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Constitutional Law—Injunctive Obscenity Statute Upheld

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be determinative of the question of the correctness of the Appellate Division's order, because it could have based its finding on fact or discretion.[67]

In other cases, however, the Court had *interpreted* the question as implying that the Appellate Division had determined the facts or discretion in favor of one or the other parties, in order to treat the question as one of law. Thus, the facts were presumed to have been found in favor of the appellant,[68] or respondent,[69] in order to take jurisdiction. Sometimes the presumption was wrong.[70]

In 1942, in order to correct the uncertainty in this area, the legislature enacted section 603 of the Civil Practice Act. This provides that unless the question certified clearly states otherwise, it should be conclusively presumed that the Appellate Division interpreted the facts in favor of the respondent.[71] It applies to questions of discretion as well.[72]

In the instant cases, therefore, the Court of Appeals necessarily was bound to treat the questions of fact and discretion as having been found for the respondent. The legislature has foreclosed the possibility of interpreting the Appellate Division's view of the facts one way or the other in order to call the question one of law. Thus, the cases are squarely and properly within the doctrine that where upon appeal there is not the occasion for an answer necessarily determinative of the correctness of the order appealed from, the Court will dismiss.[73]

CONSTITUTIONAL LAW

Injunction Obscenity Statute Upheld

In New York the problem of obscene literature is dealt with in two statutes — section 1141 of the Penal Law which makes it a misdemeanor to sell or distribute obscene matter and section 22(a) of the Code of Criminal Procedure which gives injunctive powers over this type of literature. These statutes have not gone without

67. *Parkas v. Parkas*, 285 N. Y. 155, 33 N. E. 2d 70 (1941); *Greenhouse v. Rochester Taxicab Co.*, 244 N. Y. 559, 155 N. E. 896 (1927); *Braunworth v. Braunworth*, 285 N. Y. 151, 33 N. E. 2d 68 (1941).

68. *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901); *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449 (1897); *Mencher v. Richards*, 283 N. Y. 176, 27 N. E. 2d 982 (1940); *See* 7TH ANNUAL REPORT OF THE JUDICIAL COUNCIL, pp. 508-509.

69. *Matter of Board of Water Supply*, 277 N. Y. 452, 14 N. E. 2d 789 (1938); *Countryman v. State of New York*, 277 N. Y. 586, 13 N. E. 2d 782 (1938); *See* 7TH ANNUAL REPORT OF THE JUDICIAL COUNCIL, pp. 511-512.

70. *Matter of Davies*, 168 N. Y. 89, 61 N. E. 118 (1901).

71. See note 63, *supra*.

72. *Mencher v. Chesley*, 297 N. Y. 94, 75 N. E. 2d 257 (1947); *Langan v. First Trust & Deposit Co.*, 296 N. Y. 60, 70 N. E. 2d 15 (1946); *See* 8TH ANNUAL REPORT OF THE JUDICIAL COUNCIL, p. 434.

73. See cases, note 67, *supra*.

challenge in the courts. The criminal section has been repeatedly held valid[1] although one of its subdivisions was struck down as being so vague as to be violative of the Fourteenth Amendment.[2] The civil section was patterned after and designed to supplement its criminal counterpart.[3] It provides for a full trial on the question of whether the book is obscene with the right of full appellate review on the facts and on the law. Upon a determination that a book is "obscene" an injunction will issue and the offending matter will be ordered surrendered to the sheriff.

In a recent decision[4] the Court of Appeals upheld this statute in the face of an argument that it constitutes an invalid prior restraint. The Court did not have to determine whether the book was obscene[5] but it did have to determine the extent of the freedom from prior restraints of free speech guaranteed by the Constitution. It held that section 22(a) involved a prior restraint but the restraint was not serious enough to invalidate the statute. The question which this holding raises is whether an injunction, which issues subsequent to publication, can properly be held to be a prior restraint and if it is not a prior restraint whether it is such a restraint as is permitted by the First Amendment.

