UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 34 | Number 3 Article 9

4-1-1956

Constitutional Law -- Second Class Mail

Lewis H. Parham Jr.

to give the opinion, that as long as their religious tenets and devotions are confined to the sphere of Christianity, the grantor can have no claim; . . . . If the grantor has no right, on what foundation does the plaintiffs claim rest? It appears, that they [plaintiffs] are seceders from the church, and are not the trustees or representatives of it; they were a minority of the members before their secession. Had they remained in the church, they must have yielded to the government of the majority. Much less can they have any control over it, when they are no part of it. It is a rule applicaable to aggregate corporations or to societies, that the will of the majority must govern. A contrary rule would be as absurd, as to say, that a lesser number contained more units than a greater.

"With respect to the allegation made by the plaintiffs, that the defendants, or the church they represent, have strayed from the true faith . . . on that question, it is not for them, nor this Court to decide. It might be more than difficult to qualify any earthly tribunal to decide it."[31]

On principle it would seem desirable that a religious society in a country of religious equality should be allowed to change its faith without losing its property, where no express trust is present and the church is non-hierarchical. It is submitted that the general rule in this area should be construed in the light of the words and spirit of the *Organ Meeting House* case, and that as long as the majority "worship Almighty God according to dictates of their own conscience" or at least remain "confined to the sphere of Christianity," they should control the property of the church. Civil courts should adopt the view of the Nebraska court in the *Wehmer* case, "whether the religious teachings, faith, and church polity of these synods differed in essential particulars was and is a question for the ecclesiastical tribunals, not the civil courts."[32] To hold otherwise is to have a temporal court adjudicate religious doctrines under the guise of "property rights."

MORTON A. SMITH.

Constitutional Law—Second Class Mail

Article 1, section 8 of the United States Constitution grants to Congress the power to establish post offices. Since the dissemination of news has always been considered a contribution to the public good, special mailing rates were accorded to newspapers in 1792.[1] In 1879 Congress divided the mails into four classes,[2] with matters coming within

[31] *Id.* at 455.
[32] 57 Neb. 510, 516, 78 N. W. 28, 30 (1899).

[1] Act of February 20, 1792, I STAT. 232.
[2] Sec. 7 of the Classification Act of 1879, as amended, 39 U. S. C. § 221 (1926) provides:

the second class afforded the most favorable rate. Certain objective standards were set to determine which publications qualified for this rate. Sections 10 and 14 of the Classification Act of 1879 as amended in sections 224 and 226 of title 39 of the United States Code provides:

> "Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in 225 and 226 of this Title."[3]
>
> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class mail are as follows:
>
> First. It must be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguishes printed books for preservation from periodical publications. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."[4]

The constitutional validity of these standards was upheld in the case of *Lewis Publishing Company v. Morgan*,[5] which case further upheld an act of Congress requiring publishers intending to use the facilities of second class mail to file at stated intervals with the Postmaster General certain information concerning their publications.[6] This, said the court, was an incident necessary to Congress' power to classify.

The determination of what particular publications are to be properly included or excluded from second-class mail carriage under the above

---

"Mailable matter shall be divided into four classes:
First, written matter;
Second, periodical publications;
Third, Miscellaneous printed matter and other mailable matter not in the first, second or fourth classes.
Fourth, merchandise and other mailable matter weighing not less than eight ounces, and not in any other class."

[3] 20 STAT. 359, 39 U. S. C. § 224 (1926).
[4] 20 STAT. 359, 39 U. S. C. § 226 (1926).
[5] 229 U. S. 288 (1912).
[6] Post Office Appropriation Act of August 24, 1912, 37 STAT. 539, 553, 554.

statutes is necessarily delegated to the Post Office Department.[7] It may be readily seen that this determination is of great economic importance to publishers.[8] The amount of discretion which the Postmaster General may use in deciding whether or not a particular publication is eligible to travel through the mails at a second-class postal rate has been a constant source of litigation in the federal courts. It has been stated that "Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive, and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power and will occasionally exercise the right of so doing."[9] It would thus appear that the Postmaster General's determination of whether a publication was "issued as frequently as four times a year," "numbered consecutively," and "formed of printed paper sheets without board, cloth or leather binding" would be conclusive, and not reviewable by the courts.

