IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 846

J. M. NEAR,

Appellant,

ads.

STATE OF MINNESOTA ex rel. FLOYD B. OLSON, COUNTY ATTORNEY OF HENNEPIN COUNTY, MINNESOTA,

Appellee.

STATEMENT SHOWING BASIS OF JURISDICTION AS REQUIRED BY RULE 12.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this court to review the above entitled cause on appeal respectfully represents:

A.

Statutory provisions sustaining the jurisdiction of this court.

This appeal is taken under Sections 861a and 861b of Title 28 of the United States Code, as amended January 31, 1928, and April 26, 1928; under Section 344 of Title 28 of the United States Code (Section 237 of the Judicial Code as amended); and under Rule 46 of the Rules of this court.

B.

Date of judgment and date of application for appeal.

The opinion of the Supreme Court of Minnesota was filed on December 20, 1929 (Rec., 377)*; entry of judgment was stayed pending the determination of the application for re-argument on December 30, 1929 (Rec., 393); the application for re-argument was denied on January 10, 1930 (Rec., 394); judgment was formally entered on February 25, 1930 (Rec., 379), which is the judgment sought to be reviewed on this appeal.

The application for appeal was presented (Rec., 380-383), the appeal allowed (Rec., 384-385), and the citation issued on the second day of April, 1930. (Rec., 386.)

C.

Nature of case and rulings of the Supreme Court of Minnesota.

Appellant and Howard A. Guilford were copartners doing business under the firm name of The Saturday Press and on the 24th day of September, 1927, began the publication of a weekly newspaper known as The Saturday Press. (Rec., 361-362.) They continued the publication of the paper for nine issues up to and including the issue of November 19, 1927. (Rec., 361-362.)

Chapter 285, Session Laws of Minnesota, 1925, (Mason's Minnesota Statutes, 1927, Secs. 10123-1 to 10123-3) contains three sections the first of which is as follows:

"Sec. 1. Any person who, as an individual, or as a

*Note: All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of Minnesota and on file with the Clerk of this Court. The record has not yet been printed.

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.

(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.

Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.

In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report to issues or editions of periodicals taking place more than three months before the commencement of the action."

The second section of the act provides that actions thereunder shall be brought by the County Attorney in the name of the State, or in certain contingencies by the Attorney General, or a citizen. The section then continues:

"In any such action the court, or a judge thereof in vacation, may upon such evidence as the court shall deem sufficient, taken in such form as the court shall require, grant a Writ of Temporary Injunction."

The section concludes with a provision for service of summons which may be by publication. The third section, after providing that the action shall be governed by the practice applicable to civil actions for injunctions is as follows:

"After trial the court may make its order and judg-

ment 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.

The court may, as in other cases of contempt, at any time punish, by fine of not more than $1,000, or by imprisonment in the county jail for not more than twelve months, any person or persons violating any injunction, temporary or permanent, made or issued pursuant to this act."

An action was instituted in the District Court for the Fourth Judicial District, Hennepin County, Minnesota, under the above described statute by the County Attorney of Hennepin County against appellant and his copartner Guilford, for the purpose of having their newspaper declared a public nuisance and abated by injunction. The bill of complaint (Rec., 4-8) charged that The Saturday Press was a malicious, scandalous and defamatory newspaper within the meaning of Section 1 (b) of the statute. On November 22, 1927, the summons and complaint, notice of motion, order to show cause and temporary restraining order were served upon appellant and Guilford returnable December 19, 1927. (Rec., 1-8.) Immediately upon the filing of the bill of complaint, the court issued a temporary restraining order restraining the appellant and Guilford from publishing, having in possession, selling or giving away not only any past editions of The Saturday Press but any future editions whether defamatory or not; the defendants were also restrained from publishing, having in possession, selling or giving away any publication known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint or otherwise; although the defendants were not ordered to show cause until December 19, 1927, this temporary restraining order was issued on November 22, 1927, without notice, without waiting to grant

the defendants a hearing, without a showing of irreparable damage and without requiring the plaintiff to give any bond. (Rec., 1-2.)

The defendants demurred to the complaint (Rec., 336) and argued that it violated both the guaranty of liberty of the press contained in Article I, Section 3, of the Constitution of Minnesota and the Fourteenth Amendment to the Constitution of the United States. The trial court overruled the demurrer and certified the question of the constitutionality of the act to the Supreme Court of Minnesota. (Rec., 336-338.) The defendants appealed. (Rec., 338-339.) The State Supreme Court rendered an opinion (Rec., 339-349) in which it held that the statute did not violate in any way the Constitution of Minnesota but it did not pass upon any of the federal questions involved. The order of the District Court overruling the demurrer was affirmed (Rec., 349) and the case remanded for further pleading. This opinion is reported in 174 Minn. 457, 219 N. W. 770.

At this point Howard A. Guilford sold out all his interest in The Saturday Press to appellant and withdrew from active participation in the defense. (Rec., 350.) Appellant filed an answer in which he admitted the publication of the nine issues of the newspaper but denied that those publications constituted a public nuisance on the ground that the statute violated not only the Constitution of Minnesota but also ran counter to each of the three prohibitions contained in the first section of the Fourteenth Amendment to the federal Constitution and was incompatible with the republican form and theory of government. (Rec., 349-355.)

