as well. *Allgeyer v. Louisiana,* 165 U. S. 578, 165 U. S. 589.