A question which has caused some controversy has been the interpretion of the meaning of the word "periodical" within section 224 of title 39 of the United States Code. The problem usually involved is whether the particular publication is a periodical and thus eligible to qualify for second-class rates, or is a book, complete in itself,[10] and subject to the higher third-class rates. In *Houghton v. Payne*,[11] the court stated:

> "But while section 14[12] lays down certain conditions requisite to the admission of a publication as to mail matter of the second-class, it does not define a periodical, or declare that upon compliance with these conditions the publication shall be deemed such. In other words it defines certain requisites of a periodical, but does not declare that they shall be the only requisites. Under section 10 the publication must be a periodical publication; which means, we think, that it shall not only have the feature of perio-

[7] 42 STAT. 24, 5 U. S. C. § 369 (1921) states that it shall be the duty of the Postmaster General to superintend generally the business of the department and to execute all laws relative to the Postal Service.

[8] In Hannegan v. Esquire, 327 U. S. 146, 151 (1945) it was found that the second class mailing privilege was worth $500,000 a year to Esquire Magazine. "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." CHAFEE, FREEDOM OF SPEECH, p. 199 (1920).

[9] Bates & Guild Co. v. Payne, 194 U. S. 106 (1903).

[10] "Mail matter of the third class shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second class matter) . . ." 43 STAT. 1067 U. S. C. § 235 (1926).

[11] 194 U. S. 88 (1903).

[12] Section 14 of the Classification Act of 1879.

dicity, but that it shall be a periodical in the ordinary meaning of the term."[13]

The court relied on the definition of a periodical stated by Century Dictionary to be "a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself,"[14] and concluded that the Postmaster General properly used his discretion in determining that the publication of the plaintiff was not a "periodical publication" within the meaning of the statute. In a later decision to the same effect, the court stated, "But we think that although the question is largely one of law, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of the opinion that it was wrong."[15]

Congress has made certain matter nonmailable. Section 1461 of title 18 of the United States Code provides that no "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character" may be conveyed in the mails under a penalty of fine and imprisonment. For purposes of exclusion from the mails the Postmaster General is given the power to determine what mater is obscene under the standards set by Congress, subject to a hearing and review by the courts.[16]

In *Milwaukee Publishing Company v. Burleson*,[17] it was held that under the Espionage Act of June 15, 1917,[18] declaring periodicals containing subversive material nonmailable, the Postmaster had an implied power to refuse second-class rates to an offender without denying it the use of the mails altogether. A prior decision had established that Congress had power to deny subversive publications the use of the mails

[13] 194 U. S. at 96. The publications in question (*Riverside Literature Series*) were small books, 4½ by 7 inches, in paper covers, issued from their office of publication monthly and numbered consecutively, but each number contained a novel, story or a collection of short stories or poems by the same author.

[14] *Id.* at 96.

[15] Bates & Guild Co. v. Payne, 194 U. S. 106, 107 (1903). "The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong, and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied." *Id.* at 108. See also: Smith v. Hitchcock, 226 U. S. 53, 57 (1912); Smith v. Payne, 194 U. S. 104 (1904).

[16] See LAW AND CONTEMPORARY PROBLEMS § 20, p. 608 (Autumn 1955) for a thorough discussion of obscenity and the mails. For other matters which are nonmailable, see 62 STAT. 762, 18 U. S. C. § 1302 (1948) pertaining to lotteries, and 63 STAT. 94, 18 U. S. C. § 1341 (1948) dealing with mail fraud.

[17] 255 U. S. 407 (1921). The dissent in this case was to the effect that there was no authorization to deny second class privileges with regard to *future issues* of a paper merely on the grounds that previous issues contained non-mailable matter.

