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Judicial Repeal of Legislative Action

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JUDICIAL REPEAL OF LEGISLATIVE ACTION

A GLARING example of judicial legislation amounting to a virtual repeal of an ancient New York statute is found in The People v. Brainard and Harper & Brothers.[1] The eminently respectable, widely influential and highly connected corporation of Harper & Brothers and its President, Brainard, were convicted in the Court of Special Sessions [2] on the charge of having for sale an obscene book. The publication was the intimate life of a common prostitute. On appeal to the Appellate Division of the First Department the conviction was reversed, and the information (charge) dismissed as a matter of law. That is the decision which smashed the anti-obscenity statute, let in the present flood of obscenity and created the necessity of amending the law.

The statute in question is found in the Penal Law of the State under the sub-title "Obscene prints and articles." [3]

This statute declares it to be a crime to sell or have for sale any "obscene, lewd, lascivious, filthy, indecent or disgusting" book. What is left of the law when such a book can escape its sweeping provisions? And upon what authority did the court rely in letting it through the law?

Here is the answer in the language of Justice Smith who wrote the prevailing opinion: [4]

> "That section (New York's anti-obscenity statute) was construed by the Court of Appeals in People v. Eastman,[5] in which it is said: 'From the context of the statute it is apparent that it is directed against lewd, lascivious and salacious or obscene publications, the tendency of which is to excite lustful and lecherous desire.' [6] I venture that no one can read the book and

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[1] 192 App. Div. 816, 183 N. Y. Supp. 452 (1st Dept. 1920).
[2] Judgment rendered January 30, 1920.
[3] Sec. 1141 of the Penal Law, formerly Sec. 317 of the Penal Code.
[4] *Supra* Note 1, 192 App. Div. at 820, 183 N. Y. Supp. at 455.
[5] 188 N. Y. 478, 81 N. E. 459 (1907).
[6] *Ibid.* 188 N. Y. at 480, 81 N. E. at 460.

truthfully say that it contains a single word or picture which tends to excite lustful or lecherous desire. It contains the autobiography of a prostitute, but without the recital of any facts which come within the condemnation of the section as thus interpreted."

The above construction of the statute cited by Justice Smith as that of the Court of Appeals is not part of the prevailing opinion. They are the words of Chief Judge Cullen who wrote a concurring opinion, in which no other of the seven judges concurred, although two Judges (O'Brien and Haight) dissented from the prevailing opinion, which is as follows:

"The court is of opinion that the publication set forth in the indictment is improper, intemperate, unjustifiable and highly reprehensible, nevertheless it is not 'indecent' as that word is employed in Section 317 of the Penal Code.

The definitions given by the standard lexicographers are not controlling in deciding its legal signification; many meanings as used in ordinary conversation are also irrelevant.

Section 317 of the Penal Code is found in Chapter VII, headed as follows: 'Indecent Exposures, Obscene Exhibitions, Books and Prints, and Bawdy and Other Disorderly Houses.'

Section 317 opens as follows: 'Section 317. Obscene Prints. 1. A person who sells, lends, gives away or shows, or offers to sell, lend, or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, *newspaper,* story paper, writing, paper, picture, drawing, photograph, figure or image, *or any written or printed matter of an indecent character;*' (Italics ours).

It is clear from the manner in which the legislature has used the word 'indecent' that it relates to obscene prints or publications; it is not an attempt to

> regulate manners, but it is a declaration of the penalties to be imposed upon the various phases of the crime of obscenity. The word 'indecent' is used in a limited sense in this connection and falls within the maxim of *noscitur a sociis*.
>
> The judgment and order appealed from should be affirmed."

That is the prevailing opinion and all of it. The language quoted by Justice Smith is not there.

The writer has studied the *Eastman* case from its inception in the County of Monroe, the original indictment, its dismissal by County Judge Benton, the affirmance without opinion of that dismissal by the Appellate Division of the Fourth Department [7] and the complete record of the case as it was presented to the Court of Appeals, including of course the briefs of counsel.

To know just what any court decides, one must first find out what questions were before the court. In the first place the prosecution never contended that the printed matter upon which the indictment was based was obscene, lewd, lascivious, filthy, indecent or disgusting within the statutory meaning of those words or any of them as they appear together in the statute. The indictment was not based upon those words at all but was based upon the segregated phrase "or any written or printed matter of an indecent character" which occurs several lines below the six preceding adjectives mentioned. "Indecent," as so used the second time was the one and only word before the court or considered by it. That was the sole word found in the indictment as shown by the headnote to the *Eastman* case and confirmed by the original record.

