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Constitutional Law

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of the remainder of value. Formerly the limit was eighty percent of the first ten thousand dollars of value and fifty percent of the remainder.[4] The total amount which a mutual savings bank can invest in real estate contracts and mortgages upon real estate has been decreased from seventy-five percent to seventy percent of its funds.[5] A new section provides that "a mutual savings bank may invest its funds in bonds or other interest-bearing obligations of corporations not otherwise eligible for investment by the savings bank which are prudent investments for such bank in the opinion of its board of trustees or of a committee thereof whose action is ratified by such board at its regular meeting next following such investment." Such investment may not exceed "fifty percent of the total of its guaranty fund, undivided profits, and unallocated reserves, or five percent of its deposits, whichever is less."[6]

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CONSTITUTIONAL LAW

Constitutional Law—Seizure and Destruction of Obscene Materials. The 1959 Washington legislature enacted in substance New York's book-burning statute,[1] which was held constitutional by the United States Supreme Court on June 24, 1957, in *Kingsley Books, Inc. v. Brown.*[2]

The Washington statute[3] allows the prosecuting attorney, on behalf of the state, to maintain an action for an injunction to prevent the sale, acquisition, distribution, or possession with intent to sell or distribute, of any writing, record, image or picture, which is obscene, lewd, lascivious, filthy or indecent, or which contains an article or instrument of indecent use or purports to be for indecent use or purpose. The defendant is entitled to jury trial "within a reasonable time after joinder of issue" and to judgment within two days after conclusion of the trial. No injunction or restraining order is to be issued prior to the conclusion of the trial. If the injunction issues, it is to contain direction to the sheriff for seizure and destruction of the material. The act expressly declares that it does not apply to certain specified libraries and museums.

There are three principal differences between the Washington statute

[4] Wash. Sess. Laws 1959, c. 41, § 4, amending RCW 32.20.250.
[5] Wash. Sess. Laws 1959, c. 41, § 5, amending RCW 32.20.270.
[6] Wash. Sess. Laws 1959, c. 41, § 6.

[1] NEW YORK CODE OF CRIMINAL PROCEDURE § 22-a.
[2] 354 U.S. 436 (1957).
[3] The statute, here paraphrased, is chapter 105, Session Laws of 1959.

and the New York statute sustained in the *Kingsley* case: Under the Washington statute, the issues tendered by the application for the injunction are to be tried by a jury rather than by the court, the injunction may not issue *pendente lite,* but only after conclusion of the trial, and certain libraries and museums are exempt.

The New York statute, by contrast to the Washington statute, contemplates the issuance of a temporary restraining order *pendente lite* and therefore is designed to enable the defendant to get to trial in very short order, presumably because of the already outstanding injunctive order, the legality of which is yet to be judicially determined.

The New York statute is summary indeed: "The person . . . sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue . . ." (The Washington statute substitutes "a reasonable time" for "one day.") In Washington, with the state unable to get injunctive relief prior to trial, it is not so apparent why the defendant might want to get such speedy determination of the issues; rather, it becomes to the state's advantage to pursue the matter assiduously and to receive the judgment of the court within two days after trial. Yet the Washington statute retains the New York language, giving the defendant, not the state, the right to the speedy procedure.

In order to appreciate the changes made by the Washington legislature in its adoption of the New York statute, one must consider the *Kingsley* case in detail. The majority opinion, written by Justice Frankfurter, pointed out first that the defendant did not challenge on appeal the finding by the lower court that the books involved were obscene, nor did the defendant claim that New York could not constitutionally "outlaw" obscenity. The defendant's challenge to the New York law was only that the summary procedure involved, with its attendant seizure of the books, was a violation of fourteenth amendment due process. To this claim Justice Frankfurter answered that there is nothing in the fourteenth amendment which restricts New York in its choice of remedies to only the criminal sanctions enforced against those who deal in obscenity and if, to enforce its policy, "New York chooses to . . . deal with such books as deodands of old, . . . it is not for us to gainsay its selection of remedies."[4] Justice Frankfurter's only qualification was that there be opportunity to try the underlying issue of whether the books are obscene.

