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THE POWER OF THE STATE OVER CHRISTIAN SCIENCE.

Although the dangerous and often fatal results of Christian Science teachings as to the treatment of disease are the occasion of frequent newspaper comment, the subject has received a surprisingly small amount of legislative or judicial consideration. It is believed that very few of the State laws regulating the practice of medicine could, as they now exist, be construed as to include its advocates. It appears that their method of healing the sick is simply and solely by inaudible prayer, and as is said in the case of *State v. Mylod,* 20 R. I. 632, 41 L. R. A. 428: "Prayer for those suffering from disease, or teaching that disease will disappear and physical perfection be attained as a result of prayer, does not constitute the practice of medicine in a popular sense." So also *Evans v. State,* 9 Ohio S. & C. Dec. 222. In Nebraska, to be sure, Christian Science healers have been held to be within the provisions of the act regulating the practice of medicine, but that act is much more comprehensive than are those in most states, covering: "All who shall, under any pretense * * * profess to heal, prescribe for, or otherwise treat, any physical or mental ailment of another."

An interesting and important decision on much broader grounds, and going directly to the root of the matter, has recently been handed down by the Supreme Court of Pennsylvania. *In re First Church of Christ, Scientist,* 55 Atl. 536. This case held that an application for a charter of incorporation, by a Christian Science Church, was properly denied, as opposed to the general policy of the State in

reference to the treatment and existence of disease. This is believed to be the first instance in which the refusal to charter has been interposed as a bar to the spread of these doctrines. It appeared in the application for a charter, that the main purpose for which incorporation was desired, was: "To preach the gospel according to the doctrines of Jesus Christ as found in the Bible, and the Christian Science text-book 'Science and Health, with Key to the Scriptures,' by Mrs. Mary Baker-Eddy." A perusal of the latter book, and the testimony of the witnesses, plainly showed that the purpose of the Church was not merely to inculcate a creed, but was also to accomplish the treatment and cure of disease through healers which it was to train and constitute; that the method to be pursued by such healers in curing the sick was simply and solely by inaudible prayer. This method was claimed to be efficacious in organic as well as functional diseases, the most malignant contagion being handled with perfect ease. The master, in refusing the charter in the first instance, had pointed out that this theory was directly opposed to the laws of Pennsylvania with regard to the public health and the treatment of disease, and the learned judge in the principal case, in affirming the master's finding, said: "The common faith of mankind relies not upon prayer, but upon the use of means which knowledge and experience have shown to be efficient, and when the results of this knowledge and experience have been chrystalized into legislative enactments, declarative of what the good of the community requires, in the treatment of disease. Anything in opposition thereto may fairly be taken as injurious to the community." Especially in the case of contagious diseases it is the policy of the State to assume control and, to quote further from the opinion: "In such cases, failure to treat, or any attempt to treat, by those not possessing the lawful qualifications, are equally violative of the policy of the law. Neither the law nor reason has any objection to the offering of prayer for the recovery of the sick. But in many cases both law and common sense require the use of other means which have been given to us for the healing of sickness." This seems to us a much safer view than that apparently adopted in the recent case of *American School of Healing v. McAnnulty,* decided by the Supreme Court of the United States in November, 1902, 187 U. S. 94, where the opinion holds that: "The effectiveness of such treatment (mental) is but matter of opinion in any court."

Nothing is more clearly embraced within the police power of the State than the power to make reasonable regulations for preserving the public health. And to this power even the constitutional provisions, guaranteeing freedom of worship, have repeatedly been held subordinate. In the case of *Reynolds v. United States,* 98 U. S. 145, the statute declaring bigamy committed in a Territory a crime against the United States, was declared to be constitutional and valid, although such bigamy was an essential doctrine of the Mormon religion. In *Washburn v. City of Bloomington,* 32 Ill. App. 245, it was held that a city ordinance, prohibiting such disturbances as were caused by Salvation Army workers was not an invasion of religious liberty. So also *Commonwealth v. Plaisted,* 148 Mass.