The district attorney who carried the appeal to the highest court did not need to be told that the printed matter in question did not fall within the meaning of the six preceding words or any of them. He confessed to that in not seeking the indictment under them. He thought the printed matter in question did come within the general meaning of

[7] 116 App. Div. 922 (4th Dept. 1906).

the word "indecent" as used in the phrase quoted which is independent of the six preceding descriptive adjectives. He knew that even if the indictment were based upon the word "indecent" as it first appears in collocation with obscene, lewd, lascivious and disgusting, it would not hold, because "indecent" as there used must be construed within the range of meaning of its associated words. He sought to avoid this rule of construction by selecting the one word "indecent" where it occurs independently of the other words.

As every one knows few adjectives in the language have a wider diversity of meaning than "indecent." Discourteous treatment of a guest for example is commonly characterized as "indecent." One woman may say of another that she looked "positively indecent" in her unbecoming hat or gown, or that a neighbor's behavior is "indecent" in disturbing the family quiet. In the Standard Dictionary are these definitions on indecency: "Offensive to common propriety, offending against modesty or delicacy, immodest, contrary to what is fit and proper, unbecoming, inelegant in form, uncomely."

The district attorney's brief in the Court of Appeals consists of six short pages mainly made up of selected definitions of "indecent," such as those mentioned, which were culled from the dictionaries and other authorities to show that it has a meaning quite removed from the signification of "obscene" and the other correlated adjectives as they appear together in the statute.

The Court of Appeals properly held that the position of the word "indecent" in the independent phrase of the statute, "any written or printed matter of an indecent character," did not take it out of the elementary rule of construction which requires words to be construed in the light of their associated words and according to the context. That was all the Court of Appeals decided.

As to the article which was the subject matter of the indictment in the *Eastman* case, the best proof that it was not obscene is the fact, pointed out by Chief Judge Cullen, of its incorporation in the dissenting opinion of Judge O'Brien to appear and remain in the official reports of the court forever. No judge would thus spread upon the records of the

court an obscene production—certainly not any of the vile prints which now abound. The article itself is the best proof that it does not fall within the purview of the anti-obscenity statute. It was a scurrilous attack upon the Roman Catholic clergy and begins:

> "The Open Door to Hell is the confessional box. It is hell's gate. The mainspring to lust. The very embodiment and focus of the virus of hell. It is the very matter and pus that runs from the corpse in hell. It is the pollution and rottenness of the decay of ages," and ends "all unite with me in prayer that the above will open the eyes of many deceived Romanists and come to the blood of Christ."

The language used by Eastman is not of the kind against which the statute is directed. It is coarse and vulgar but it contains no lesson in vice as do the publications against which the obscenity statute is aimed. The article is not an incitement or inducement to immorality but a perfervid denunciation of it. The evils he finds in the confessional are held up as a warning of its dangers. He uses apt language for his purpose. The terms he employs are not usually heard in polite society. His charges were made against the Catholic clergy and were libelous on their face as Judge Benton pointed out in his opinion upon his dismissal of the indictment. Whether that dismissal was erroneous was the only question before the Court of Appeals in the *Eastman* case. Indeed, while dismissing the indictment as not obscene, Judge Benton had held the defendant in bail to answer to another indictment for criminal libel should one be found under the proper statute [8] by the next ensuing grand jury.

Eastman's statements were allegations of fact. He had the absolute right to make them but he could be punished as for criminal libel if he failed to prove their truth and he was entitled to an opportunity to do so. So Judge Benton held. Since neither the Appellate Division nor the Court of Appeals decided to the contrary, Judge Benton's decision remained the law of the case. The majority in the latter court

[8] Sec. 1340 of the Penal Law, formerly Sec. 242 of the Penal Code.

said nothing about the libelous character of the publication but Chief Judge Cullen discussed it at length, concurring in the main with Judge Benton.

Even Chief Judge Cullen's individual dictum is not susceptible of the broad meaning given to it by the Appellate Division in the *Brainard* case. He concurred in the prevailing opinion and that must be read as part of his own. In asserting that the statute is directed against publications "the tendency of which is to excite lustful and lecherous desire" he gave a good definition of "lascivious," one word of the statute, but it fits no other of the six prohibitory adjectives employed. What he says is literally true. The statute is directed against such publications. But he could not alone as Chief Judge restrict the meaning of "obscene" for example, one prohibitory adjective of the statute, to the narrow scope of his definition, for his own court had unanimously declared in People v. Muller [9] that the test of an obscene publication was "whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into contact with it." [10]

All the Chief Judge intended by his casual remark was to repeat, what he had already agreed to in the prevailing opinion, that the meaning of "indecent" was limited by the general scope and intendment of the statute. Nowhere does he take exception to any part of the prevailing opinion. Yet this passing remark of Chief Judge Cullen is wrongfully taken in the *Brainard* case as the decision of the court and thus are the two words "filthy" and "disgusting" read out of the statute altogether and the other words robbed of their true signification as given to them by the Court of Appeals in the *Muller* case, and by countless judicial decisions in other jurisdictions. Consequently a book dealing with the life of a common prostitute is held immune from the provisions of the New York statute directed to curb the publication of immoral books.

