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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 91.

J. M. NEAR,

Appellant,

ads.

STATE OF MINNESOTA EX REL. FLOYD B. OLSON, COUNTY ATTORNEY OF HENNEPIN COUNTY, MINNESOTA, *Appellee.*

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This appeal involves the constitutionality of Chapter 285, Session Laws of Minnesota for the year 1925, which provides that any person who shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and may be enjoined from continuing to publish such malicious, scandalous or defamatory newspaper, magazine or other periodical.

Agreeably to the provisions of this statute, complaint was made by Floyd B. Olson, county attorney of Hennepin county, against appellant charging him with a violation thereof. Appellant demurred, raising by the demurrer solely the constitutionality of the statute (R. 336). The

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demurrer was overruled. In conformity with the provisions of statute regulating appeals from an order overruling a demurrer, the District Court certified that the question raised by the demurrer was important and doubtful (R. 338). An appeal was taken to the State Supreme Court, which court affirmed the order of the District Court overruling the demurrer and held the law constitutional as against the objection that it violates Article 1 of Section 3 of the Minnesota Constitution and the Fourteenth Amendment to the Constitution of the United States. The opinion of the State Supreme Court is reported in 174 Minn. 457, and transcribed in the record (R. 340-9).

The case was then remanded to the District Court. Appellant answered, admitting the publication of the scandalous and defamatory matter alleged in the complaint and alleging that the law under which the injunction is sought is unconstitutional and violative of the constitutions of the state and of the United States (R. 349-55).

The trial resulted in findings of fact and conclusions of law directing the issuance of a permanent injunction (R. 360-3). Judgment was entered pursuant thereto (R. 364-5), from which judgment an appeal was taken to the State Supreme Court, where the judgment was affirmed. This opinion is reported in 179 Minn. 40, and transcribed in the record (R. 372-3).

From this judgment an appeal has been taken to this court.

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STATEMENT OF FACTS.

The complaint charges a violation of the statute by the publication of nine malicious, scandalous and defamatory articles directed against Charles G. Davis, a special law enforcement officer employed by a civic organization of Minneapolis, George E. Leach, then mayor of Minneapolis; Frank W. Brunskill, then chief of police of Minneapolis; Floyd B. Olson, county attorney of Hennepin county; members of the grand jury of Hennepin county, and members of the Jewish race (R. 4-8). Attached to and made a part of the complaint are exhibits consisting of copies of the newspapers setting forth articles upon which the complaint is based.

The findings of fact made by the trial court set forth the nature of the malicious, defamatory and libelous articles, the names of the persons defamed, and the dates of the publication of the articles (R. 361-3).

Nowhere in the proceedings did appellant raise any issue of fact. His attack has been centered upon the constitutionality of the law under which this proceeding was instituted. Appellant does not in this court attack the form of the judgment, nor does he make any claim that the State Court misconstrued the law or entered a judgment not authorized by the terms of the statute.

The settled case (R. 356-9) shows that plaintiff's evidence consisted of the verified complaint together with the issues of the publication in question. Defendant objected to the introduction of the evidence. The grounds of this objection were solely that the statute under which the proceeding was instituted is unconstitutional. That objection was overruled; both sides then rested. Plaintiff then moved the court for the issuance of a permanent injunction, which motion was

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granted. No attempt was made by appellant to prove the truth of the statements or to show that the appellant was not publishing the kind of newspaper prohibited by statute.

The copies of this publication which were made a part of the complaint show that this newspaper carries no items of general news interest. It is devoted almost solely to scandalous and defamatory matter. With the exception of a few squibs claimed to contain humor nothing but malicious, scandalous and defamatory matter appears therein.

The only question involved in this appeal is whether the state statute properly construed violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

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SUMMARY OF ARGUMENT.

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(b) The court has power to restrain publication of defamatory matter by injunction..... 10

(c) The Minnesota statute merely prohibits engaging in the business of regularly or customarily producing, publishing or circulating a malicious, scandalous and defamatory newspaper..... 11

(d) Appellant cannot complain of the terms of the injunction issued by the trial court..... 14

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ARGUMENT.