The argument was made, however, that this action by New York

[4] 354 U.S. 436, 441 (1957).

was "prior restraint," condemned by the doctrine of *Near v. Minnesota*,[5] where the action of the state in restraining a publisher from issuing any further scandalous publications was held violative of the fourteenth amendment for interfering with the publisher's freedom of speech and press at the stage before he had even spoken. To this argument, Justice Frankfurter answered that really the principal case was not very much different from *Alberts v. California*,[6] decided the same day, where a California obscenity criminal statute was upheld as applied to a dealer in obscene books. In both New York and California the power of the state was brought to bear when the book was on the dealer's shelf, before the public reads the book. Furthermore, the inhibitions of the injunction of the New York case were, in one sense, more solicitous of the defendant's welfare than the criminal sanction of the California case: In the New York case, the defendant had at least the benefit of a specific injunction before him which he had to violate before he could be punished by contempt, whereas in the California criminal case, the seller of the book had to "steer nervously among the treacherous shoals"[7] without the benefit of judicial order or adjudication before he would know with certainty whether he had brought about the wrath of the state through enforcement of its criminal law against him. Also, the penalty in the California case was much more severe than under the New York law: in California, the defendant was fined $500, sentenced to sixty days in prison, and put on probation for two years; in New York the defendant simply was unable to sell certain books, the sheriff taking them for destruction.

To this majority opinion, Justice Brennan, who wrote the majority opinion in the California case, dissented. He believed that a jury trial was essential before any book could be constitutionally determined to be obscene — that obscenity was defined only in terms of community standards and that the jury was traditionally the only body judicially capable of making such a determination.

It is to be assumed that this objection by Justice Brennan led the Washington legislature to provide for the jury trial.[8]

The dissent of Justice Douglas, joined by Justice Black, goes to the

[5] 283 U.S. 697 (1931).
[6] 354 U.S. 476 (1957).
[7] The quotation, appearing in 354 U.S. at 442, is from Warburg, "Onward and Upward With The Arts," The New Yorker, April 20, 1957, p. 101.
[8] The provision for jury trial is probably valid, despite the strong equity aspects of the proceeding. Forfeiture of goods was a common law proceeding. See C. J. Hendry Co. v. Moore, 318 U.S. 133 (1943). The usual case for argument has involved an attempt by the state to remove the jury, with only moderate success. Cases are collected in notes in Annot., 17 A.L.R. 568 and Annot., 50 A.L.R. 97.

entire New York scheme, condemning it. Pertinent here is Justice Douglas' first point — that to allow injunctive relief prior to a judicial determination of obscenity "gives the State the paralyzing power of a censor . . . This is prior restraint and censorship at its worst."[9]

It is to be assumed that this objection by Justices Douglas and Black led the Washington legislature to provide that no injunction was to issue prior to judgment.

The point of the other dissent, that of Chief Justice Warren, also expressed to a certain extent by the Douglas-Black dissent, is one not easily remedied, for it applies as well to the Washington version as to the New York version of the statute.

The point is this: A state may, as did California in the *Alberts* case, define the purveying of obscenity as a crime without violating the inhibitions of the fourteenth amendment, because such purveying was "the commercial exploitation of the morbid and shameful craving for materials with prurient effect."[10] The conduct of the individual is what is visited with criminal sanction for what he, himself, did; what he did will, of course, be before the court and jury in the detail of a particular factual setting, and the question will be, did the defendant's conduct amount to a dissemination of obscenity? Judged by community standards, did the defendant in selling or distributing the particular book to the particular clientele appeal to the "prurient interest?" In the New York case, by contrast, what is condemned is not the conduct of the individual at all; rather, it is the article itself which is stifled, judged without regard to its recipients. In the New York case, there is no room for even the existence of the book, for even though it provides that only that possessor who intends to sell or distribute is subject to the statute, it in actual effect also frustrates the person who would possess the book without that intent, since under the statute there would be no one within the state able to sell or distribute the book to him, even assuming that all he wished to do was to keep the book on his shelf.