Hardly worse than the reversal of the conviction in the *Brainard* case was the dismissal of the information as a

[9] 96 N. Y. 408, 411 (1884).
[10] *Ibid.* 412.

matter of law. That set the precedent, which the magistrates and the trial judges have been prompt to follow, of dismissing charges and indictments without trial. That too in face of the unanimous decision of the Court of Appeals in the *Muller* case that "The question whether a picture or writing is obscene is one of the plainest that can be presented to a jury.* * *"

It is a noteworthy fact that the magistrate who held the defendants for trial in the *Brainard* case, after his rebuff in the reversal of the conviction and the dismissal of the information by the Appellate Division, dismissed charges against three of the foulest books which ever appeared in print. Moreover he wrote a glowing panegyric upon them which was worth to the publishers, as advertising matter, an incalculable sum in the immense sale his approval and praise of them procured.

The law as laid down in the *Brainard* case remains the law to the inferior courts and furnishes the excuse for failure to prosecute the purveyors of obscenity.

The dominant rule for the interpretation of a statute requires that the language used, if plain and unambiguous, must be taken in its ordinary meaning and every word given full force and effect. Its meaning is that which would be given to it by a reader of ordinary intelligence. That is one of the first things taught the law student. Of course simple words in every-day use have widely different meanings but that signification must be given to every word which the context requires to make sense and relevancy. Thus the primary meaning of the word "rich" is wealthy. But when one speaks of a rich cake it means something quite different. So of a "rich" joke, a "rich" color, a "rich" field and so on. But invariably in good writing the precise meaning to be given to a word is revealed by the connection in which it is used. That is all that is meant by the maxim *noscitur a sociis* applied in the real decision in the *Eastman* case. Literally the Latin words mean, "he is known by his associates." Applied to words it means that they must be construed in harmonious relationship to their associated words. Every writer and speaker, every reader and hearer, unconsciously applies this

rule. As to the construction of statutes that standard authority, the Cyclopedia of Law says: [11]

> "In the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the court to give it force and effect."

Now the language of the New York anti-obscenity statute is plain and unambiguous. In People v. Muller it was so characterized in the unanimous decision of the Court of Appeals. "It is to be observed," said the court in that case,[12] "that the statute does not undertake to define obscene or indecent pictures or publications. But the words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning, and readily and in most cases accurately applies them to any object or thing brought to his attention which requires judgment as to the quality indicated."

At that time the statute used only the two descriptive words "obscene" and "indecent." The latter word was the only one before the court in People v. Eastman, decided twenty-three years later, although by that time the statute had been strengthened by adding the four words "lewd," "lascivious," "filthy" and "disgusting." None of these words, nor the word "obscene," was before the court in the *Eastman* case.

The judge who wrote the prevailing opinion in the *Brainard* case has since passed away. No justice who concurred in it is now on the bench. But the destructive decision remains and is just as binding upon the lower courts as any act of the legislature and it will so remain until changed by legislative enactment. In a criminal case the people have ordinarily no right of appeal from an acquittal

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[11] 36 Cyc. Law Procedure 1114.

[12] *Supra* Note 1 at 410.

and the defendant of course will not appeal from his own exoneration. So there is no way of getting to the Court of Appeals. The legislature is the only hope.

Another obstacle to the enforcement of the New York statute is a dictum of the Court of Appeals [13] in a case of malicious prosecution which declares that an obscene publication must be "considered broadly as a whole." There is no objection to permitting the triers of fact to examine, read and consider the whole work, or such portions of it as the court deems relevant and material, upon the trial. But the district attorney of New York County erroneously accepted that dictum as requiring the grand jury, before returning an indictment, to read the entire work charged as obscene and then to read it himself to the trial jury, even though only a few pages may be complained of as violating the law. Grand juries have not the time to do so and the re-reading on the trial tires the jury and wastes the time of the court.

This practice is contrary to that of the Federal courts [14] where the indictment may be based upon the objectionable part or parts of the book, although the language of the New York and Federal statutes [15] are substantially alike. The result is that the Federal government successfully prosecutes offenders against its obscenity statutes while in New York the enforcement of its statute has almost completely broken down at the very source of distribution of the great bulk of the published obscenity circulating throughout the country. The remedy for this condition is to amend the law so that the courts will be required to give to the New York statute the same force and effect as is given to it by the Federal courts.

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[13] Halsey v. New York Soc., 234 N. Y. 1, 4, 136 N. E. 219, 220 (1922).

[14] U. S. v. Bennett, 16 Blatchf. 338, 24 Fed. Cas. No. 14751 (C. C. N. Y. 1879); U. S. v. Benedict, 165 Fed. 221 (C. C. N. Y. 1908).

[15] Criminal Code, Sec. 211, amended (18 U. S. C. A., Sec. 334).