Appellant's brief may be separated into two parts: The first is devoted to an attack upon the wisdom and expediency of the legislation. The second to an attempt to demonstrate that the law, as he construes it, is unconstitutional.

I.

THE LAW PROPERLY CONSTRUED DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

The only portion of the Fourteenth Amendment which is involved herein is that portion which reads as follows:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

Article 1 of the Bill of Rights of the United States Constitution providing

> "Congress shall make no law * * * abridging the freedom of speech or of the press"

is a limitation of the right of congress and not on the rights of the states.

Livingston vs. Moore, 7 Pet. 469.
Eilenbecker vs. Plymouth County, 134 U. S. 31.
The Justices vs. Murray, 9 Wall. 274.
Edwards vs. Elliott, 21 Wall. 532.
United States vs. Cruikshank, 92 U. S. 542.
Walker vs. Sauvinet, 92 U. S. 90.
Fox vs. Ohio, 5 How. 410.
Holmes vs. Jennison, 14 Pet. 540.
Presser vs. Illinois, 116 U. S. 252.

Generally speaking, restrictions on the rights of the states must be found in their respective constitutions. In

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the case at bar the State Supreme Court has held that the legislation in question does not offend against Section 3 of Article 1 of the Minnesota Constitution, providing:

> "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

The construction placed by the State Supreme Court on the State Constitution is binding on this court.

Merchants Bank vs. Pennsylvania, 167 U. S. 462.

The Slaughter House Cases, 16 Wall. 36.

The circumstance that this construction is at variance with the construction placed by the courts of other states on similar provisions of the constitutions of those states furnishes no ground for complaint to this court.

There can be no claim upon the record that the legislation under consideration violates the clause of the Fourteenth Amendment prohibiting a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States as there is no showing in the record that appellant is a citizen of the United States.

Appellant's argument is based upon an entirely erroneous construction of Chapter 285, Laws 1925. He construes it as authorizing the court to prohibit the appellant from conducting a newspaper under the name of the Saturday Press, even though such newspaper may be entirely innocent. The law does not permit of such a construction nor did the Supreme Court of the state so construe it.

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(a) *The liberty of the press does not include the free and unrestricted right to publish obscene, scandalous or defamatory matter.*

Conceding arguendo that the liberty protected by the Fourteenth Amendment includes the liberty of speech and of the press, *the term "liberty" does not include the free and unrestricted right to publish all matters. This guaranty is not absolute but subject to lawful restraint.

Gitlow vs. New York, 268 U. S. 652.
Toledo Newspaper vs. U. S., 247 U. S. 402.
Robertson vs. Baldwin, 165 U. S. 275.
Patterson vs. Colorado, 205 U. S. 454.
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Gilbert vs. Minnesota, 254 U. S. 325.

In *Robertson vs. Baldwin, supra,* it is said (page 281):

"Thus the freedom of speech and of the press (Article 1) does not permit the publication of libelous, blasphemous or indecent articles *or other publication injurious to public morals or private reputation.*" (Italics ours.)

---

*Note: A criticism of this pronouncement, as contained in the Gitlow case, is voiced by Hon. Charles Warren in an article entitled "The New 'Liberty' Under the Fourteenth Amendment," 39 Harvard Law Review, page 431. His view is that the inclusion within the definition of liberty, guaranteed by the fourteenth amendment against deprivation by a state without due process of law, that of liberty of speech and of the press is unwarranted, at variance with prior decisions of this court and with the intention of the framers of the constitution and the amendment.

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In *Gitlow vs. New York, supra,* on page 666, it is said:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. * * * Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.
>
> "That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question. *Robertson vs. Baldwin, supra,* p. 281; *Patterson vs. Colorado, supra,* p. 462; *Fox vs. Washington, supra,* p. 277; *Gilbert vs. Minnesota, supra,* p. 339; *People vs. Most,* 171 N. Y. 423, 431; *State vs. Holm,* 139 Minn. 267, 275; *State vs. Hennessy,* 114 Wash. 351; *State vs. Boyd,* 86 N. J. L. 75; *State vs. McKee,* 73 Conn. 18, 27. Thus it was held by this court in the Fox case, that a state may punish publications advocating and encouraging a breach of its criminal laws; and, in the Gilbert case, that a state may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies."

