INDEX

SUBJECT INDEX

Table of Cases

Texts Cited

STATUTES CITED

UNITED STATES CONSTITUTIONAL SECTIONS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 114

GRACE MARSH,

Appellant,

vs.

THE STATE OF ALABAMA,

Appellee

BRIEF FOR APPELLEE

Official Report of Case in Court Below

This case has not been officially published but opinion and decision of the Court of Appeals is published in 21 So. 2d. 558, 563, and certiorari denied by the Supreme Court of Alabama in 21 So. 2d. 564. The opinion of the Court of Appeals may also be found in the record in this case (R. 140-152).

Statement of Case

This case was set in motion by an affidavit which was as follows:

"THE STATE OF ALABAMA,
County of Mobile:

Personally appeared before me, Wm. J. Kern, Clerk of the Inferior Criminal Court of Mobile County, A. I. Chatham who, on being sworn, deposes and says that

> he has probable cause for believing and does believe, that within the past 12 months Grace Marsh without legal cause or good excuse and after having been warned within the past six months not to do so, entered upon the premises of the Gulf Shipbuilding Corporation, a corporation contrary to law and against the peace and dignity of the State of Alabama, and prays for a warrant for the arrest of the said Grace Marsh.
>
> A. I. CHATHAM.
>
> "Sworn to and subscribed before me this 27 day of December, 1943.
>
> W. J. KERN,
> *Clerk of the Inferior Criminal Court of Mobile County*" (R. 1).

The affiant was an employee of the Gulf Shipbuilding Corporation, acting within the line of his duties (R. 11-12).

A warrant of arrest was duly issued on the affidavit, made returnable to the Judge of the Inferior Criminal Court of Mobile County, and duly executed, and judgment of conviction rendered (R. 1-2). From the judgment an appeal was taken to the Circuit Court of Mobile County, wherein it was tried by the Judge without a jury and judgment of conviction rendered. From this judgment the defendant prayed an appeal and under the law it was heard by the Court of Appeals of the State of Alabama.

The sole basis for the affidavit and charge against the defendant in the court below was for a violation of Title 14, Section 426 of the Code of Alabama 1940, the material part of which is as follows:

> "Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; * * * shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to

hard labor for the county, for not more than three months.''

This statute clearly shows that its purpose is aimed solely at the protection of private property and the owners thereof against trespass thereon by any person after being warned not to do so.

The record shows without dispute that the place where the appellant was alleged to have been trespassing was on the property of the Gulf Shipbuilding Corporation and under its control (R. 34-42, 32-33). The appellant's brief, in legal effect, admits these facts when it says: ''Grace Marsh has the right to use the sidewalk and street of the business block in Chickasaw, Alabama, for the purpose of distributing Bible literature regardless of the private ownership and title vested in the Gulf Shipbuilding Corporation'' (Brief of Appellant, page 26).

This is the central thought and theory of appellant in this Court and was in the court below—a right to go on private property although the owner objects, so long as she is propagating her religious beliefs. This was appellant's point of view when she called on Peebles to explain her rights by saying:

> ''Yes sir, I reminded him we were Ordained Ministers and that was the right granted to us by the Constitution; we were commanded by Almighty God to do this and we couldn't ask man for permits to do this work; we were not peddlers and we were not soliciting for anything, we were simply there carrying on our Christian educational work in an orderly manner'' (R. 64).

This statement was made by the appellant after she had been warned not to come upon the property for the purpose of solicitation or doing the works of the Almighty.

> ''Q. And when they came in they told you they wanted to go ahead with that work?

"A. I don't know; I know what the substance of the conversation was but not everything said.

"Q. Just what was the substance of the conversation?

"A. They had been warned by our policemen not to come back there and were threatened with arrest and they came back to see me or sent me word, and they came in and we sat there and talked.

"Q. In that conversation didn't they tell you that they were Jehovah Witnesses?

"A. Oh! yes.

"Q. And that they were Ordained Ministers?

"A. Yes sir.

"Q. And that they were distributing these booklets in the furtherance of their religious belief and as they believed in accordance with the directions of Jehovah?

