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Criminal Law–Obscene Books–Evidence

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theory that the borrower’s necessities deprive him of freedom in contracting and place him at the mercy of the lender. 9 The situation of the laborer is much like that of the borrower. The case, it is believed, tends "to establish the equality of position between the parties in which liberty of contract begins."10 However, it may be doubted whether this decision goes very far to effectuate the purpose of the statute.11

—Henry K. Higginbotham.

Criminal Law—Obscene Books—Evidence.—On charge for selling obscene matter1 under Massachusetts General Laws (1921) c. 272 § 28, trial judge admitted in evidence the chapters of the book containing the excerpts charged obscene, and refused to admit the entire work or a synopsis. The jury found the defendant guilty. Held, affirmed. Commonwealth v. Freide.2

The question of obscenity is generally held one of fact for the

10 The dissenting opinion of Mr. Justice Holmes in Coppage v. Kansas, supra n. 5, at 236 U. S. 27.

"In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him . . . . If that belief, whether right or wrong, may be held by a reasonable man it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins."

11 The avowed purpose of the statute is to facilitate the settlement of disputes, and though it contains no provision for forcible arbitration, it does state that "All disputes between carrier and its employees . . . . . shall be considered and if possible decided . . . . in conference between representatives designated and authorized so to confer, respectively, by the carrier and by the employees thereof interested in the dispute."

However, Chief Justice Hughes, in delivering the opinion of the court, said: "While an affirmative declaration of a duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of the legislation can not be disregarded." So, although as indicated in the text, the Court enforced the prohibition, even though the statute did not provide the means for such enforcement, the inference would be that the positive obligation to confer and attempt to settle disputes would be unenforceable, and thus each party being free to refuse to confer, either could easily thwart the purpose of the statute.

1 Theodore Dreiser's, "An American Tragedy".

2 "Whoever imports, prints, publishes, sells or distributes a book, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language . . . . shall be punished by imprisonment for not more than two years and by a fine of not less than one hundred nor more than one thousand dollars."

3 171 N. E. 472 (Mass. 1930).
jury under proper instructions. The decision in the principal case is supported by authority, but in one case where the entire book was charged obscene and only excerpts were admitted in evidence, the verdict of guilty found by the jury was reversed.

Much standard literature contains obscene passages, yet the selling of such has been held not an offense. In *Konda v. United States*, the defendant was charged with mailing an obscene pamphlet. Only excerpts from the pamphlet were before the jury. The court in reversing the conviction said it was error to base it on the "unattested assumption that the excerpts truly gauged the scope and character of the pamphlet."

Is it not true that in many cases a reading of the entire book would destroy the ill effects the obscene passages might impress upon the minds of the young or immature? But under such a statute as was involved in the principal case, it would be difficult for a court to allow the jury to consider the entire book. West Virginia has a similar statute. In its forty-eight years of existence no cases have been carried to the Supreme Court of Appeals under it, a record Massachusetts might well envy.

The result of the principal case might be avoided by amendment or a strained construction of such statutes where works of literary value are in question. Moreover, it would be helpful if "Watch and Ward Societies" could be induced to direct their activities toward such stuff as one type of magazine that frequent our newsstands rather than standard literature.

—David G. Lilly, Jr.

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5 United States v. Bennett, 16 Blatchf. 338; Fed. Cas. No. 14,571 (1897); Burton v. United States, 142 Fed. 57, 73 C. C. A. 243 (1909); Commonwealth v. Buckley, supra n. 3.

6 Clark v. United States, 211 Fed. 916; 128 C. C. A. 294 (1914).


8 Supra n. 3.

9 On page 92.