

APR 18 1957

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE  
IN CHANCERY

RANDOM HOUSE, INC., a New York  
corporation,

Plaintiff,

vs.

No. 555 684

CITY OF DETROIT, a Municipal corporation,  
CITY OF DETROIT METROPOLITAN POLICE  
DEPARTMENT, EDWARD S. PIGGINS and  
MELVILLE E. BULLACH,

Defendants.

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OPINION

This action is brought by plaintiff for a permanent injunction (1) directing defendants to withdraw the ban against the sale in Detroit of the hard-bound edition of the book TEN NORTH FREDERICK; (2) enjoining defendants, their agents and subordinates, from directly or indirectly ordering any person engaged in the sale of the book to discontinue sale thereof, and from making any threat of prosecution, explicit or implicit, to any person selling the book by reason of their sale, distribution or display for sale thereof; the aforesaid relief, however, not to impose any restraint upon defendants' lawful duties of law enforcement by prosecution.

The matter is before the Court on an application for a preliminary injunction.

There is no dispute as to the facts. Plaintiff, a New York corporation, in 1955 published the hard-bound edition of the book TEN NORTH FREDERICK. The book was awarded the National Book Award as being the outstanding novel of 1955 and was on the national best seller lists for 52 weeks. Plaintiff has sold in excess of 100,000 copies of the book throughout the United States.

Defendant Piggins is the Chief of Police of the City of Detroit, and defendant Bullach is an Inspector and Head of the Censor Bureau of said Police Department. In or about the middle of January, 1957 defendant

Piggins made a public announcement to the effect that the book TEN NORTH FREDERICK was obscene and thereafter defendant Bullach notified booksellers in the City of Detroit that the sale of the book would lead to arrest and prosecution. Since then the book has not been sold by booksellers in the City of Detroit.

Plaintiff contends that the foregoing acts on the part of defendants Piggins and Bullach were in excess of the authority conferred upon them by law and constituted an illegal banning and suppression of the book TEN NORTH FREDERICK, as a result of which plaintiff has been irreparably injured in violation of its constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States.

Defendants, on the other hand, contend that they acted within the statutory powers conferred upon them by the Michigan state statute and the Detroit municipal ordinance, both prohibiting the sale of obscene publications.

This Court is constrained to disagree with the defendants' position. We are here dealing with the precious constitutional right of a free press.

"Freedom of the press is not limited to freedom to publish, but includes the liberty to circulate publications, which the Supreme Court has said 'is as essential to that freedom as liberty of publishing'. *Lovell v. City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 669, 82 L. Ed. 949. In the *Lovell* case the court again stressed the importance of protecting freedom of the press 'from every sort of infringement'. See also *Near v. State of Minnesota*, 283 U. S. 697, 61 S. Ct. 625, 75 L. Ed. 233, 56 S. Ct. 444, 80 L. Ed. 660; *De Jonge v. State of Oregon*, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278. Freedom of the press, together with freedom of speech and freedom of religion, occupy a 'preferred position' among our constitutional guaranties. *Marsh v. State of Alabama*, 1946, 326 U. S. 501, 509, 66 S. Ct. 276, 90 L. Ed. 265; *Jones v. City of Opelika*, 1943, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290; *Murdock v. Com. of Pennsylvania*, 1943, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292; *Martin v. City of Struthers*, 1943, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313. That preferred position gives these guaranties 'a sanctity and a sanction not permitting dubious intrusions.' *Thomas v. Collins*, 323 U. S. 516, at page 530, 65 S. Ct. 315, 89 L. Ed. 430. . . . .  
. . . . . Censorship in any form is an assault upon freedom of the press. A censorship that suppresses

books in circulation is an infringement of that freedom." (New American Library of World Literature, Inc. v. Allen, 114 F. Supp. 823, 832, 833; U. S. Dist. Ct., N. D. Ohio. E. D. 1953)

Neither the Michigan statute nor the Detroit municipal ordinance, under which defendants have claimed to act, clothed defendant Piggins, as Police Chief of the City of Detroit, or defendant Bullach, as Head of the Censor Bureau, with power to censor or ban the sale of any books. The sole authority granted to defendants Piggins and Bullach under the Michigan statute or the Detroit ordinance is to order the arrest of any person selling a book where there is probable cause that such sale violates the obscenity laws. In the event of such an arrest, it would then devolve upon a court of competent jurisdiction to determine whether or not the book violates the obscenity statute or ordinance, thus guaranteeing a judicial determination in accordance with the constitutional requirements of due process. If, after such a judicial determination, the book were found to be obscene, a legal ban on its sale would then ensue. Here, however, defendants Piggins and Bullach have circumvented the judicial process and have effected such ban upon the sale of the book by their non-judicial determination that the book is obscene, their announcement of the fact, and their notifying booksellers that the sale of the book would lead to prosecution. Such conduct on the part of said defendants is beyond the scope of their lawful authority and violates plaintiff's constitutional rights under the First and Fourteenth Amendments to the constitution of the United States.