"A. I can't answer that, what all they told me; I didn't have much chance to talk; they told what they were going to do.

"Q. They did tell you they felt that it was a matter of their (fol. 59) religion, they were required to distribute these booklets?

"A. I don't know whether they told me that or not, but they told me they were going to do it and regardless, and I told them they weren't, and that is how it started" (R. 58).

Appellant's brief again announces the same doctrine under the heading "Questions presented numbered 2 and 3" (Appellant's brief, pages 10-11).

Prior to the arrest of appellant a representative of the Gulf Shipbuilding Corporation tried to get appellant to leave the premises and she would not (R. 12, 14).

The record shows that following (R. 49):

"NOTICE

"This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.

"Gulf Shipbuilding Corporation,
Housing Division."

This notice was posted on several windows on different parts of the "Business Block" (R. 13, 22, and 47). Permits were also required to sell newspapers (R. 30, at top of page 48).

The property here involved belonged to the Tennessee Land Company in 1918, and it continued to own the property until sold to the Chickasaw Development Company (R. 82, 85) which is alleged to have covered a period of twenty-three years (Appellant's brief, page 12, last paragraph).

While owned by the Tennessee Land Company it maintained control of all of this property and required permits throughout the whole time it was in charge thereof (R. 87), and maintained peace officers charged with patrolling or policing the grounds (R. 89). Nowhere in the record is it denied that the various owners of this property since 1918 required permits from the owners to enter thereon.

The "Business Block" was constructed by the Tennessee Land Company in 1921 (R. 82-83). This business block parallelled the Craft Highway and is separated from it by a strip of land thirty feet wide, which is owned by the Gulf Shipbuilding Corporation (R. 44-45). The sidewalk runs only in front of the business property the width of the building, which is about two hundred and fifty feet (R. 45).

The sidewalk is built on the Shipbuilding Corporation's property (R. 46). All the stores on this block are leased to private individuals or companies (R. 56). It is not denied that the Gulf Shipbuilding Corporation or its predecessor in title and possession constructed the sidewalks and roads here involved.

In view of the undisputed facts here stated the controlling question on this record comes to this, Was the place where the appellant was distributing the religious literature one where she had a right to be under the objections of anyone?

Stated another way, Was the place a public way or place within the meaning of the law or was it a private way or place?

If it was such a public place or way, then with some exceptions, not here involved, the First and Fourteenth Amendments to the Federal Constitution protected the appellant. If it was a private way or place then appellant stands defenseless. We may suggest that evidence was offered on these questions as shown by the record, noted above. The trial court, acting in the capacity of a jury, heard this evidence and found that the way or place was a private one. That is necessarily the effect of the judgment of conviction because the defendant was being tried for trespass upon private property. If the record shows there is any evidence that reasonably sustains the finding of the court on these questions the matter is beyond the reach of this Court.

The appellant's chief reliance, if not the sole one, rests upon the First and Fourteenth Amendments to the Constitution of the United States. And our reply to this is that these constitutional provisions deal solely with action by governmental or state action such as by its legislature in the enactment of laws or the acts of its officers in the construction and administration of the law.

The record directly or indirectly raises a number of legal principles, which we will now state and consider.

ARGUMENT

PROPOSITION OF LAW ONE

The First and Fourteenth Amendments to the Constitution of the United States, by their language, are limited to Federal and State action by way of forbidding the passage of any law affecting the establishment of religion or prohibiting the free exercise thereof and forbidding Federal or State agencies acting under color of office to construe any law so as to make it forbid or restrict the free exercise of religion.

Virginia v. *Rives,* 100 U. S. 313, 318;
Ex Parte Virginia, 100 U. S. 346;
Home Telephone Company v. *Los Angeles,* 227 U. S. 278, 289-291.

This principle is so universally accepted by this Court and other courts that it would seem unnecessary to cite authorities or present argument. We are led to make further statement by the apparent misconception of appellant of the limitations of the principle.

