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Constitutional Law -- Obscenity Statutes -- Freedom of Speech

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CASE COMMENTS

CONSTITUTIONAL LAW — OBSCENITY STATUTES — FREEDOM OF SPEECH

The appellant, a Michigan bookseller, was convicted of violating a penal statute[1] which made it a misdemeanor to offer for sale or to sell to anyone, a book "containing obscene, immoral, lewd or lascivious language, . . . tending to incite minors to violent or depraved acts, manifestly tending to the corruption of the morals of youth . . . ." On appeal to the United States Supreme Court,[2] *held*, reversed. The statute arbitrarily restricts freedom of speech in violation of the due process clause of the fourteenth amendment,[3] in that the incidence of the enactment would reduce the adult population to reading only what is fit for children. *Butler v. Michigan*, 352 U.S. —, 77 S. Ct. 524 (1957).

In the United States the early cases[4] adopted the English rule of *Regina v. Hicklin*,[5] in which the Queen's Bench held that if any obscenity were found which tended to deprave or corrupt "those whose minds were open to such immoral influences," the entire book would be obscene. The courts soon realized that a rule so broad would unavoidably encompass the classics as well as current literary efforts of artistic value.[6] The "any obscenity view" of the *Hicklin* case was thus dropped in favor of the more modern concept of viewing a book in its entirety.[7] There are various views, however, as to

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1. MICH. COMP. LAWS § 750,343 (Supp. 1954).

2. In view of the denial by the Michigan Supreme Court to allow an appeal, the United States Supreme Court granted jurisdiction. Butler v. Michigan, 350 U.S. 963 (1956).

3. U.S. CONST. amend. XIV, § 1. ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

4. United States v. Kennerly, 209 Fed. 119 (S.C.N.Y. 1913); United States v. Bennett, 24 Fed. Cas. 1093, No. 14,571 (C.C.S.D.N.Y. 1879); People v. Muller, 96 N.Y. 408 (1884).

5. L.R. 3 Q.B. 360, 371 (1868). "[W]hether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

6. United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934) (Mr. Justice Hand observed that classics such as Hamlet, Romeo and Juliet, Venus and Adonis and the Bible would be suppressed by the Hicklin rule).

See Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 62-74 (1938).

7. United States v. One Book Called "Ulysses," *supra* note 6; New Am. Library of World Literature v. Allen, 114 F. Supp. 823 (N.D. Ohio 1953); People v. Wepplo 78 Cal. App. 2d 959, 178 P.2d 853 (1947); American Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954); Attorney General v. Book Named "Forever Amber," 323 Mass. 302, 81 N.E.2d 663 (1948); Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945); People v. Viking Press, 147 Misc. 813, 264 N.Y. Supp. 534 (1933); State v. Lerner, 51 Ohio L. Abs. 321, 81 N.E.2d 282 (1948); Commonwealth v. New, 142 Pa.Super. 358, 16 A.2d 437 (1940).

the type or class of reader upon whom the test of obscenity is to be based.[8] In *Dunlop v. United States*,[9] the United States Supreme Court used a test, indicating that if the matter is "calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes . . . ," then it is obscene. In *United States v. One Book Called "Ulysses,"*[10] Mr. Justice Woolsey, in holding that a book's obscenity must depend upon the court's opinion as to its effect on a person with average sex instincts, said that "it is with the normal person that the law is concerned." Another view was expressed in *State v. Lerner*,[11] in which the Ohio Court decided that the moral concepts of the people of that state would determine what was obscene literature. Some jurisdictions, by following the rule of the *Hicklin* case in an attempt to protect their youth,[12] completely ignore the trend one might perceive of prohibiting from the general reading public only that literature which has a demoralizing influence on the normal, average, reasonable man.[13]

