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Constitutional Law: Loyalty Oath: Tax Exemtpion

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difference in the joint tenancy of husband and wife in homestead property when compared with a tenancy in non-homestead property. In the former, survivorship cannot be destroyed by one tenant's action alone as it can in a normal joint tenancy of non-homestead property.[26] This is true at least as long as the property continues to be used as a homestead.[27] It would seem that there is a similarity between the incident of survivorship of a tenancy by the entireties and the Wisconsin joint tenancy of homestead property by husband and wife. This similarity might lend some weight to an application of the rule of the *Lopez* case to a similar situation in Wisconsin, if it were not for a broad statutory provision which seems to commit Wisconsin to the principal of equitable contribution between joint debtors.[28] The Wisconsin Supreme Court has not been confronted with the problem of applying this statute to a joint debt secured by a lien on realty owned by the debtors as joint tenants. Existing decisions have been limited to tenants in common and partnerships.[29] However, the wording of the statute is such that it could easily be applied to the facts of the principal case, and it is extremely doubtful that a joint tenancy in the property securing the debt would justify a refusal to apply the statute. Hence, if the testator wishes such property to pass to the surviving tenant debt-free, his will should be carefully worded to express this intention. The statute does not appear to prohibit a testator from achieving this result if he so desires. Mortgage insurance would also achieve the desired result.

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Constitutional Law: Loyalty Oath — Tax Exemption—In an attempt to effectuate a provision of the California Constitution which requires that tax exemption be denied all persons who advo-

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[26] WIS. STATS. §235.01(2) (1957) "No mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, shall be valid without his wife's consent, evidenced by her act of joining in the same deed, mortgage or conveyance, except a conveyance from husband to wife." WIS. STATS. §235.01(3) (1957) "No mortgage or other alienation by a married woman of any interest legal or equitable, present or future, by deed or otherwise, in a homestead held by her and her husband as joint tenants, shall be valid without her husband's consent, evidenced by his act of joining in the same conveyance or mortgage or executing a separate conveyance from wife to husband."

[27] Siegel v. Clemons, 266 Wis. 369, 63 N.W. 2d 725 (1954).

[28] WIS. STATS. §313.12 (1957) "When two or more persons shall be indebted on any joint contract or upon a judgment founded on a joint contract and either of them shall die his estate shall be liable therefor, and the claim may be allowed by the court as if the contract had been joint and several or as if the judgment had been against him alone, and the other parties to such joint contract may be compelled to contribute or to pay the same if they would have been liable to do so upon payment thereof by the deceased."

[29] McLaughlin v. The Estate of Curtis, 27 Wis. 644 (1871); W. E. Smith Lumber Co. v. Estate of Fitzhugh, 167 Wis. 355, 167 N.W. 455 (1918).

cate the overthrow of the United States government or of a state, or who advocate the support of a foreign government engaged in hostilities with the United States, the California legislature passed an act requiring a property-tax exemption claimant to sign a statement on his tax return declaring that he does not engage in the proscribed advocacy. Petitioner refused to subscribe the oath and struck it from the form which he executed and filed for the tax year 1954-1955. The California Supreme Court, reversing a lower court, held that the statement was designed for the purpose of relieving the tax assessor from the burden of ascertaining facts with reference to the claimants, and denied,*inter alia,* that freedom of speech under the Due Process Clause of the Fourteenth Amendment had been infringed thereby.[1] *Held:* Judgment for petitioner. The Supreme Court of the United States assumed without deciding that the State of California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned, but found, nevertheless, that the present statutory scheme fell beneath the minimal procedural protection demanded by the Fourteenth Amendment for freedom of speech.[2]

In the majority opinion written by Mr. Justice Brennan, the court would appear to have adopted a somewhat more calloused attitude toward the controversial loyalty oath than has been evinced in the past by the same court. Despite the fact that the Act had been construed by the California Court as applying only to those guilty of the particularized type of "advocacy" dictated by the *Dennis*[3] decision, the court refused to sustain the Act because the burden of overcoming an adverse administrative determination of the tax assessor was placed upon the tax exemption claimant. Even admitting the normality of "the practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector,"[4] the court disallows such a procedure under the present circumstances where by the very nature of the legislation there is a marked tendency to penalize free speech.