As evidence of the misconception we notice a few contentions of appellant set forth in her brief. Under Point "Five" of appellant's brief it is stated that the refusal to permit preaching and the making of regulations by private persons on the property of such persons breaches the appellant's right of free speech and worship contrary to the United States Constitution (Appellant's brief, 33).

Following up this statement appellant declares "The use of these regulations * * * by both managers amounts to an out-right prohibition of the activities of Jehovah's witnesses" (Appellant's brief, 36).

It is contended by appellant that if appellee's position be sustained "private property confers the right to censor

and prohibit the exercise of civil rights thereunder.'' It is then suggested that a formidable weapon would be designed to defeat the purpose of the Constitution (Appellant's brief, 40). The appellant closes these remarkable statements by saying: ''If ownership of property is the criterion by which the right to censor and prohibit the right of freedom of speech, press and worship of Almighty God is allowed then there is a probability that large portions of the State or city could be bought up by a private concern and thus the Bill of Rights defeated within those areas.'' The appellant treats the notice not to trespass upon the property as a regulation made by the owners (Appellant's brief, 16-17) whereas it was proper evidence on one of the ingredients of the crime of trespass after warning, as well as proper evidence on the question of whether or not the place was a public one by prescription.

PROPOSITION OF LAW TWO

These Constitutional provisions have other limitations. They are not to be so construed as to prohibit the passage of a law by the State under its police power, appropriately designed to reach and punish evils or to protect the property or persons of the citizens.

Sara Price v. *Mass.*, 321 U. S. 158;
Reynolds v. *U. S.*, 98 U. S. 145, 161-167;
Tiedman's Lim. Pol. Pow., page 171, Sec. 74;
State and Federal Control, Second Tiedman, page 205, Sec. 66.

This proposition of law may well be considered in connection with Proposition Three immediately following.

PROPOSITION OF LAW THREE

The Statute of the State of Alabama, Title 14, Section 426, of the Code of Alabama of 1940 (the Statute here involved) making it a crime for any person to enter upon the premises of another after having been warned within six months preceding not to do so, is a due exercise of the State's police powers and is not violative of the First and Fourteenth Amendments of the Constitution of the United States.

The authorities cited to Proposition of Law Two, *supra,* fully support this proposition. We will not burden the Court by making quotations therefrom. There is nothing in the plain language of the statute that authorizes the conclusion that it is intended to or does interfere with freedom of religion. Nor is it open to any sensible construction that would authorize its application so as to infringe these constitutional guarantees. Very clearly its sole purpose is to protect the freedom of the person and property of the citizen against trespass. The statute is careful to provide that there is no violation of these rights unless the trespassing party has notice or warning not to do so. The constituent elements of the statute are that there must be a trespass on private property without a lawful excuse by a person after he has been warned not to do so. This is the crime. No effort is made to deny or infringe upon or punish for religious beliefs. The statute is not dealing with and punishing parties for propagating any religious beliefs, but rather punishing the unlawful act of entering upon private property after warning not to do so. These views are fully sustained by the decisions of this Court, a few of which will now be noticed, in addition to the authorities cited under Proposition Two, *supra.*

In *Murdock* v. *Penn.,* 319 U. S. 104, the Court had under consideration a municipal ordinance (this being within the meaning of the Constitutional state action) requiring a license to solicit orders for merchandize, etc. While the Court held the ordinance violates the First and Fourteenth Amendments to the Constitution of the United States, it was careful to point out that these constitutional provisions do not protect persons from crimes; and that "Jehovah Witnesses are not above the law" (p. 116).

In *Martin* v. *Struthers,* 319 U. S. 141, the Court had under review a municipal ordinance prohibiting any person to knock on doors, ring dor bells to summon to the door the occupants for the purpose of distributing to them handbills. The Court held that the ordinance was open to a fair construction that it interfered with parties engaged in propagating their religious belief and held the ordinance invalid. The Court, however, made this significant observation, "Traditionally the American law punishes persons who enter into the property of another after having been warned by the owner to keep off" (p. 147).

This Court has consistently held that the constitutional provisions guaranteeing free speech and freedom of religion are not absolute, and that it does not place the activities of those propagating their religious beliefs beyond the reach of the state statutes passed in the due exercise of their police powers making certain acts of persons punishable as a crime.

