

1-1-1957

Constitutional Law—Emergency Business Rent Law

June A. Murray

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Recommended Citation

June A. Murray, *Constitutional Law—Emergency Business Rent Law*, 6 Buff. L. Rev. 157 (1957).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol6/iss2/16>

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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 Court¹¹ 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 period¹² or allows the suspension for a period which is discretionary with the court.¹³ Even if the lease specifically provides for ejection or some other dispossession 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).

situation, it may provide the occasion for the exercise of the power.¹⁵ But an emergency does not remove all constitutional restraints and a law which depends on the existence of an emergency for its validity ceases to operate if the emergency ceases or the facts change though it was a valid exercise of the police power when passed.¹⁶

Thus, it has been held that the state's inherent power to protect essential interests of the public may be exercised without running afoul of the contract clause of the Constitution in preventing temporarily the immediate enforcement of a contractual obligation.¹⁷ The question which must be answered—is there an emergency?—is primarily one for legislative determination. However, this determination is not conclusive because the courts of the state possess final authority as to whether an emergency actually exists.¹⁸

In the judicial determination of the existence of an emergency, the test in each case is whether a situation exists which calls for the exercise of the reserved power of the state and whether the remedy adopted is reasonable and legitimately tends toward the desired end.¹⁹ It is for the court to determine if the conditions which caused the emergency have abated and if the statute now imposes an invalid restriction.²⁰ But, the court must apply its own analysis of the situation in the light of legislative findings which are entitled to great weight and the legislative remedy will not be invalidated unless its inappropriateness to the situation as it now exists is clearly established.²¹

Recently²² a challenge was raised to the constitutionality of New York's Business Rent Law, insofar as it affects office space only. A landlord, in attempting to recover possession of office premises of tenants who held over after the expiration of the lease, introduced a large quantity of evidence to show that the legislation, originally adopted in wartime,²³ was no longer valid because the emergency had ceased. The Attorney General presented no affirmative proof on any of the issues, relying on the probability that the landlord could not demonstrate beyond

15. *Matter of People (Title & Mtge. Guar. Co.)*, 264 N. Y. 69, 190 N. E. 153 (1934).

16. *Chastleton Corp. v. Sinclair*, 264 U. S. 543 (1924).

17. *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398 (1934).

18. *Home Building & Loan Association v. Blaisdell*, *supra* note 17.

19. *Matter of People (Title & Mtge. Guar. Co.)*, 264 N. Y. 69, 190 N. E. 153 (1934).

20. *Chastleton Corp. v. Sinclair*, 264 U. S. 543 (1924).

21. *East N. Y. Sav. & Loan Assoc. v. Hahn*, 326 U. S. 230 (1945).

22. *Lincoln Building Associates v. Barr*, 1 N. Y. 2d 413, 135 N. E. 2d 801 (1956).

23. Though originally enacted in 1945, this section was annually reenacted with relaxing modifications from time to time. In 1948 a temporary state commission was created to make recommendations to the Legislature on desirable modifications in the rent laws. In 1955, the commission conducted public hearings and determined the emergency still existed. It is the 1955 reenactment which has been challenged.

any doubt that the statute was unconstitutional. The Court upheld the statute feeling that the landlord had done no more than raise a conflict of testimony and opinion as to the continuance of the emergency and he had failed to carry his burden of proof. The Court held that where, in looking at the basis of statutes which were enacted under particular conditions, questions of what the facts elicited tend to establish is a debatable one, the Court will accept the legislative determination and will not substitute its judgment for that of the legislature as long as the Court can discover any state of facts either known or reasonably assumed, which support the legislation. Questions of wisdom, reasonableness and propriety are for the legislature and not for the courts.²⁴

It is impossible from this decision to determine that the Court has retreated from the stand which it took in *Defiance Milk*²⁵ against economic restrictions. There the Court felt that the Attorney General had to show some basis for the statute whereas in the instant case it was not necessary for the Attorney General to do so for the evidence adduced in opposition to the legislation itself showed that there was some basis for an enactment of this type. This case appears to follow the general police power principles which the Court has long followed and adds little to the concept of the weight which is to be given to legislative determinations.

Licensing of Electricians

It has long been generally recognized that all property is held subject to the general police power of the state to regulate and control its use to secure the general safety and the public welfare.²⁶ The right of an individual to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, subject to such restraints as are necessary for the common welfare, has never been denied.²⁷ A license to engage in a traditionally lawful business is a property right, protected by due process.²⁸ But a license in a potentially harmful or nuisance-type activity is a mere privilege,²⁹ which does not constitutionally even require notice and hearing before revocation.³⁰

Licensing statutes are usually classified in two ways: (1) according to the

24. *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177 (1938).

25. *Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537, 132 N. E. 2d 829 (1956), 6 BUFFALO L. REV. 42 (1956).

26. *Nebbia v. New York*, 291 U. S. 502 (1934).

27. *Slaughter House Case*, 83 U. S. (16 Wall.) 36 (1873); *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636 (1885).

28. *Ex parte Robinson*, 86 U. S. (19 Wall.) 505 (1873); *Bender v. Board of Regents*, 262 App. Div. 627, 30 N. Y. S. 2d 779 (3d Dep't 1941).

29. *Lodes v. Dept. of Health*, 189 N. Y. 187, 87 N. E. 187 (1907).

30. *Matter of Yates v. Mulrooney*, 245 App. Div. 146, 281 N. Y. Supp. 218 (4th Dep't 1935).