375, 2 L. R. A. 142. The relation of the police power of the State to the constitutional guarantee of freedom of worship is admirably stated by Chief Justice Waite in *Reynolds v: United States, supra.* as follows: "The precise point of inquiry is, what is the religious freedom which is guaranteed? Congress was deprived of all legislative power over mere opinion, but was left free to reach acts which were in violation of social duties or subversive of good order. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the government could not interfere to prevent such a sacrifice? To permit this would be to make the professed doctrines of religious belief superior to the laws of the land and in effect to make every citizen a law unto himself. Government could exist only in name under such circumstances."

LOCAL TAXATION OF INTERSTATE COMMERCE.

In the decision in *Atlantic and Pacific Tel. Co. v. City of Philadelphia,* decided June 1, 1903, the Supreme Court has restated a new principle (laid down for the first time in *Western Union v. New Hope,* 187 U. S. 419, decided January 5, 1903) in respect to the extremely difficult and important question of the extent of the power of a local governmental body to tax a corporation engaged in interstate commerce. The case arose upon the attempt of the city of Philadelphia to enforce the payment of license charges imposed upon the telegraph company by a city ordinance, which charges were intended to reimburse the city for sums expended in the enforcement of local governmental supervision of the telegraph poles and wires. Judgment in the lower court being rendered in favor of the city, the company carried the case up on the ground that the ordinance, though purporting to be merely a police regulation, was in reality an unconstitutional regulation of interstate commerce.

Justice Brewer begins his opinion by saying that certain propositions have been adjudicated so often as to be no longer open to discussion: First—Congress has exclusive power to regulate interstate commerce. Second—No State or sub-division thereof can compel a person or corporation to pay for the privilege of engaging in interstate commerce. Third—This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory, and employed in interstate commerce. Fourth—The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing, at least, the franchise is not derived from the United States. Fifth—No corporation, even though engaged in interstate commerce, can appropriate property without liability to charge therefor.

He then goes on to lay down the further proposition, based upon the ruling in *Tel. Co. v. New Hope, supra.* that if a corporation, although engaged in interstate commerce, so carries on its business as to justify police supervision at the hands of a municipality, the

municipality is not bound to furnish such supervision for nothing, but may, in addition to ordinary property taxation, require the corporation to pay a reasonable license fee to cover the expense of the supervision.

In *Tel. Co. v. New Hope, supra,* the question of the validity of such an ordinance as that in question here, came before the court for the first time, and in his opinion Fuller, C. J., said: "This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and, as such, not in itself obnoxious to the clause of the constitution relied upon." This ruling seems to us to be marked by good common sense, and to indicate in its manner of application, as set forth by the court, a careful desire to do justice, both to the inhabitants of the municipality and the members of the corporation. If, on the one hand, a certain amount of police supervision is necessary to protect the public from the danger of falling poles and wires, we see no reason why the police itself should be put to the expense of providing this supervision merely because the telegraph company happens to carry on business within two different States instead of being confined entirely within the limits of one. On the other hand, it is the duty of the courts to see to it that the charges are reasonable and not out of all proportion to the work required, nor unduly burdensome to the company. Having laid down the fundamental proposition, that a reasonable license fee is constitutional, Justice Brewer goes on to discuss the question of reasonableness.

The extent of the expense to which the municipality is put in exercising its supervision is the test of the reasonableness of the license charge. But it is not within the power of the court to declare dogmatically what shall be the limit of expense. That is a proper question for a jury. When it is said by courts and authors that the question of the reasonableness of a regulation is for the courts to decide, it is meant by that merely that such is the case where the question depends on the *character* of the regulation. When the court has decided that a regulation imposing a charge is of a proper character it becomes the duty of the jury to decide from the facts of the particular case whether or not the amount of the charge is unduly large; and in this way the *jury* passes on the question of reasonableness.