Recognition that state obscenity statutes were violative of the due process clause of the fourteenth amendment has also been a difficult achievement. Subsequent to *Gitlow v. New York*,[14] it became well settled that the freedom of speech and press which is secured by the first amendment[15] from abridgment by the federal government is similarly protected by the due process clause of the fourteenth amendment.[16] But in *Chaplinsky v. New Hampshire*,[17] the court stated that obscenity within narrowly limited classes of speech was never thought to raise a constitutional question. More recently, in *Beauharnais v. Illinois*,[18] obscene and libelous speech were classified in the same category, in that neither was within the area of constitutionally protected speech. The case of *Winters v. New York*,[19] although not

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8. But the main problem is what excites lascivious thought or arouses lustful desire. See Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

9. 165 U.S. 486 (1897).

10. 5 F. Supp. 182 (S.D.N.Y. 1933).

11. 51 Ohio L. Abs. 321, 81 N.E.2d 282 (1948).

12. Commonwealth v. Friede, 271 Mass. 317, 171 N.E. 472 (1930); People v. Berg, 241 App. Div. 543, 272 N.Y. Supp. 586 (1934), *aff'd*, 269 N.Y. 514, 199 N.E. 513 (1935); Commonwealth v. New, 142 Pa. Super. 358, 16 A.2d 437 (1940).

13. For publications of a scientific, educational or instructive character regarding sex relations as within the perview of statutes relating to obscene or immoral publications, see 76 A.L.R. 1099 (1932).

14. 268 U.S. 652 (1925).

15. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

16. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Hughes v. Superior Court of California, 339 U.S. 460 (1950); Pennekamp v. Florida, 238 U.S. 331 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Thornhill v. Alabama, 310 U.S. 88 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938); DeJonge v. Oregon, 299 U.S. 353 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931).

17. 315 U.S. 568, 571 (1942).

18. 343 U.S. 250, 266, (1952).

19. 333 U.S. 507 (1948).

concerned with what might be considered the traditional obscenity statute,[20] reversed a conviction under a New York statute[21] that prohibited the distribution of magazines principally made up of criminal news or stories pertaining to deeds of bloodshed, lust or crime, "so massed as to become vehicles for inciting violent and depraved crimes against the person."[22] The court held that the statute was so vague and indefinite, that it permitted within the scope of its language the punishment of incidents within the protection of the guarantee of the fourteenth amendemnt.[23]

The instant case was the first decision of the Supreme Court to question the validity of a state obscenity statute. Mr. Justice Frankfurter, writing for the majority, declined to invoke the rule of the *Winters*[24] case, which left unanswered the question of vagueness. Nor does it appear that he thought it necessary to discuss the "any obscenity" view as opposed to the "entirety" view in applying the test of obscenity to a particular book. In this decision, unusual for its brevity and lack of authoritative citations, he held that a statute prohibiting sale to the general public of a book having a tendency to corrupt only youth was arbitrary in its restriction of freedom of speech.[25] In so doing, he brought obscene literature within the protection of the due process clause of the fourteenth amendment.

The effect of this decision placed in jeopardy obscenity statutes of seven other states,[26] including that of Florida,[27] and although it may be credited with completely overruling the *Hicklin* case, a far greater service could have been performed by holding that the type of reader upon whom to base the test of obscenity should be the average man rather than the abnormal person. It is hoped that the next step will be to apply the clear and present danger

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20. Note, 22 So. CALIF. L. REV. 298 (1948). See also dissenting opinion by Mr. Justice Frankfurter, 333 U.S. at 527 (he assumed that the statute dealt with incitement to crime).

21. N.Y. PEN. LAW, § 1141 (2).

22. The interpretation applied by the highest court in New York State. People v. Winters, 294 N.Y. 545, 63 N.E.2d 98 (1945).

23. For illustrations as to when a statute is subject to attack as vague, indefinite or uncertain, see Annotation 83 L. Ed. 893 (1938).