In a similar situation (New American Library v. Allen, supra, pp. 833, 834) the United States District Court of Ohio issued an injunction against the Police Chief of the City of Youngstown. The Court there said:

"The defendant was without authority to censor books. Such a drastic power can be vested in a police officer only by a valid express legislative grant. As Chief of Police it was defendant's duty to examine the suspected publications to determine whether there was probable cause for prosecution. He was without authority to determine with finality whether the books were obscene or in moral violation of the ordinance. In the event prosecutions were undertaken, the burden would

rest upon the city officials to establish by proof beyond a reasonable doubt every element of the offense, including the obscene or immoral nature of the books. Until a court of competent jurisdiction adjudged a book to be obscene or immoral, there would exist no warrant in law for its suppression. "

In Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479, Federal

Judge Westenhaver issued an injunction against the Mayor and Chief of Police of Cleveland who were acting under color of an ordinance proscribing the sale of obscene and scandalous literature. Judge Westenhaver there said (p. 482):

"The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene or scandalous; but, if it were, the limit of the city's power would be to conduct the prosecution for the specific offense thus committed, \* \* \*."

See, also Bantam Books, Inc. v. Melko, 25 N. J. Super. 292, 96 A. 2d 67, mod. on other grounds 14 N. J. 524, 103 A. 2d 256.

Nor can defendants Piggins or Bullach successfully argue that their conduct did not constitute a banning of the book. The fact remains that after these defendants made their announcement that the book is obscene and notified booksellers that its sale would subject a seller to prosecution, booksellers in Detroit stopped selling the book. To say that such stoppage of sale, in the light of defendants' announcement and notification, was a voluntary act on the part of booksellers is to fly in the face of realism.

Like arguments have been struck down by the courts. In Bantam Books, Inc. v. Melko, supra, the Court said:

"Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of The Chinese Room in his county, or that they were in fact a ban on such sale. The contention is naive \*\*\*. True, as the prosecutor says by way of defense, there was no actual compulsion or threat in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The

plain fact of the matter is that not a single copy of The Chinese Room was sold in Middlesex County after the prosecutor's letters were received.

Similarly, in American Mercury, Inc. v. Chase, 13 F.

2d, 224, 225, the Court said:

"Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

Defendants have urged as an additional defense to this motion that the book TEN NORTH FREDERICK is obscene. The question of the obscenity or non-obscenity of the book is not involved in this case. Plaintiff's right to an injunction does not depend upon the contents of the book. Plaintiff's right stems from the fact that these defendants have illegally banned the sale of plaintiff's book by exercising powers beyond those delegated to them by the statute and ordinance under which they acted.

It is fundamental that equity will intervene to prevent an official from transcending his power where, in so doing, he causes or threatens to cause irreparable injury to property or civil rights.

This principle was forcibly expressed by Federal Judge McNamee in New American Library v. Allen, 114 F Supp. 823, 831 (U. S. Dist. Ct., N. D. Ohio, E. D. 1953), as follows:

"Where public officers charged with the enforcement of a valid criminal law exceed their lawful powers and by arbitrary action cause or threaten to cause irreparable injury to property rights or civil rights of the complainant, equity will intervene. 28 Am. Jr. 373, Sec. 185; id. 421, Sec. 238; 43 C. J. S., Injunctions, Sec. 111, p. 634."

See Also:

Wetherby v. City of Jackson  
264 Mich. 146, 249 N. W. 484, 485

Grosse Pointe Fire Fighters Ass'n v. Village of Grosse Pointe Park, 303 Mich. 405, 6 N. W. 2d 725, 727.

Bantam Books, Inc. v. Melko, 25 N. J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N. J. 524, 103 A 2d 256.

Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479.

Plaintiff has been deprived of a property right without due process of law. It has suffered loss incapable of accurate measurement in an action at law. Accordingly, plaintiff has sustained irreparable injury and is threatened with further loss.

For the reasons above set forth, the Court holds that the conduct of defendants Piggins and Bullach in ordering the suppression of plaintiff's book under threat of arrest and prosecution of the booksellers was in excess of their lawful powers under the Michigan statute and the Detroit ordinance. An order may be entered herein restraining the defendants, pending the trial of this action, from engaging in such unauthorized conduct. No restraint, however, is imposed upon defendants' power to enforce the statute of the State of Michigan or the ordinance of the City of Detroit by prosecution.

COLUMA W. DEEMAN

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Circuit Judge