The case at bar is not the only instance where extreme advocates have pressed the guarantee to the border line of the domain of absurdity. The case of *Chaplinsky* v. *N. H.,* 315 U. S. 568, is a striking example where one of Jehovah's Witnesses was convicted on a charge of violating a statute of New Hampshire making it a crime for any person to address any offensive, derisive or annoying words to another person who is lawfully in any street or public place.

The defendant, as a defense, claimed that at the time of using the language he was or had been preaching the true facts of the Bible and, therefore, was protected by the freedom of religion clause of the Constitution. This Court replied to this defense as follows: "We cannot conceive that crusing a public officer is the exercise of religion in any sense. But even if the activities of the appellant which preceded the incident could be viewed as religious in character and therefore entitled to the protection of the Fourteenth Amendment, they could not clothe him with immunity from the legal consequences of comitant acts committed in violation of valid criminal statute" (p. 571).

In the case of *Nuxbom* v. *City of Riverside,* 29 Fed. Supp. 3, the Court was passing upon the validity of another ordinance prohibiting the distribution in the yards or grounds of any house, porch, etc. without having obtained permission of the owner. The Court delivered a very learned and carefully prepared opinion, in which it discussed the origin and general principles of freedom of speech. Some of the most pertinent facts cover pages 6-7. We quote a few extracts.

> "The right to speak freely does not imply the right to force one's speech on another's private premises" (p. 6).
>
> "In like manner the right to distribute literature and pamphlets does not imply the right to force acceptance by placing them on another person's premises without his permission" (pp. 6-7).
>
> "Nor is any constitutional norm violated when he who would spread literature on private premises is compelled to obtain the owner's consent. A man's home is still his castle. If, to paraphrase Chatham, the King is not free to enter the humblest cottage without being guilty of trespass, what 'Divinity doth hedge the purveyor of handbills that he should be free to enter'" (p. 7).

The Court then said:

> "Yet that is exactly what the plaintiff here claims. He engages in the business of distributing advertising or other leaflets for hire. Under the claim of freedom of the press he would have us confer upon him the right to invade the property of others in the conduct of his business" (p. 7).

The Constitution in guaranteeing religious beliefs does not relieve the individual from obedience to a general law not aimed at the prevention and regulation of religious beliefs.

Minerville v. *Gobitis,* 310 U. S. 586, 594-5.

Judge Cooley in discussing the constitutional provisions guaranteeing religious freedom recognizes that the provisions are not absolute and uses substantially this language. No one can stretch his liberty so as to interfere with that of his neighbor, or violate police regulations or penal laws of the land enacted for the good order and general welfare of all the people.—*2nd Cooley, Constitutional Limitations* (8th Ed.) pp. 968-969.

PROPOSITION OF LAW FOUR

The Alabama Statute on trespass after warning creates a new offense, and it is explicit and complete, leaving nothing in doubt or uncertainty as to what conduct will render a trespasser liable to its penalties. Under this statute a person before entering has full knowledge that it is criminal to do so.

Connelly v. *General Construction Company,* 269 U. S. 385, 391-393.

Toger v. *U. S.,* 52 Fed. 917, 919-920.

The appellant has made an alternative effort to show that the place where she was distributing the religious literature

was a public street or sidewalk. To meet and answer this contention we state the following propositions of law.

PROPOSITION OF LAW FIVE

A public highway or place must be established in a regular proceeding for the purpose or by evidence showing that it was generally used by the public continuously and uninterruptedly or by dedication of the owner of the soil and acceptance by the proper authorities.

District of Columbia v. *Roberson,* 180 U. S. 92;
Belle View Cemetery v. *McEvers,* 174 Ala. 457, 461.

PROPOSITION OF LAW SIX

To constitute dedication by prescription the roadway or place must be an open, defined roadway or place in continuous use by the public without let or hindrance for a period of twenty years.

Irwin v. *Dixon,* 9 How. 10, 30-33.
Central of Georgia Railroad Company v. *Faulkner,* 217 Ala. 82-84;
16 *Am. Juris.* (Dedication), Sec. 16;
26 *C. J. S.* (Dedication), Sec. 11.