Still more notable was the rejection by the court of the State's contention that the instant case should be included within the general body of decisions in which the court has sustained comparable loyalty oaths. In disposing of this suggestion, the court pointed out

[1] Speiser v. Randall, 48 Cal. 2d 903, 311 P. 2d 546 (1957); Companion cases: Prince v. County of San Francisco, 48 Cal. 2d 472, 311 P. 2d 544 (1957); First Unitarian Church of Los Angeles v. County of Los Angeles, 48 Cal. 2d 419, 311 P. 2d 508 (1957); Valley Unitarian-Universalist Church v. County of Los Angeles, 48 Cal. 2d 899, 311 P. 2d 540 (1957).

[2] Speiser v. Randall, — U.S. —, 2 L.Ed.2d 1460, 78 Sup. Ct. 1332 (1958).

[3] Dennis v. United States, 341 U.S. 494 (1950).

[4] *Supra* note 2, at 1472.

that in each of the earlier cases in which the loyalty oath had been sustained, the avowed purpose of the legislation was not to control speech directly, but rather "to protect from an evil shown to be grave, some interest clearly within the *Sphere of Governmental Concern.*"[5] (Italics supplied).

A brief analysis of the decided United States Supreme Court cases involving this problem reveals that the power to utilize the loyalty oath has been affirmatively sanctioned in but a relatively few fact situations. On each of these occasions, the alleged need therefore was eminently clearer than in the present situation. Thus it was readily understandable that the court should recognize a necessity for the removal of subversives from such key positions as public office,[6] union leadership,[7] the schools,[8] and from public service.[9] The decisions simply acknowledged the inherent right of any government to protect itself by the use of reasonable means from attack whether from without or from within.[10]

But even in these areas where the power to require a proper oath might readily be assumed by those seeking to justify its use on constitutional grounds, the court has never lost its awareness of the fact that forcing an individual to use a loyalty oath limits, at least indirectly, his basic freedom of speech.[11] While the Court has made clear there is no question that the right of free speech is not absolute, the cases upholding the validity of a loyalty oath generally have been marked by a painstaking effort on the part of the court

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[5] *Ibid,* at 1473.

[6] Gerende v. Board of Supervisors, 341 U.S. 56 (1951). See also Huntamer v. Coe, 40 Wash.2d 767, 246 P. 2d 489 (1952); loyalty oath held invalid if construed to apply to candidates for Congress under view that the Constitution of the United States specifies qualifications for such candidates and is to be considered exclusive, Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950); loyalty oath held invalid because State Constitution prescribed election requirements and was deemed exclusive, Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950).

[7] American Communications Ass'n. v. Douds, 339 U.S. 382 (1950).

[8] Adler v. Board of Education, 342 U.S. 485 (1951); Pockman v. Leonard, 39 Cal. App. 2d 676, 249 P. 2d 267, *appeal dismissed for lack of a substantial federal question,* 345 U.S. 962 (1952); Thorp v. Board of Trustees, 6 N.J. 498, 79 A. 2d 466, *vacated because moot,* 342 U.S. 803 (1951); Dwarken v. Cleveland Board of Education, 108 N.E.2d 103 (Ct. App. Ohio 1951); Pickus v. Board of Education, 9 Ill. 2d 599, 138 N.E. 2d 532 (1956).

[9] Garner v. Board of Public Works, 341 U.S. 716 (1951); See also Steiner v. Darby, 88 Cal. App. 2d 481, 199 P. 2d 429 (1948); Bowen v. Los Angeles County, 39 Cal. 2d 714, 249 P. 2d 285 (1952); Hirschman v. Los Angeles County, 39 Cal. 2d 698, 249 P. 2d 287 (1952); Fitzgerald v. City of Philadelphia, 387 Pa. 379, 102 A.2d 887 (1954).

[10] *Supra* note 3.

[11] *Supra* note 2, at 1468. The court indicates its feelings towards the matter: "So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."

to emphasize some significant factor serving to justify the limitation imposed upon free speech.[12]

With such a philosophy as a basis, the present case assumes real significance as a possible guide for the future use of the loyalty oath. At least inferentially, it appears that the court has laid a groundwork for the restriction of the loyalty oath to areas very clearly within the rightful sphere of governmental concern. In short, it is possible to predict the time when use of the loyalty oath will have to be more palpably allied with an actual threat of substantial danger to the government attempting its use.

At the state level it is significant to note that a gradually expanding number of courts restrict the use of loyalty oaths to areas where occupation of a key position by subversives might work genuine damage.[13] There remain, however, some state jurisdictions where courts have justified the use of the loyalty oath in fields where the good accomplished seems remote by comparison with the freedom sacrificed.[14] This seems regretable.

