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## Administrative Law—Statutory Construction

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such minimum figures was arbitrary and out of harmony with the expressed statutory mandate to tax only that portion of the receipt properly attributable to business done within the state.

In *Claim of Gold*,<sup>41</sup> the State Industrial Commissioner's regulations for the ascertainment of gratuities includable in employee remuneration for the purpose of computing unemployment insurance benefits were found defective.<sup>42</sup> In consonance with the statutory mandate<sup>43</sup> of formulating and promulgating all regulations necessary to carry out the Unemployment Insurance Law,<sup>44</sup> the Commissioner declared that determination of the amount of gratuities earned by hotel chambermaids would be made by means of the filing by the chambermaids of a signed statement of the amount so received with her employer, after having been duly notified of such requirement by the employer. If no such statement should be filed, the amount of gratuities should be deemed to be "nil".

In the instant case, the chambermaid's employer did not notify her of this requirement and she submitted no statement of gratuities. Hence when she applied for unemployment insurance benefits, she discovered that the \$400 in gratuities she had in fact received over the time in question were excluded from the computation of her benefits, even though she worked in a hotel known to be one of the type where tipping of chambermaids is common (the so-called American Plan hotels). The court decided that in view of the *mandatory* duty imposed upon him by § 517<sup>45</sup> to determine the amount of gratuities, it was unreasonable and arbitrary for the Commissioner to penalize the employee by invoking a presumption that such gratuities were nil where he had done nothing more to determine the fact than to instruct the employer to do so, and the latter had in fact failed to do so.

### *Statutory Construction*

In two cases, the Court of Appeals was called upon to construe Federal statutes in regard to housing. In *Peters v. New York City*

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41. 307 N. Y. 224, 120 N. E. 2d 799 (1954).

42. § 517 of the Labor Law, defining remuneration to employees, includes as such remuneration gratuities received by employees in the course of their work. Hence such gratuities are includable for purposes of computing unemployment insurance benefits under § 590(2). The employer is therefore obligated to include the amount of such gratuities in his payroll for the purpose of ascertaining the amount he is required to contribute under § 570(1).

43. LABOR LAW § 530(1).

44. LABOR LAW Art. 18.

45. "Where gratuities are received by an employee in the course of his employment from a person other than his employer, the value of such gratuities shall be determined by the commissioner and be deemed and included as part of his remuneration paid by his employer." [Emphasis added.]

## BUFFALO LAW REVIEW

*Housing Authority*,<sup>46</sup> the so-called Gwinn Amendment<sup>47</sup> to the United States Housing Act of 1937<sup>48</sup> was involved. That enactment amended the Housing Act to provide that "no housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated as subversive by the Attorney General: *Provided further*, that the foregoing prohibition shall be enforced by the local housing authority." In accordance with the latter directive, the New York City Housing Authority issued the following resolution: "No applicant shall be admitted to, and no tenant shall be permitted to continue to reside in . . . a federally aided project" unless the applicant should sign a certificate to the effect that he is not a member of an organization designated by the Attorney General as subversive.

Petitioners brought an action to annul this requirement and it was granted in the first instance on the ground that the resolution was arbitrary, capricious and unreasonable and violated due process in that the proscribed organizations were placed on the Attorney General's list without benefit of hearing.<sup>49</sup> The Appellate Division modified by striking the petition for relief, holding that, since affected organizations were at the present time being given hearings, the constitutional argument was no longer tenable.<sup>50</sup> The Court of Appeals held that the constitutional question could not then be decided, under the doctrine that courts will not pass on the constitutionality of acts of legislatures until such action becomes absolutely necessary.<sup>51</sup> Instead, two non-constitutional grounds were found on which to base the decision. The Federal statute applied only in the case of housing units constructed *under* the United States Housing Act, not, as intimated by the resolution, to *federally aided* projects. Though it was admitted that the units in question were built partially with Federal funds, it had not been determined whether they were built *under* the Housing Act; until this determination was made, it could not be determined whether the Gwinn Amendment applied. The second ground was that the Housing Authority resolution required non-membership in *all* organizations on the Attorney General's

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46. 307 N. Y. 519, 121 N. E. 2d 529 (1954).

47. 66 STAT. 403 (1953), 42 U. S. C. A. § 1411c.

48. 50 STAT. 888 (1937) as amended, 42 U. S. C. A. § 1401 *et seq.*

49. *Peters v. New York City Housing Authority*, \_\_\_\_\_ Misc. \_\_\_\_\_, 128 N. Y. S. 2d 224 (1953).

50. *Peters v. New York City Housing Authority*, 283 App. Div. 801, 128 N. Y. S. 2d 712 (1954).

51. *Rescue Army v. Municipal Court of Los Angeles*, 331 U. S. 549 (1947), *Lynbrook Gardens v. Ullman*, 291 N. Y. 472, 53 N. E. 2d 353 (1943).

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list, not merely those described as "subversive"<sup>52</sup> as provided by the Gwinn Amendment.