PROPOSITION OF LAW SEVEN

To establish such a dedication the clearest intention on the part of the owner must be shown. . . And the burden rests on the party (appellant here) claiming a right to the use thereof. To discharge this burden the evidence must be clear and cogent. . . The acts of the owner relied upon to establish dedication must be convincing of an intent to dedicate the property to public use and such acts must be unequivocal to the intention to create a public right exclusive of rights of the owner.

Town of Leeds v. *Sharpe,* 218 Ala. 403, 405;
Locklin v. *Tucker,* 208 Ala. 155;
Irwin v. *Dixon,* 9 How. 10, 30-33.

PROPOSITION OF LAW EIGHT

In case of doubt or uncertainty as to the character of use of roadway or place it will be presumed that the use thereof was a permissive one.

Bellevue Cemetery Company v. *McEvers,* 168 Ala. 535.

Propositions of Law Five–Eight may be considered together.

There is no evidence or claim in the record or brief in this case that there was ever any establishment of the sidewalk or street referred to in this case by any legal proceedings looking to that end, nor is there any evidence or claim that the State, county, or any municipal corporation ever made any effort to set apart this sidewalk or street for the use of the public, nor is there any evidence that the owners of the property ever platted the property showing the likely use of any streets or sidewalks or prepared and filed any maps covering this property or that it sold

or offered for sale any lands or lots with reference to this sidewalk or street on this property. Under this state of the record and case we must look elsewhere for evidence to show this sidewalk or street had been legally established for use by the general public. Under the authorities cited, *supra,* this may and must be done by finding in the record evidence that clearly shows an intention on the part of the owners to dedicate the sidewalk and street to the general use of the public and this must be done by evidence showing they have been generally used by the public continuously and uninterruptedly as such without let or hindrance for a period of twenty years. The burden is on the appellant to establish each and all of these essential elements by evidence that is clear and cogent, and the acts of the owners relied upon to establish the dedication must be convincing of an intention to dedicate the sidewalk and street on the land to public use and the acts must be unequivocal to the intention *to create a public right exclusive of the rights of the owners.* If there is any doubt or uncertainty as to the *character* or use of the sidewalk or street the law steps in and says that it will be presumed that the use was *permissive.*

When these settled principles of law are applied to the facts shown by the record in this case the conclusion must follow that this sidewalk and street had never been dedicated in any manner to the use of the general public within the meaning of the law. On the trial below there was some evidence of the use of the sidewalk and street by the public (R. 24, 25, 74 and 80). We have recited this evidence in our "Statement of the Case" and will not burden the Court by its repetition. However, when it is considered as a whole it is, at best, very inconclusive and falls far short of the requirements of the law as set forth in these Propositions of Law (Five–Eight), *supra.*

The record presents the legal question that the sidewalk and street were merely a way of necessity. This question will be discussed later under that title. When viewed in that light it becomes clear that the use of the sidewalk and street is controlled by this stated principle of law. In any event the contention that the sidewalk and street were public ways devoted to the use of the general public is completely and conclusively met by the evidence in this record.

The record shows that the property here involved belonged to the Tennessee Land Company from 1918 until sold to the Chickasaw Development Company (R. 82, 85), and that while so owned the company maintained control of all of the property in its entirety on which the sidewalk and street were located and required permits to enter upon the lands throughout the whole time it was in charge of it (R. 87); and it maintained peace officers charged with patrolling or policing the grounds (R. 89). The appellant admits that the Tennessee Land Company was in control for twenty-three years (Appellant's Brief, page 12).

The appellant was told by the Superintendent of the Gulf Shipbuilding Corporation prior to this arrest not to come on the property (R. 48), and the Corporation had posted a notice on the property that the property was private and that without permission no street or house vendor, agent or solicitor of any kind would be permitted (R. 49). The record fails to deny in any manner whatever that during all the period of time here involved that permission to enter for such purposes must be had.