As originally drafted, the First Amendment was directed against the legislative power of the licensor, but the courts have not felt that freedom from prior restraints exhausts the grant of liberty under this amendment.[6] It would appear that in categorizing a specific restraint it is not necessary to force it into the form characterized as a prior restraint since speech may be protected even from subsequent restraints.[7] It is also recognized that a restraint enforced subsequent to publication may fall into the category of a prior restraint if it is of such a character as to be an effective deterrent to publication.[8]

In the *Brown*[9] case the Court did not discuss the question of whether the First

1. *People v. Wendling,* 258 N. Y. 451, 180 N. E. 169 (1932); *People v. Berg,* 241 App. Div. 542, 272 N. Y. Supp. 586 (2d Dep't 1943), *aff'd.,* 269 N. Y. 514, 199 N. E. 513 (1935).
2. *Winters v. New York,* 333 U. S. 507 (1948).
3. REPORT OF NEW YORK STATE JOINT LEGISLATIVE COMMITTEE TO STUDY PUBLICATION OF COMICS, Leg. Doc. (1954) No. 37, p. 32. The Committee felt that section 1141 of the Penal Law was not sufficient and that a susceptible public remained contaminated with pornographic filth and they determined that some way had to be found to keep these books from an impressionable public.
4. *Brown v. Kingsley Books,* 1 N. Y. 2d 177, 134 N. E. 2d 461 (1956).
5. Defendants conceded that the books were indisputably pornographic, obscene and filthy; they did not question the test of obscenity applied by the trial judge.
6. *Lovell v. Griffin,* 303 U. S. 444 (1937); *Patterson v. Colorado,* 205 U. S. 454 (1907).
7. *Near v. Minnesota,* 283 U. S. 697 (1931).
8. See Emerson, *The Doctrine of Prior Restraint, 20* LAW AND CONTEMPORARY AFFAIRS 648, 655 (1955).
9. *Brown v. Kingsley Books,* 1 N. Y. 2d 177, 134 N. E. 2d 461 (1956).

Amendment protects "obscene literature" as opposed to "obscene matter"[10] nor did it discuss whether the burden of proof under the civil section is less than must be carried in a criminal prosecution. Both of these questions must eventually be answered.

The statute, as applied in this case, is clearly valid, due to the admitted obscene nature of the work involved but it is hoped that the Supreme Court[11] will accept the opportunity presented to it to decide definitively the bounds of prior restraint; to determine what, if anything, is protected by the First Amendment other than prior restraints; and to determine the status of "obscene literature" in the First Amendment. If this case is affirmed, it will probably cause many states to add this type of preventive relief by way of injunction to their obscenity statutes for it undoubtedly provides a more effective way of ridding the bookstands of objectionable literature.

Emergency Business Rent Law

Emergency housing laws adopted under the police power of the state, which suspend a landlord's right to dispossess a holdover tenant, have been held not to be violative of constitutional guarantees, whether the statute suspends removal for a definite period[12] or allows the suspension for a period which is discretional with the court.[13] Even if the lease specifically provides for ejectment or some other dispossessment action, a statute doing away with this right is valid.[14]

While an emergency does not create power in the state to act in a given

10. See Lockhart And McClure, *Literature, The Law of Obscenity and the Constitution,* 38 MINN. L. REV. 295, 356 (1953); JACKSON, THE FEAR OF BOOKS, 121-135 (1932). It is in the field of literature that the serious problem arises. Though there is dicta to the effect that obscene literature is not protected by the First Amendment (*Near v. Minnesota,* 283 U. S. 697 (1931)) it would seem that when a book, which can be said to have some literary merit is attacked as being obscene, the courts must not go witch-hunting but must give it constitutional protection by using the "clear and present danger" test (*Schenck v. U. S.,* 249 U. S. 47 (1919)) or, as more recently modified (*Dennis v. U. S.,* 341 U. S. 494 (1951)), the "clear and probable danger" test. To constitutionally restrict speech there must be a clear danger that the speech will cause a substantive evil which the state has the right to prevent; the danger must be serious and it must be probable. Finally these factors must be weighed against the value of freedom of expression on the subject involved.

11. Appeal has been granted. *Kingsley Books v. Brown,* — U. S. —, 1 L. Ed. 2d 319 (1957). The case has been consolidated with *Alberts v. California,* 138 Cal. App. 2d Supp. 909, 292 P. 2d 90 (1956) dealing with the California obscenity statute, and *Roth v. U.S.,* 237 F. 2d 796 (2d Cir. 1956) which is concerned with the constitutionality of the federal obscenity statute.

12. *Marcus Brown Holding Co. v. Feldman,* 256 U. S. 170 (1921); *People ex rel. Durham Realty Corp. v. LaFetra,* 230 N. Y. 429, 130 N. E. 601 (1921).

13. *Blauweis v. Kirschner,* 128 Misc. 630, 219 N. Y. Supp. 662 (Sup. Ct. 1927); *Kuenzle v. Stone,* 112 Misc. 125, 182 N. Y. Supp. 680 (Sup. Ct. 1920).

14. *People ex rel. Durham Realty Corp. v. LaFetra,* 230 N. Y. 429, 130 N. E. 601 (1921).