See also *Whitney vs. California,* 274 U. S. 357, in which the statement in the first paragraph of this quotation is quoted with approval.

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In *Schenck vs. United States, supra*, on page 52, it is said:

> "The most stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theatre and causing a panic. It does not even protect a man against uttering words that may have all the effect of force. *Gompers vs. Bucks Stove and Range Co.,* 221 U. S. 418, 439."

In *Tyomieo Publishing Co. vs. United States* (District Court, Michigan), 211 Fed. 385, the court say, answering an attack made by the plaintiff on the laws forbidding placing of matter advertising a lottery in the mails, which attack was based on a claimed violation of the freedom of the press:

> "The constitutional guaranty of a free press cannot be made a shield from violation of criminal laws which are designed to protect society from acts clearly immoral or otherwise injurious to the people. *Ex parte Jackson,* 96 U. S. 727, 736, 24 L. Ed. 877; *In re Rapier,* 143 U. S. 110, 133, 134, 12 Sup. Ct. 374, 36 L. Ed. 93; *Public Clearing House vs. Coyne,* 194 U. S. 497, 506, 24 Sup. Ct. 789, 48 L. Ed. 1092; *Knowles vs. United States,* 170 Fed. 409, 411, 95 C. C. A. 579; *United States vs. Journal Co.* (D. C.), 197 Fed. 415, 418."

(b) *The court has power to restrain by injunction publication of defamatory matter.*

In *Gompers vs. Bucks Stove and Range Co.,* 221 U. S. 418, a court of equity upon proper application issued its order restraining defendant from boycotting complainant by publishing statements that complainant was guilty of unfair trade. Upon a proceeding to review a judgment holding Gompers and others guilty of contempt of court by publishing statements in violation of the injunction, it was held

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that the injunction did not amount to an unconstitutional abridgment of free speech or of the press. On page 437, the court say:

> "* * * when these facts exist, the strong current of authority is that the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction."

In *Toledo Newspaper vs. United States, supra,* on page 419, it is said:

> "* * * however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing."

(c) *The Minnesota statute merely prohibits engaging in the business of regularly or customarily producing, publishing or circulating a malicious, scandalous and defamatory newspaper.*

It can readily be seen from the language of the statute that no attempt is made to abridge the freedom of the press or prevent one from engaging in a lawful calling. We quote the language of the statute:

> "Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.

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(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

* * * * * * * * *

"After trial the court may make its order and judgment permanently enjoining any and all defendants found guilty of violating this act from further committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated."

We direct the court's attention to the section last quoted. The power of the court is therein limited to restraining the business of regularly publishing, circulating, having in possession, selling or giving away a malicious, scandalous and defamatory newspaper, magazine or other periodical. It is the business of regularly and customarily producing, publishing or circulating such a newspaper which is denominated as a nuisance and which may be abated. The statute is not directed against the incidental publication, distribution or circulation of defamatory matter.

On page 54 of appellant's brief appears the following:

"* * * appellant is now effectively barred, to perpetuity, from ever again following his chosen vocation of journalism. Journalism is a lawful calling. So much is it a lawful calling that it is the only one specifically mentioned for protection in the Constitution of the United States."

And on page 51:

"Under the injunction issued in this case the result-

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ing situation is such that the defendant can never again publish The Saturday Press, since it has been wholly abated, but must, if he wishes to publish anything, launch a new newspaper and take his chances that it will not founder on the rocks of financial failure."

And on page 65:

"His newspaper has been wholly stifled * * *."

The statute does not undertake to prohibit appellant from following journalism as a calling or from publishing, circulating or distributing the Saturday Press, provided he does not regularly and customarily publish therein the matter prohibited by statute.