Chief Justice Warren did not like this. He said: "It savors too much of book burning. I would reverse."[11] Neither did Justices Douglas and Black; the second point of Justice Douglas' dissent, in which Justice Black concurred, was substantially the same as Chief Justice Warren's: "The nature of the group among whom the tracts

[9] 354 U.S. 436, 446 (1957).
[10] 354 U.S. 476, 496 (1957).
[11] 354 U.S. 436, 446 (1957).

are distributed may have an important bearing on the issue of guilt in any obscenity prosecution. Yet the present statute makes one criminal conviction conclusive and authorizes a statewide decree that subjects the distributor to the contempt power . . . Free speech is not to be regulated like diseased cattle and impure butter."[12]

This objection the Washington legislature did not successfuly remove. Indeed, really to remove the objection would seemingly require that there be no such legislation at all. Rather, the Washington legislation contains a sedative instead of a cure; it simply removes from the reach of the statute a certain class of possessor and distributor of books — namely, the libraries.[13] Such exemption from the operation of the statute is, of course, but a recognition of the fact that while the censor may with some certainty be able to deny a particular book to one particular audience, such as to juveniles, that censor is much less able to say with certainty that no one, not even he, should read the particular book. The difference is significant. Perhaps there is merit in the particular publication which the statute would have burned; do as Chief Justice Warren would do: Curtail its distribution among those who we think would be harmed by its reading, but at least, do not deny all of society the benefit, whatever it might be, of one author's work. Book burning is final and absolute; perhaps we should make some allowance for the possibility that our censors may make mistakes.

One anomalous feature of this exemption of the library is that it does not direct the library to keep the publication out of circulation; yet library administrators, by putting such publications "on reserve" or in the "manuscript room" or the "vault" do preserve such publications from theft and to some degree discourage their circulation.

The Washington statute responds to the decision by the Washington Supreme Court in *Adams v. Hinkle,*[14] in which Chapter 282 of the Laws of 1955, the Comic Book Act, was held to violate the inhibitions of the fourteenth amendment to the United States Constitution.[15] The

[12] 354 U.S. 436, 447 (1957).

[13] § 7 of the statute provides: "Nothing in this act shall apply to any recognized historical society or museum, the state law library, any county law library, the state library, the public library, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision."

[14] 51 Wn.2d 763, 322 P.2d 844 (1958). This case has been fully treated in a recent issue of this review. Bottiger, *Freedom of the Press,* 34 WASH. L. REV. 160. The only points here treated in detail are those which bear upon the Kingsley case and the equal protection clause.

[15] The statute under discussion is not the only response of the 1959 Legislature to Adams v. Hinkle; in addition, the criminal obscenity statute, RCW 9.68.010, was revised to include specific mention of comic books. Chapter 260, Laws of 1959.

principal objections to the 1955 legislation were its license or permit system for dealers in publications and its very broad and ambiguous coverage.[16] In addition, the exemption of newspapers from the application of the statute was thought by Judge Foster, joined by four others of the court in the principal opinion, to constitute a denial of fourteenth amendment equal protection, though the four remaining members, in a concurring opinion by Judge Finley, disagreed as to the last basis for decision.

During the course of his opinion Judge Foster discussed the *Kingsley* case, for it had been argued by the attorney general that the decision sanctioned a prior restraint of publications. Ignoring, for the purpose of discussion, the fact that *Kingsley* dealt with obscenity as contrasted to comic books, Judge Foster said that *Kingsley* was also to be distinguished from the comic book case in that the restraint effected in the *Kingsley* case came much later than the license in the Comic Book Act, that licensing was the very extreme of control, "in the seventeenth century mold," and therefore void on its face.

The issue which split the Washington court in the comic book case may well lead to a similar problem with the present statute; does the exemption of libraries from the reach of the statute constitute a denial of equal protection to those who are subject to the statute? In the comic book case, the exemption of newspapers was held to do so, the majority opinion saying that when freedom of speech and press were threatened by legislation assailed as being a denial of equal protection there was no presumption of constitutionality, Judge Foster quoting Justice Jackson in *West Virginia State Board of Education v. Barnette*,[17] as follows:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific

[16] The invalidity for vagueness was based largely on the holding of Winters v. New York, 333 U.S. 507 (1948), in which a New York statute substantially identical to section (2) of the pre-1959 version of RCW 9.68.010, discussed in note 15, supra, was held unconstitutional; this section made it criminal to deal in publications ". . . devoted to the publication, or largely made up of criminal news, police reports, accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime"; the 1959 Washington Legislature took cognizance of this aspect of Adams v. Hinkle by simply deleting the entire section (2). Reliance for constitutionality is more safely placed in the more usual condemning language: "obscene, lewd, lascivious, filthy or indecent," words specifically upheld as against a challenge for vagueness in Roth v. United States, 354 U.S. 476 (1957). Mr. Bottiger also treats of the vagueness point of Adams v. Hinkle in his note in 34 WASH. L. REV. 160 at 164.