In *Hutchins v. McGoldrick*,<sup>53</sup> the de-control provisions of the State Residential Rent Law<sup>54</sup> came into question. In each of the two cases property was involved which had been converted to residential property after Feb. 1, 1947 and before May 1, 1950. Section 2(2) of the Rent Law defines "housing accommodation" and excepts from that classification a number of accommodations among which is the following:

(g) housing accommodations . . . which are . . . (2) additional housing accommodations created by conversion on or after Feb. 1, 1947; provided, however, that any housing accommodation created as a result of any conversion . . . on or after May 1, 1950 shall continue to be subject to rent control as provided herein unless the commission issues an order decontrolling them which it shall do if there has been a structural change involving substantial alterations or remodeling; and such change has resulted in additional housing accommodations consisting of self-contained family units as defined by regulations issued by the commission. . . .

"Self-contained family unit" is defined as a "housing accommodation with private access, containing one or more rooms in addition to a kitchen . . . and a private bathroom."<sup>55</sup>

The apartments created by conversion in the first case did not contain private bathrooms and those in the second case came about as a result of very minor structural changes. The apartments in both cases had been under Federal rent control prior to May 1, 1950.<sup>56</sup>

In a strictly literal reading of the State control law, the majority of the Court of Appeals, speaking through Chief Judge Lewis, decided that the accommodations in question were exempt from control as falling within the first clause of section 2(g)(2), since they had been converted subsequent to Feb. 1, 1947 and prior to May 1, 1950. The fact that these premises had been under Federal rent control was held to be immaterial, on the ground that the State law was complete in itself and made no reference in

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52. The list included six categories: Totalitarian; Fascist; Communist; Subversive; Organizations which have 'adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States'; and Organizations which 'seek to alter the form of Government of the United States by unconstitutional means' 5 CODE FED. REGS., APP. A, p. 203.

53. 307 N. Y. 78, 120 N. E. 2d 335 (1954) (two cases).

54. L. 1946, c. 274, as amended by L. 1950, c. 250, MCK. UNCONSOL. LAWS § 8581 *et seq.*

55. MCK. UNCONSOL. LAWS, APPENDIX § 11.

56. 61 STAT. 193 (1947) as amended, 50 U. S. C. A. § 1891 *et seq.*

this connection to the Federal act which had controlled up to April 30, 1950. Judge Conway, with whom Judge Van Voorhis concurred, dissented, pointing out that the Legislature had declared that its intent in passing this statute was to control those same accommodations which had been governed by the Federal law.<sup>57</sup> It was also pointed out that the purpose in exempting converted housing accommodations from rent control in both the State and Federal acts was to encourage such conversions to alleviate the housing shortage; but that the Federal act manifested an intention to exempt only those accommodations which constituted self-contained family units,<sup>58</sup> and that decontrolling units under the State act which do not meet these standards is a violation of the Legislature's expressed intent to keep under control those accommodations which were controlled by the Federal act.

It would seem that the exactly literal reading of the State control statute has resulted in a frustration of the intent of the Legislature to afford a smooth changeover from Federal to State control. A reading of the statute *in pari materia* with that which it is designed to succeed would seem the more warranted procedure.

### Scope of Review

a. *Forms of review:* Under C.P.A., Article 78, the classifications and forms of the writs of certiorari to review, mandamus and prohibition have been abolished.<sup>59</sup> However, in adjudicating relief in Article 78 proceedings, these forms are still relevant in determining the type of relief to be granted.<sup>60</sup>

In *Gimprich v. Board of Education of City of New York*,<sup>61</sup> a schoolteacher brought an Article 78 proceeding in the nature of mandamus to compel the respondent to grant her two years' salary credit for outside teaching experience. The petitioner would be entitled to relief in the nature of a writ of mandamus if the respondent was under a statutory duty to grant such relief.<sup>62</sup> However, such relief will not be granted if the respondent is vested with an exercise of discretion.<sup>63</sup>

57. McK. UNCONSOL. LAWS § 8594(1).

58. 50 U. S. C. A. § 1892(c) (3).

59. C. P. A. § 1283.

60. *Newbrand v. City of Yonkers*, 285 N. Y. 164, 33 N. E. 2d 75 (1941).

61. 306 N. Y. 401, 118 N. E. 2d 578 (1954).

62. *Strum v. Board of Education of City of New York*, 301 N. Y. 803, 96 N. E. 2d 192 (1950), *Wakefield v. Board of Education of City of New York*, 192 Misc. 639, 79 N. Y. S. 2d 420 (Sup. Ct. 1948), modified 274 App. Div. 884, 84 N. Y. S. 2d 700 (1st Dep't 1948), *aff'd* 299 N. Y. 664, 87 N. E. 2d 58 (1949).

63. *People ex rel. Hammond v. Leonard*, 74 N. Y. 443 (1878), *Hanson v. Teacher's Retirement Board*, 236 App. Div. 589, 260 N. Y. Supp. 481 (1st Dep't 1932), *aff'd* 262 N. Y. 496, 188 N. E. 36 (1933).