The State Supreme Court in *Olson vs. Guilford,* 174 Minn. 457, so construed it (R. 340-9). On page 461, it is said:

"The business at which the statute is directed involves more than libel. Mere libel under the statute does not constitute the nuisance. The statute is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel. The distribution of scandalous matter is detrimental to public morals and to the general welfare."

And on the second appeal from the judgment, reported in 179 Minn. 40 (R. 372-3), it is said:

"We see no reason however for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield."

The statute is open to no other construction. However, if it could be construed as prohibiting appellant from ever engaging in the publication of a newspaper and that construction raises doubt as to its constitutionality this court

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would interpret the act in such a way as to eliminate such doubt.

Fox vs. Washington, 236 U. S. 273 (277), where it is said:

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States vs. Delaware and Hudson Co.,* 213 U. S. 366, 407, 408 * * *."

(d) *Appellant cannot complain of the terms of the injunction issued by the trial court.*

The extracts from appellant's brief to which we have heretofore called attention are based upon the terms of the injunction issued by the trial court rather than upon the statute. If the language of the injunction is not justified by the statute appellant cannot take advantage of this under the record as it stands. He made no suggestion to the trial court that the terms of the injunction are not authorized by the law; nor do his assignments of error in the State Court or in this court raise that point. Apparently this contention was made for the first time in the State Supreme Court on the appeal from the judgment. It is discussed by that court in this language:

> "The argument is made that the judgment goes too far and literally prevents the defendants from publishing any kind of a newspaper and thereby deprives them of their means of livelihood and the legitimate use of their property. It is sufficient to say that the assignments of error do not go to the form of the judgment. The lower court has not been asked to modify the judgment. * * * *Defendants have in no way indicated any desire to conduct their business in the usual and legitimate manner*" (R. 373). (Italics ours.)

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The portion of this quotation set out in Italics finds support in this court in the case of *Milwaukee Publishing Company vs. Burleson,* 255 U. S. 407. In this case this court is considering the constitutionality of the espionage law (Act of June 15, 1917, Chapter 30, Title 12, Sec. 3, 40 Stat. 217), which denies the mails to newspapers and other publications violating its provisions. The postmaster general of the United States acting under the authority conferred upon him by this statute revoked the second-class mail privilege theretofore enjoyed by the publishing company for the reason that its newspaper had for more than five months almost daily contained articles which under the express terms of the statute rendered it non-mailable. In speaking of the terms of the order the court say:

> "The order simply withdrew from the relator the second-class privilege, but did not exclude its paper from other classes, as it might have done, and there was nothing in it to prevent reinstatement at any time. It was open to the relator to mend its ways, to publish a paper conforming to the law, and then to apply anew for the second-class mailing privilege. This it did not do but, * * * it preferred this futile litigation * * *. Whatever injury the relator suffered was the result of his own choice."

Appellant quotes as authority for his right to raise this question for the first time in this court the case of *Fiske vs. Kansas,* 274 U. S. 380, in which the court uses the following language (385):

> "A decision of a State Court applying and enforcing a state statute of general scope against a particular transaction *as to which there was a distinct and timely insistence that, if so applied, the statute was void under*

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> *the Federal Constitution,* necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by a writ of error. * * *
>
> "And this court will review the finding of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." (Italics ours.)

This language does not justify appellant's position. Here there was no distinct and timely insistence that the statute, as applied by the trial court, is void. Appellant has directed his attack solely upon the constitutionality of the statute, regardless of its application. The findings of fact in this case were upon the undisputed evidence. In the Fiske case this court stated that there was no evidence to support the findings. If appellant considered that the terms of the injunction were not authorized by the statute, his remedy was an application to the court granting it for a modification thereof.

The power of a state legislature to forbid an innocent calling upon the ground that certain evils incident to the calling existed which could not be prevented without at the same time preventing the exercise of the calling in which the evils existed, has been often sustained by this court against attack on the ground that such prohibition resulted in the taking of property without due process.