24. It should be noted that Mr. Justice Frankfurter wrote a strong dissent in the Winters case. 333 U.S. at 520.

25. Michigan does have a penal code specifically designed to protect its youth from such publications, by prohibiting the sale to a minor of any book "containing obscene language . . . tending to the corruption of the morals of youth. . . ." MICH. COMP. LAWS § 750.142 (1948).

26. DEL. CODE ANN. tit. 11, § 435 (1953); FLA. STAT. § 847.01 (1955); R.I. GEN. LAWS c. 610 § 13 (1938); S.C. CODE § 16.414 (1952); TENN. CODE ANN. § 39-3001 (1955); VA. CODE ANN. § 18-113 (1950); W. VA. CODE ANN. § 6066 (1955). Typical of these is Florida's:

> Whoever . . . sells or distributes any book . . . containing obscene language or . . . discriptions manifestly tending to the corruption of the morals of youth . . . shall be punished by imprisonment. . . .

27. At the time of this writing, it is understood that Florida will pattern a new obscenity statute after the present New York statute, N.Y. PEN. LAW, § 1141.

test of *Schenck v .United States*[28] to obscenity statutes, completing the trend toward a more liberal and modern approach to literature of all types. However, for the present time, the Court has placed obscenity statutes clearly within the due process clause of fourteenth amendment of the United States Constitution, and has given fair warning to the states that they cannot arbitrarily restrict the sale of literature.

JOHN M. THOMSON

REAL PROPERTY — TENANCY BY THE ENTIRETIES— RIGHT OF CONTRIBUTION FROM ESTATE OF DECEASED SPOUSE

• Husband and wife executed notes and purchase money mortgages on Florida properties which they owned as tenants by the entireties. After the death of the husband, the wife sued her husband's executor for contribution and exoneration with respect to the balance owed on these notes and mortgages. *Held*, a surviving spouse is *not* entitled to contribution or exoneration from the estate of a deceased spouse for money due on notes and purchase money mortgages executed by them where land was held by entireties. *Lopez v. Lopez*, 90 So.2d 456 (Fla. 1956).

This was a case of first impression in the Florida court, but the questions presented have been passed upon in several of the twenty jurisdictions which recognize tenancy by entireties.[1] Exoneration in respect of liens on entireties properties has generally been denied the surviving spouse.[2] However, decisions are in sharp conflict as to the right to contribution.

The courts of Indiana,[3] Maryland,[4] New Jersey,[5] North Carolina,[6] Pennsylvania[7] and Tennessee[8] hold that the decedent's estate is liable for half

28. 249 U.S. 47, 52 (1919). "Whether the words used, are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils. . . ."

In Doubleday & Co. v. New York, 335 U.S. 848 (1948), the appellant unsuccessfully argued the applicability of the clear and present danger test to his conviction under the New York statute prohibiting sale of obscene publications. See Lockhart and McClure, *Literature, The Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295 (1954).

1. Those jurisdictions which recognize entireties are: Arkansas, Delaware, District of Columbia, Florida, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming.

For a tabulation of conflicting attributes of entireties tenures in the several states, see Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24 (1951). However, this exxcellent survey does not evaluate a survivor's right to contribution.

2. Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930); Gardner v. Waldman,—R.I.—,111 A.2d 922 (1955).

3. Magenheimer v. Councilman, 76 Ind. App. 583, 125 N.E. 77 (1919).

4. Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930).

5. Nobile v. Bartletta, 109 N.J.Eq. 119, 156 Atl. 483 (1931).

6. Underwood v. Ward, 239 N.C. 513, 80 S.E.2d 267 (1954); Wachovia Bank and Trust Co. v. Black, 198 N.C. 219, 151 S.E. 269 (1930).

7. *In re* Dowler's Estate, 368 Pa.519, 84 A.2d 209 (1951); *In re* Kershaw's Estate, 352 Pa. 205, 42 A.2d 538 (1945).

8. Newson v. Shackleford, 163 Tenn. 358, 43 S.W.2d 384 (1931).