In *Tel. Co. v. New Hope, supra,* when the decision of the question of reasonableness was held to be rightly left to the jury, White, Peckham, and McKenna, J. J., "dissented from the judgment." In the present case, when the judgment of the lower court was reversed because the court improperly took upon itself the decision of that question, the learned justices "concurred in the judgment." As none of them has declared the grounds for his action, it seems impossible to tell whether they deny the validity of the fundamental proposition that a city may impose a license fee of the character in

question, or of the secondary proposition, that the reasonableness of such a fee is a question for the jury. It is to be regretted that upon such an important question the exact position of the court should not be clearly defined.

FEDERAL SUCCESSION TAX ON BEQUESTS TO MUNICIPALITY.

The theory of the succession tax has been thoroughly considered in a number of cases. In *United States v. Perkins,* 163 U. S. 625, it was decied that a State inheritance tax was a limitation upon the power of a testator to bequeath his property. Upon this theory it was held in *Plummer v. Coler,* 178 U. S. 115, that a State might impose a succession tax upon property composed wholly or in part of Federal securities, since the tax is not upon the property itself.

But though the authority of the States to regulate the right of succession is conceded, it was seriously questioned whether the United States had power also to impose a succession tax. In *Knowlton v. Moore,* 178 U. S. 41, it was established that "the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power." The right of the United States to impose a succession tax having been established, a new question has arisen as to whether this tax might be imposed on a bequest to a municipality, as being a tax upon an agency of the State. From the conclusions reached in *Knowlton v. Moore, supra,* it would seem that the nature of an inheritance tax as imposed by the United States is a tax upon the property itself, while an inheritance tax by a State is broader, being derived not only from the power to tax the property itself, but also from the power to tax the right to bequeath property. Upon this theory it would appear that a succession tax by the United States upon a bequest to a municipality would be unconstitutional as a burden upon an agency of the State. *Snyder v. Bettman,* 23 Sup. Ct. Rep. 803, holds, however, that a tax on such a bequest is valid since it is collected from the property while in the hands of the executor, before payment to the legatees. The court supports its position by the argument that since a State may tax a bequest to the United States, as held in *Plummer v. Coler, supra,* therefore, the United States may tax a bequest to a State, or its agency, not recognizing, it would seem, the distinction drawn in *Knowlton v. Moore,* as to the difference between the tax when levied by a State, and when levied by the United States.

PROPERTY RIGHT IN ONE'S NAME AND PICTURE.

By a law which went into effect September 1, the New York Legislature has sought to nullify the effect of the decision of the Court of Appeals in *Roberson v. Rochester Folding Box Co.,* 171 N. Y. 538, where it was held that no injunction to restrain the unauthorized use of one's photograph for advertising purposes, would lie. We commented on that decision at the time it was

rendered and expressed our disapproval of it. (See YALE LAW JOURNAL, XII, 35.) Whether or not the court was right, the public has been very loath to accept its decision as law; and the result of a strong public opinion that such a state of the law was intolerable is seen in Chap. 132, Laws 1903, "An Act to prevent the unauthorized use of the name or picture of any person for purposes of trade." The act provides, in brief, that any person or corporation that uses for advertising purposes or purposes of trade, the name or picture of a living person, without his or her written consent, is guilty of a misdemeanor; and the person aggrieved may obtain an injunction to restrain such use, and damages for the use, which, in a proper case, may be made exemplary. The act seems clear and easy of application. We think that other legislatures in States which are accustomed to follow the New York Courts should imitate the example of New York and put the law on a satisfactory basis, without waiting until such a case as *Roberson v. Box Co.,* with its distressing features, has arisen to arouse public feeling.

In opposition to the act it was contended that it might be construed by the courts to apply to the publication of portraits in newspapers, but the contention had no weight with the legislature. We are not at all sure that a law which would call a halt to the excessive license which certain newspapers and publishers display in publishing the pictures of private citizens, would not be a good thing. Whether the courts will construe this act to apply to such a case is an interesting question, which we may reasonably expect to arise at no distant date.