Murphy vs. California, 225 U. S. 623 (ordinance of South Pasadena, California, prohibiting the operation of a billiard hall within the city limits sustained).

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Booth vs. Illinois, 184 U. S. 425 (law prohibiting buying of grain for future delivery sustained).

Otis vs. Parker, 187 U. S. 606 (law prohibiting sales of shares of capital stock to be delivered in the future sustained).

The best statement of the principle of law upon which this legislation has been sustained is found in *Booth vs. Illinois, supra,* on page 429:

> "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

This statement was quoted with approval in *Murphy vs. California, supra,* and *Otis vs. Parker, supra.*

In *Mugler vs. Kansas,* 123 U. S. 623, a law of Kansas authorizing the issuance of an injunction against the sale of intoxicating liquors was sustained as against the attack that it violated the due process clause of the Fourteenth Amendment. There the court say (page 665):

> "The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly

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all, if not all, of the states at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Answering the claim that proceedings in equity for the abatement of a nuisance are inconsistent with due process, it is said (page 672):

"Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. * * * In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information, also, lies in equity to redress the grievance by way of injunction.' 2 *Story's Eq.*, §§ 921, 922. The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy, than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas, courts of law can only

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reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community."

Mugler vs. Kansas, supra.

There is the further consideration that effect must be given to the provision in the bill of rights declared by the State Constitution that every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character.

§ 8, Article 1, *Minnesota Constitution.*

II.

The Act Is a Legitimate Exercise of the Police Power.

No clearer definition of the term "police power" can be made than that of Mr. Justice Harlan in *Jacobson vs. Massachusetts,* 197 U. S. 11, where on page 26, it is said:

"This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' *Railroad Co. vs. Husen,* 95 U. S. 465, 471; *Missouri, Kansas & Texas Ry. Co. vs. Haber,* 169 U. S. 613, 628, 629; *Thorpe vs. Rutland & Burlington R. R.,* 27 Vermont 140, 148. In *Crowley vs. Christensen,* 137 U. S. 86, 89, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing au-

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thority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law'."

While the legislature has not the right to declare that to be a nuisance which in fact is not a nuisance, a great deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed.

Lawton vs. Steele, 152 U. S. 133 (140).

The general rule deducible from the decisions of the courts in this country is to the effect that the legislature has general control and supervision over practices which in its judgment are inimical to the public morals and welfare of the state, and the exercise of this authority will be sustained unless it appears that the legislation is arbitrary and capricious.

Phalen vs. Virginia, 8 How. 163.

"Since the limits of the police power of the state have never been defined with precision, and its boundary line cannot be determined by any general formula in advance, recourse had been had to the gradual process of judicial inclusion and exclusion. This gradual process of determining its limitations is due to the fact that it is easier to perceive and realize the existence of the police power. * * * The courts have been unable or unwilling definitely to circumscribe it, but instead have

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determined as each case is presented, whether it falls within or without appropriate limits."

6 *Ruling Case Law* 187.

Judge Cooley says that the police power of a state

"embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

Cooley's Const. Lim., 8th Ed., Vol. 2, p. 1223.

As has been shown, the books abound with cases holding practices to be "nuisances," although such practices may not be intrinsically criminal, because of their tendency to create annoyances—and this even in the absence of statutes declaring such practices nuisances.

In the instant case we are considering whether an act authorizing the abatement of a practice, which manifestly is productive of much harm and of an intrinsically criminal character, comes within the scope of the police power.

In the earlier decisions the power was defined as extending to regulations promulgated by authority of the legislature, having for their object the promotion of the public health, the public morals and the public safety.

The authority is now generally defined as extending far beyond this, and to many matters clearly not so intimately essential to the public welfare.

In commenting upon the limitation of legislative action, the Supreme Court of Washington said:

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"Without reviewing the evolution of the law upon this subject, as evidenced by the decisions of courts of last resort, it may be said that, whatever may be the limits by which the earlier decisions circumscribed the power, it has, in the more recent decisions, been defined to include all of those regulations designated to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals or the public safety."

State vs. Pitney, 79 Wash. 608.