[18] 40 STAT. 217 (1917).

altogether.[19] The Postmaster in this case had not rested his entire argument on this point, but also contended that section 14 of the Classification Act of 1879, by its fourth condition, demanded that the publication contain something of positive worth in order to enjoy the second-class mailing privilege.

This contention alone appeared to be the government's defense in *Hannegan v. Esquire*.[20] The Postmaster General had issued a citation to Esquire Magazine to show cause why its second-class mailing permit should not be revoked. After a scheduled hearing[21] the permit was revoked, and Esquire brought suit to enjoin the Postmaster General from enforcing the revocation. The Postmaster General did not contend that the subject matter of Esquire Magazine was obscene and therefore nonmailable, but stated that he revoked the permit because:

> "The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry'. . . . a publication to enjoy these unique mailing privileges is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."[22]

The court refuted this contention, saying that the Classification Act plainly adopted a strictly objective test and left no discretion to the postal authorities to withhold from a mailable periodical the second-class privilege because it failed to meet some standard of worth; that the more particular descriptions of the first,[23] third,[24] and fourth,[25] classes are like the first three conditions of the second-class, and if the fourth condition is read in context with these, it too must be taken to supply standards which relate to the format of the publication and to the nature, but not the quality, worth, or value of its contents; that in this view "literature" and "arts" mean no more than productions which convey

[19] Frohwerk v. United States, 249 U. S. 204 (1919).
[20] 327 U. S. 146 (1945).
[21] 31 STAT. 1007, 39 U. S. C. 232 provides: "When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested." In this case the board designated for the hearing recommended that the permit not be revoked, but the Postmaster General revoked notwithstanding such recommendation; so it appears that the value of such hearing is dubious since the prosecutor, after the hearing, becomes the judge.
[22] 327 U. S. at 149 (1945).
[23] 20 STAT. 358, 39 U. S. C. § 222 (1926).
[24] 43 STAT. 1067, 39 U. S. C. § 235 (1926).
[25] 43 STAT. 1067, 39 U. S. C. § 240 (1926).

ideas by words, pictures, or drawings; and that to uphold the Postmaster General's revocation would be saying that Congress granted him the power of censorship, or the power to alone determine whether a publication is good or bad for the public to read. This, said the court, would be a radical change from the other standards regarding classifications, and "such a power is so abhorrent to our traditions that it should not be easily inferred."[26]

The Postmaster General in *Esquire* relied on the holding of *Milwaukee Publishing Company,* but as has been pointed out the matter involved in the latter case was completely nonmailable. It appears then that anything which the Postmaster General may properly declare nonmailable, he may exclude from the second-class without denying mailing privileges entirely, but where the matter involved is mailable he must objectively apply the standards set by Congress.

The basis of the court's decision in the *Esquire* case was that Congress had not intended to give to the Postmaster General the power of enforcing tests of "positive worth" in determining whether a periodical should be accorded second-class mailing privileges. The case suggests the question of whether Congress could delegate such powers. It could be argued that there is no constitutional right to cheap mail, that Congress is not attempting to regulate the businesses of newspapers and periodicals, but is merely performing a service, and in so doing may name its conditions for performance. On the other hand, it may readily be seen that the denial of second-class privilages would be likely to drive a publisher out of business,[27] and in this respect actually would be a regulation. The court of appeals in the *Esquire* case[28] considered this question and concluded that Congress might withdraw the second-class privilege completely if it felt that the benefits of wide circulation were not worth the cost of the subsidy, as there was no obligation to grant it in the first place, but that Congress may not use the privilege as a weapon to force compliance with its notions of what is worthwhile. To allow a "merit test" would be to deny what is meant by freedom of the press.

LEWIS H. PARHAM, JR.

Criminal Law—Homicide—Application of Felony-Murder Rule When Non-Felon Kills Felon

Under the common law a homicide, whether intentional or not, committed by a person in the perpetration of a felony, is murder by each

[26] Hannegan v. Esquire, 327 U. S. at 151.
[27] *Supra* note 8.
[28] Esquire v. Walker, 151 F. 2d 49 (D. C. Cir. 1945).