Plaintiff offered the complaint and the nine issues of the newspaper in evidence (Rec., 356); appellant objected to the introduction of the evidence on the ground that the law under which the evidence was offered was unconstitutional for the same reasons as were set forth in the answer (Rec.,

356-359.) The court overruled the objection and defendant excepted. (Rec., 359.) Thereafter the District Court made its findings of fact and conclusions of law, and final judgment was entered January 19, 1929. (Rec., 360-365.) It was thereby adjudged that The Saturday Press was a malicious, scandalous and defamatory publication constituting a public nuisance, and that it be abated; that the defendants be perpetually enjoined and restrained from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law; and that the defendants be perpetually enjoined and restrained from further conducting said nuisance under the name and title of The Saturday Press or any other name or title. (Rec., 364-365.)

From this final judgment of the District Court the appellant again appealed to the Supreme Court of Minnesota (Rec., 365), and assigned as error that the statute violated each of the three prohibitions contained in the first section of the Fourteenth Amendment to the federal Constitution, was in excess of the police power in violation of that amendment, and violated several provisions of the State Constitution. (Rec., 367-371.) The Supreme Court of Minnesota rendered an opinion (Rec., 377-378), wherein it held that the statute does not violate the Constitution of the United States, and affirmed the judgment of the court below (.... Minn. ...., 228 N. W. 326). The court said:

> "The claim is advanced that the statute is in contravention of article I, Sec. 3 of our state constitution relating to the liberty of the press, and also that it violates the due process clause of both article I, Sec. 7, of our state constitution and the Fourteenth Amendment to the Constitution of the United States. In our opinion the laws of 1925 c. 285, violate neither the state nor the federal constitution."

Appellant filed a petition for re-argument (Rec., 391-392) which was denied on January 10, 1930 (Rec., 394) and the Supreme Court of Minnesota entered its judgment of affirmance on February 25, 1930 (Rec., 379.) From this judgment an appeal was taken to this court on April 2, 1930. (Rec., 384-385.)

Howard A. Guilford, the sole co-defendant of appellant in this cause, was served by appellant with notice, on February 1, 1930, to join with appellant in this appeal. (Rec., 372.) Howard A. Guilford, having failed so to join, appellant moved for an order of severance from his co-defendant for the purpose of an appeal to the Supreme Court of the United States. (Rec., 373-374.) This motion was granted on April 2, 1930. (Rec., 375-376.)

It thus appears that the federal questions presented by the assignments of error in the appeal now before this Court were raised at the beginning of the case, were presented on appeal, and were passed upon by the Supreme Court of Minnesota. The opinion of the Supreme Court of Minnesota filed December 20, 1929 (Rec., 377-378) with the judgment entered thereon February 25, 1930 (Rec., 379) constitute a final judgment of the highest court of the State of Minnesota in which a decision in the suit could be had; the validity of Chapter 285, Sessions Laws, 1925, was therein drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity and against the claims of appellant that the statute violated the federal Constitution.

D.

Cases believed to sustain jurisdiction.

The following decisions are believed to sustain the jurisdiction of this court of this appeal:

1. Freedom of speech and press is a liberty protected by the Fourteenth Amendment:

Fiske v. *Kansas*, 274 U. S. 380.
Whitney v. *California*, 274 U. S. 357.
Gitlow v. *New York*, 268 U. S. 652.

2. Freedom of speech and press is a privilege and immunity of a citizen of the United States protected by the Fourteenth Amendment:

United States v. *Hall*, 26 Fed. Cas. No. 15, 282.

3. Foreign language act cases:

Meyer v. *Nebraska*, 262 U. S. 390.
Bartels v. *Iowa*, 262 U. S. 404.
Yu Cong Eng v. *Trinidad*, 271 U. S. 500.
Farrington v. *Tokushige*, 11 F. 2d (C.C.A. 9th Cir.) 710, affirmed: 273 U. S. 284.

4. Words, to be prohibited, must create a clear and present danger of substantive evil to the state:

Schenck v. *United States*, 249 U. S. 47.

5. A lawful use may not be prohibited along with an unlawful use even under the doctrine of nuisance:

Lawton v. *Steele*, 152 U. S. 133.

6. The right to follow an occupation is a property right protected by the Fourteenth Amendment:

Louis K. Liggett Company v. *Baldridge et al.*, 278 U. S. 105.

This court has apparently never passed upon the precise question here involved, that is, the right of a state to declare a newspaper a nuisance and wholly to abate it, but in the so-called "Syndicalism Act Cases" cited above, this court has thrice held that freedom of speech is protected by the Fourteenth Amendment; and the so-called "Foreign-Language Act Cases" cited above, are analogous. We respectfully submit that these cases and the others, cited above, of a more general application, are authorities sustaining the jurisdiction of this court in the present case.

Respectfully submitted,

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