This decision sustained the validity of an act prohibiting the use of trading stamps. It was not claimed or even suggested that the use of such stamps involved any element of chance. It is apparent that the court experienced difficulty in pointing out the harm resulting from their use, saying that if a state of facts could exist which would justify the legislature in forbidding the use of trading stamps, it must be presumed to have actually existed. The case contains a comprehensive review of more recent decisions. Commenting further upon the necessity for the existence of facts justifying the legislation in question, the court said:

"In determining whether the provisions of a law bring it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

The exercise of the power for the public welfare is a mat-

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ter resting in the discretion of the legislature, and the courts will not interfere therewith except where the regulations adopted are arbitrary, oppressive or unreasonable. Their wisdom or expediency cannot be subjected to judicial review.

> "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."
>
> *Munn vs. Illinois,* 94 U. S. 113.

We add a brief reference to state decisions applying the general principles here proclaimed.

People vs. Weiner, 271 Ill. 74.
People vs. Robertson, 302 Ill. 442.
State vs. Morse, 84 Vt. 387.
State vs. Superior Ct., 103 Wash. 409.

Newspapers which are largely given over to scandalous matter have in some states been declared to be criminal publications.

State vs. McKee, 73 Conn. 18.
State vs. Van Wye, 136 Mo. 227.
Re Banks, 56 Kans. 243.
United States vs. Harmon, 45 Fed. 416.
Re Rapier, 143 U. S. 110, 134.

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In *State vs. McKee, supra,* the validity of an act prohibiting the sale of papers, books or magazines devoted to the publication of criminal news, police reports, or pictures or stories of deeds of bloodshed, lust and crime, was in all respects held valid. It was objected among other things that the act furnished no fixed boundary which would with uniformity determine when innocence trespasses upon the domain of crime. To this objection the court answered that it would not construe language so as to invalidate an act, when it is fairly susceptible of a construction consistent with validity, but will give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done, although admitting that the statute may have been framed with looseness and that it may in some particulars be open to a construction inconsistent with its evident purpose.

The case holds that the power of the state in punishing acts as injurious to the public health, safety or morals is not limited to acts within the adjudicated scope of the common law offenses of nuisance and libel.

In *State vs. Van Wye, supra,* an act declaring guilty of a felony anyone who engages in the business of editing, publishing or disseminating a paper devoted mainly to the publication of scandal, immoral conduct, *et cetera,* was declared to be a valid exercise of police power.

In *Re Rapier, supra,* an act prohibiting the mailing of advertisements of lotteries was upheld as within the power of Congress to declare, although, as was stated by the court, the ultimate purpose of the act was simply to disfavor, if not suppress, lotteries. The court held that Congress was empowered to prohibit the dissemination of such advertising through the medium of mails, declaring that the government may decline to become an agent in the circulation of printed matter which it regards as injurious to the people.

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In *State vs. Pioneer Press Company,* 100 Minn. 173, a statute forbidding publication of details of the execution of criminals was sustained as a valid police measure. The same objections which are urged here were made to the validity of that statute. This case has been widely quoted and accepted as authority.

It is settled that the state may prohibit publications or teachings which are injurious to society.

State vs. Holm, 139 Minn. 267.

See also *State vs. Gilbert,* 126 Minn. 95, where an act providing for the abatement of nuisances (disorderly houses) was upheld against many of the objections urged here.

III.

The Evil Which the Act Seeks to Suppress Is a Nuisance in Fact.

The legislature has the undoubted right to declare that to be a nuisance which is so in fact, so if the evil described in the statute is a nuisance in fact according to the standards of the courts, this would conclude our inquiry.

Acts of this character are also punished by statute in most, if not all, of the states.

It would seem clear that a publication customarily and regularly devoted to malicious, scandalous and defamatory matter comes within the category of nuisances.

The term nuisance is derived, it appears, from the French word, "nuire," which means to injure, hurt or harm. In a broad sense, a nuisance is anything that works an injury, harm or prejudice to an individual or the public.