[17] 319 U.S. 624, 639 (1943).

> prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

Passing the point, Judge Foster also said that even if the equal protection clause be considered as independent of the due process clause, the constitutionality of so classifying those who are subject to the comic book licensing and those who are not subject is "precarious at best," citing then several typical equal protection cases.[18]

To this the concurring opinion of Judge Finley objected, saying that to him (and to the other three members of the court who joined him) the classification of newspaper publishers in a different category from the other publishers and disseminators of comic strips or books could easily be seen to be based upon reasonable grounds, in view of the differing audiences which the newspapers and comic books generally reach. Judge Finley was emphatic that the question of whether a classification is valid under the fourtenth amendment is wholly separate from the question whether an act of the state infringes freedom of speech, and that the criterion under the equal protection clause, for all types of subject matter, is simply to determine whether the particular classification could reasonably have been made.

Whether the two different approaches to the application of the equal protection clause of the fourteenth amendment to the present book-burning statute would produce a different constitutional result leads to profitable speculation: If one must find some grave and imminent danger to a legitimate state interest before the exemption of libraries in the present statute can be upheld, one might successfully argue the unconstitutionality of the classification.[19] On the other hand, if Judge Finley's approach be used, it does seem hard to say that there is no rational ground for exempting the library from the injunctive power of the statute. If for no other reason, the legislature might well have thought it best to avoid the finality of burning all the books and to

[18] Principal of these are: Morey v. Doud, 354 U.S. 457 (1957); State *ex rel.* Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936); City of Seattle v. Rogers, 6 Wn.2d 31, 106 P.2d 598, Annot., 130 A.L.R. 1498 (1940).

[19] If such a ruling were to be made, the severability section of the statute (§ 8) might be applied, though it should be questioned whether a ruling that the equal protection clause was violated would mean that only the exemption was invalid.

allow the libraries to retain such publications in order to circulate them among the historians, sociologists and lawyers of tomorrow, in order to show them what the censors of today have kept from our inquiring minds.

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CORPORATION LAW

The Massachusetts Trust Act of 1959. Chapter 220, Session Laws of Washington of 1959 is designed to legalize in the State of Washington the type of business associations known as a "Massachusetts Trust" or "Business Trust." This type of business association employs the trust relation for the purpose of conducting a business. Money or property or both are transferred to trustees under a trust instrument authorizing them to use such assets to carry on a business for the benefit of the contributors and their successors in interest. Since the beneficiaries of a trust are not liable for the acts of the trustees, the beneficiaries achieve the same limited liability as corporate shareholders have, if trust law applies to the relationship. Beneficial interests are made freely transferable like corporate shares. The trustees are liable for their acts, but have a right of reimbursement from the trust assets for any obligations properly incurred by them. In practice the trustees endeavor to obtain from third parties with whom they deal an agreement that such parties will not hold the trustees personally liable, but will look only to the trust assets.

This type of organization, as its name implies, was first largely popularized in Massachusetts. It was developed as a substitute for the corporate form of doing business and in its earlier history was used to achieve exemption from some of the restraints of corporate law. In recent years state and federal legislation has been enacted to deprive the Massachusetts Trust of most, if not all, of those exemptions. Consequently, the motivation for organizing business trusts has largely disappeared.

While the Massachusetts Trust received quite general legal acceptance, such was not the case in the State of Washington. In *State ex rel. Range v. Hinkle*[1] and *State ex rel. Colvin v. Paine*,[2] the Washington Supreme Court held that a "Massachusetts Trust" was a corporation within the meaning of article XII, section 5 of the state constitution

[1] 125 Wash. 581, 219 Pac. 41 (1923).
[2] 137 Wash. 566, 243 Pac. 2, 247 Pac. 476 (1926), Annot., 46 A.L.R. 165.