PROPOSITION OF LAW NINE

The alleged sidewalk and street were not public highways but were ways of necessity created by operation of law for the use and benefit of tenants of the Gulf Shipbuilding Corporation.

The law defines a "way of necessity" as being an easement arising from an implied grant or implied reservation that is the result of the application of the principle that wherever a party conveys property he conveys whatever is necessary for the beneficial use of that property.

17 *Am. Juris.* (Easements), Section 48, pages 959, 960;
28 *C. J. S.* (Easements), Section 35, pages 695-696.

The rule applies as well to leases as to conveyances of title.

28 *C. J. S.* (Easements), Section 36, pages 699-700.

It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor, or surrounded by his lands, or by his and those of third persons, there arises by implication in favor of the grantee a way of necessity across the premises of the grantor to the highway. To state it in another form, if one grants a piece of land in the midst of his own he thereby impliedly grants a way to reach it.

17 *Am. Juris.* (Eastments, Section 48, pages 960-961;
Hamby v. *Templeton,* 221 Ala. 536, 537.

A right of way of necessity over another's lands is distinguished from a right of way by prescription, and cannot ripen into a prescriptive easement while the necessity continues.

28 *C. J. S.* (Easements), Section 18(k), page 674.

There are valuable notes to this Section 18(k), page 674, aptly distinguishing the difference in such ways of necessity and a public way by prescription. The two are founded on entirely different principles of law. The public may use a way of necessity for ingress and egress to the home or place of business of the tenant solely for social or business purposes. This is for the benefit of the tenant, but it does not follow that the general public may enter upon the property for any purpose foreign to any of the incident benefits and rights of the tenant, for general use of such ways by the general public rests entirely with the consent of the dominant owner of the property over which the way of necessity runs. He may exercise this consent by allowing one person or class of persons to use the way and by denying it to another. Or he may deny the use altogether for the general purposes of the public.

The appellant at the time of her arrest was not on the premises for business or social purposes with any of the tenants or by their invitation. That is established by her own mouth by the record (R. 61).

> "Q. What were you doing at the time of your arrest on December 24th?
>
> "A. I was standing on the sidewalk in Chickasaw offering——
>
> "Q. Where on the sidewalk were you standing?
>
> "A. On the outer edge by a post.
>
> "Q. You mean the curb?
>
> "A. By the curb, yes, and I was offering this magazine, I was calling to the passers by as they came by, 'Watchtower, announcing Jehovah's Kingdom,' and this offers the only hope——"

PROPOSITION OF LAW TEN

The Court below heard this case without a jury and was the trier of the facts. It heard all the evidence and passed upon its weight on the question of the character of the place where appellant was arrested, and determined that the sidewalk and street were located on the private property of the Gulf Shipbuilding Corporation.

This Court has universally held that it will not review the finding of a jury on facts properly submitted to them if there is any evidence reasonably supporting the verdict.

First Unitarian Society of Chicago v. *Faulkner,* 91 U. S. 415, 432;

Nudd v. *Burrows, Assignee,* 91 U. S. 426, 439;

Lincoln v. *Claflin,* 74 U. S. 132, 136.

Under these authorities it is evident that the finding of the court that appellant was trespassing upon the property of the Gulf Shipbuilding Corporation after warning ends all question in this Court as to the character of the place where appellant was at the time of her arrest.

Under all the facts in the record and the authorities herein cited it is evident that the Alabama statute making it a crime to trespass upon the property of another after warning not to do so is a constitutional exercise of its police powers and that it was not so construed and enforced as to violate appellant's constitutional guarantees. The judgment of the appellate courts below are due to be affirmed.

Respectfully submitted,

WILLIAM N. MCQUEEN,
Attorney General;
JOHN O. HARRIS,
Assistant Attorney General.

W. W. CALLAHAN,
Assistant Attorney General,
Of Counsel.

Certificate

I certify that on this date I sent a typewritten copy of the foregoing brief by mail, postage prepaid, to Hayden Covington at 117 Adams Street, Brooklyn 1, New York.

Dated November 30, 1945.

W. W. CALLAHAN,
Assistant Attorney General
of Alabama.