20 *Ruling Case Law* 380.

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According to the definition of Blackstone, a

> "nuisance, nocumentum, or annoyance, signifies anything that worketh hurt, inconvenience, or damage, and nuisances are of two kinds, public or common nuisances, which affect the public and are an annoyance to all the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors; and private nuisances; * * * and may be defined, anything done to the hurt or annoyance of the lands, tenements or hereditaments of another."
>
> *Blackstone's Commentaries III,* c. 13, p. 216.

A public nuisance exists wherever acts or conditions are subversive of public order, decency or morals, or constitute an obstruction of public rights. Such nuisances always arise out of unlawful acts.

20 *Ruling Case Law* 384, Sec. 7, and cases cited thereunder.

The courts have gone far in extending the law of nuisances to new conditions. Thus, a patrol of strikers in front of a factory was held to be a nuisance when instituted for the purpose of interfering with the business.

Vegelahn vs. Gunther, 167 Mass. 92.

And in another case the displaying of banners and devices, as a means of threats and intimidation, was held to constitute a nuisance.

Sherry vs. Perkins, 147 Mass. 212.

The various acts and conditions that have under different circumstances been declared public nuisances within the meaning of the common law term and general statutory definitions are numerous, and the category of nuisances is being

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greatly extended to meet new exigencies and new conditions, even in the absence of express statutes relating thereto.

We call attention to a few of the conditions and situations to which the term has been applied, as illustrative of its general application.

Thus, loud and boisterous outcries, shouting and singing, especially in the night-time, may constitute a public nuisance.

Rhodes vs. Dunbar, 57 Pa. St. 274.

Public profanity, as well as blasphemy, is an indictable offense at common law, when it takes such form and the utterances are under such circumstances as to constitute a public nuisance.

Oehler vs. Levy, 234 Ill. 595.

The circulation of false reports in a community calculated to disturb the public mind and create false terror or anxiety is a public nuisance and was so held in *Commonwealth vs. Cassidy,* 6 Phila. (Pa.) 82.

1 *Wood on Nuisances,* 3rd Ed., p. 92, Sec. 70.

The blowing of whistles, while certainly not a nuisance *per se,* has been declared to be a nuisance when they are harsh, discordant and blown at unseasonable hours and unnecessarily. The fact that they are used in connection with a commercial establishment will not prevent them from being nuisances to persons residing in the vicinity.

20 *Ruling Case Law* 428, and cases cited thereunder.

On the same principle, bells may constitute a nuisance and this is true of church bells as well as those that are rung for commercial purposes.

Davis vs. Sawyer, 133 Mass. 289.

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Outcries in a public street calculated to disturb the peace, which are wholly unnecessary but dictated by malice or a spirit of mischief; or profanity in public, have been held indictable as a nuisance.

State vs. Graham, 3 Sneed (Tenn.) 134.
Commonwealth vs. Oaks, 113 Mass. 8.

In *Tanner vs. Trustees,* 5 Hill (N. Y.) 121, the court held that a bowling alley, or any place of amusement kept for hire, that serves no useful end, is a public nuisance. The proceedings in this case were instituted under a bylaw relative to nuisances within the village limits, the passage of which had been authorized under the provisions of the village charter. The court held the bowling alley to be a nuisance as such *per se* without any further proof.

It is quite unnecessary to contend for a doctrine carrying the application of the law to such an extreme conclusion. We cite this and other cases in this class as illustrative of the attitude of the courts in applying the general principles of the law to nuisances of varying character under varying circumstances. In *Wood on Nuisances,* it is pointed out that the case has been repudiated in later decisions, and it is said that it may be stated as a rule that the question whether a bowling alley or any other place of amusement kept for gain or hire is a nuisance, *depends upon the nature of the amusement,* its location and its legitimate results.

Common scolds were common nuisances at common law, as has been seen, and for the first offense were punished by being put in the ducking stool. In the earlier cases they were not entitled to benefit of counsel, but in *Regina vs. Foxby,* 6 Mod. 213, Lord Hale granted that privilege, and suspended sentence to give an opportunity to reform, "for,"

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said Lord Hale, "if we duck her now she will go scolding to the end of her life."