[12] The court held in the *Douds* case, *supra* note 7, at 396, stated: "[The] Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in *protecting the free flow of commerce* from what Congress considers to be substantial evils of conduct that are not the products of speech at all." And in the *Adler* case, *supra* note 8, at 493: "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this the state has a vital concern. *It must preserve the integrity of the schools.*" (Emphasis supplied.) See also Wieman v. Updegraff, 344 U.S. 183 (1952) where the court declared an Oklahoma statute requiring state employees to swear that they were not, had not been, within past years, a member of any organization on the Attorney General's list, invalid because the statute did not differentiate between knowing and innocent membership.

[13] Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605, 615 (1955). The court in refusing to permit an eviction from public housing based on a refusal to subscribe to a loyalty oath reasoned: "It is beyond our power to comprehend how the evil which might result from leasing units in a federally aided housing project to tenants who are members of organizations designated subversive by the Attorney General is in any way comparable in substantiality to that which would result to the general welfare through Communists in control of labor organizations (distinguishing *Douds* case, *supra* note 7) disrupting commerce by calling strikes to carry our Communist Party policy. . . . This court deems the possible harm which might result in suppressing the freedoms of the First Amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally aided housing projects." Also Danskin v. San Diego Unified School Board, 171 P. 2d 885 (Cal. 1946) where a statute requiring the taking of a loyalty oath as the sole condition for use of the local auditorium for meetings was declared invalid. The court held, in substance, that the so-called danger to be averted by keeping the petitioners out was too remote to justify the obvious restriction on free speech and assembly. In Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954) an attempt to evict from public housing for refusal to take a loyalty oath was denied. Under a similar attempt, the court in Housing Authority of Los Angeles v. Cordova, 130 Cal. App. 2d 883, 279 P. 2d 215, 218 (1955) stated: "Nor is it apparent that the laudable purpose of combating the efforts of subversives is advanced by compelling them to live in slums or substandard housing accommodations."

[14] Dworken v. Callopy, 91 N.E.2d 564 (Ct. Com. Pleas Ohio 1950), upholding

CONCLUSION

Certainly free speech may in some instances be abridged lawfully through the valid use of the loyalty oath. At the same time, however, it is evident that particular attention will be paid to the nature of the area wherein its use is sought. The present decision impliedly indicates a growing tendency on the part of the court to look askance at indiscriminate usage of the oath, particularly in view of its manifest curtailment of free speech. It reveals that the myth entertained by a few courts that tax benefits (and conceivably unemployment benefits, public housing, etc.) are merely in the nature of a governmental bounty, to be bestowed or withheld at will, is untenable. The Supreme Court refuses to overlook the fact that withholding "bounties" because of alleged disloyalty, as evidenced solely by a refusal to make a loyalty declaration, circumscribes free speech while accomplishing little towards the actual protection of a government from subversion.

MAURICE GARVEY

Federal Criminal Procedure: Habeas Corpus — Disposition of Petitioner in State Custody after Finding Illegal Detention—Petitioner was convicted in a state trial court in 1948 of armed robbery and sentenced to an indeterminate period with life as the minimum and maximum duration of imprisonment. Immediately after the trial a notice of appeal was filed and a verbatim record of the evidence and proceedings requested. Before the official court reporter had transcribed his notes from shorthand he suffered a physical breakdown and was incapacitated from doing any further work. During this illness the shorthand notes were lost or destroyed. During the following ten years the petitioner prosecuted numerous appeals in order to obtain a review of his conviction, including three petitions to the United States Supreme Court for writs of *certiorari,* all of which failed. In 1958, on petition to the United States District Court for a writ of *habeas corpus,* the court ordered the writ to issue and after a full hearing

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the denial of an application for unemployment compensation for refusal to take a loyalty oath. Rudder v. United States, 105 A.2d 741 (Mun. Ct. App. D.C. 1954), upholding the right to evict petitioner for refusal to subscribe a loyalty oath. Reversed in 226 F. 2d 51 (D.C. Cir. 1955) without deciding the actual constitutionality of an eviction from public housing for failure to comply with loyalty oath requirements. Compare reasoning of court in Peters v. New York City Housing Authority, 283 App. Div. 801, 128 N.Y.S. 2d 712 1954), at 714: "Furthermore, in the present day context of world crisis after crisis, it is our opinion that the danger the Congress is seeking to avoid (*i.e.,* infiltration of government housing by subversive elements) justifies the requirement that tenants herein choose between government housing and membership in an organization they know to have been found subversive by the Attorney General." Note: Reversed on Non-constitutional grounds in 307 N.Y. 519, 121 N.E.2d 529 (1954).