See also *Commonwealth vs. Mohn,* 52 Pa. St. 243.

All acts put forth by men which tend directly to create evil consequences to the community at large may be deemed nuisances, where they are of such magnitude as to require the interposition of the courts.

Mohr vs. Gault, 10 Wis. 513.

"Nuisance" is a term for all practices, avocations, erections, establishments, *et cetera,* against which courts will give relief, although they are not intrinsically criminal, because of their tendency to create annoyance, ill health, or inconvenience.

Gifford vs. Hulett, 62 Vt. 342.

And it is held that where usury is proscribed, a house where money is loaned at usurious interest is a disorderly house.

State vs. Diamant, 73 N. J. Law 131.

New Jersey vs. Martin, 77 N. J. Law 652.

The New Jersey court takes the view that inasmuch as the taking of usurious interest is a violation of positive law of the state, persons maintaining a place where such interest rates were taken, and where statutes prohibiting usurious interest were habitually violated, could be indicted for keeping a disorderly house.

The foregoing illustrates occupations and things held to come within the rules that have been established by the courts in declaring nuisances. Many other things, too numerous to set out, and not inherently harmful, have been placed within the category of nuisances when their use

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has become inimical to the welfare and good order of the community.

46 *Corpus Juris* 690.

A purported newspaper or publication regularly and customarily devoted to the dissemination of malicious, scandalous and defamatory matter is subversive of public order and, as such, a public nuisance. It is a nuisance which arises out of unlawful acts.

The word "nuisance" is sufficiently comprehensive to include the alleged unlawful business which works harm, injury and prejudice to the individual and is prejudicial to the public welfare. The State Court has so declared.

State vs. Guilford, 174 Minn. 457.

It has been seen that many acts, things and practices infinitely less harmful in character than the evil described in the act in question have been condemned by the courts as public nuisances, such as the ringing of church bells and other practices, which are ordinarily harmless. There can be no doubt that many businesses that in themselves are lawful and useful may become nuisances of both a public and private character.

The fact that a newspaper or other publication is a useful and lawful business in itself does not preclude it from becoming a nuisance.

It may well be that the publication here involved might be restrained by a court of equity in the general exercise of its equity powers and without recourse to any enabling statute. The circumstance that the act sought to be abated is a crime against the laws of the state does not interfere with the application of the power of injunction.

> "Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to

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prevent the evil, as to punish the offense as a crime after it has been committed."

Eilenbecker vs. District Court, 134 U. S. 31.

The courts, of course, will not concern themselves with the expediency or wisdom of legislation declaring a particular practice to be a nuisance which may be restrained by injunction.

Munn vs. Illinois, 94 U. S. 114.

The statute may be unwise but an unwise enactment is not, necessarily, for that reason invalid.

Booth vs. Illinois, 184 U. S. 425 (431).

The statute might very well be held to be a declaration of the power of the court to restrain the commission of an act detrimental to public morals. This is not the single instance of the adoption of a statute expressly conferring upon courts of equity the right to restrain libelous publications. The power to restrain such publications is exercised by the English courts in the provisions of the Judicature Act of 1873, Sec. 25 (8).

Bonnard vs. Perryman (1891), LXV Law Times (N. S.) 506.

18 *Halsbury's Laws of England* 733.

CONCLUSION.

Appellant's entire attack on the constitutionality of the statute is based upon a construction not justified by its language. Interpreted in strict accordance with its language it does not violate any provision of the United States constitution and is well within the police power of the state. The evil sought to be suppressed is rampant and the means adopted are no more than required.

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The existence of this statute need cause no apprehension in the minds of publishers of legitimate newspapers. Their activities are in no way affected. It is aimed at the scandal monger and professional defamer. To such a class the liberty of the press affords no sanctuary. The constitution of the United States does not safeguard them in the practice of their nefarious trade.

It is respectfully submitted that the judgment of the State Court should be affirmed.

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