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Divorce, Sunday Laws, Freedom of the Press

RECENT DECISIONS

Divorce

In the recent case of *Golden* v. *Arons,*[1] the Superior Court of New Jersey held that, under some circumstances, differences in religious faith may create valid grounds for divorce. The Jewish wife was successful in obtaining a divorce on the ground of extreme cruelty, where she was able to show that after her husband had left the Jewish faith to become a Catholic, he attempted to force her conversion by insulting her, belittling her religious practices, attempting to cut off all her relationships with members of her own religion, and continually discussing religion.

A month earlier, a separation was granted to a husband in New York, when his wife, who had been converted to a Christian denomination, refused to live at the address chosen by her Jewish husband, insisted on choosing the family residence, claimed money as her own deposited for her by her husband, and unjustifiably caused a Magistrate's Court summons to be issued against him.[2]

In both cases, the courts reaffirmed the fundamental rule that differences in religious belief or affiliation are not in themselves grounds for divorce or separation, and that conversion to another religion, in a land of liberty, cannot in itself be a ground for divorce or separation. However, the holdings in these cases are based on the equally well recognized principle that religious motives may induce acts which are in themselves legal grounds for divorce or separation.

These cases are consistent with the traditional view that the problem is one of distinguishing between situations where a plaintiff wishes a divorce only because of difference of religious viewpoint with his spouse, and those cases where he seeks divorce for acts motivated by a difference in belief and which constitute valid grounds under the statutes of a particular jurdisdiction.[3]

In practice however, it has been necessary to apply these principles to cases where the religious doctrine to which a spouse adheres calls for, or at least the spouse believes it calls for, the acts which are thought objectionable. In *Smith* v. *Smith,*[4] the wife became a Jehovah Witness and travelled to distant cities with her children, distributing literature and living on charity. The husband was granted a divorce on grounds of extreme cruelty.

Generally, the rule seems to be that in actions for divorce or separation the acts themselves will be considered by the court, regardless of the motives which spawned them. The acts are to be measured against the statutory grounds for divorce and separation which of course differ from jurisdiction to jurisdiction, and the decision is to be based on that consideration alone. In no case can a difference of opinion on matters of religion, any more than a difference of opinon on political matters, be sufficient for divorce and separation, if

[1] 36 N.J. Super. 371, 115 A. 2d 639 (1955).

[2] Booke v. Booke, 207 Misc. 999, 141 N.Y.S. 2d 580 (Sup. Ct. 1955).

[3] See Mertens v. Mertens, 38 Wash. 2d 55, 227 P. 2d 724 (1951); Smith v. Smith, 61 Ariz. 373, 149 P. 2d 683 (1944); Krauss v. Krauss, 163 La. 218, 111 So. 683 (1927); Trautman v. Krauss, 159 La. 371, 105 So. 376 (1925).

[4] 61 Ariz. 373, 149 P. 2d 683 (1944).

it is not coupled with something more.[5] The constitutional guarantee of religious liberty would bar the court from granting divorces for religious differences alone, but of course, not for acts that otherwise, regardless of religious motives, would be good grounds for divorce.[6]

It is clear that if a husband wishes to divorce his wife because she belongs to another religion, he will not succeed. It is equally clear that in a jurisdiction where cruelty is a ground for divorce, if a husband should beat his wife every day because she is a member of some sect, his wife will have an excellent cause of action for divorce. But interest in this problem lies in the area between these extremes, so far devoid of much litigation, where acts springing from high religious and ethical standards, done in the best of faith by one spouse in a mixed marriage, might seem like cruelty to the other.

Sunday Laws

The defendant was arrested for violating section 2147 of the Penal Law by selling a book on a Sunday evening in his store, located in the heart of New York City's amusement district. *People* v. *Law*, 142 N. Y. S. 2d 440 (1955). Subdivision 4 of Section 2147 prohibits the public sale or offering for sale of any property on Sunday, except:

> Prepared tobacco, bread, milk, eggs, ice, soda water, fruit, flowers, confectionery, souvenirs, newspapers, magazines, gasoline, oil, tires, drugs, medicine, and surgical instruments. . . .

Although the book which was the subject of the sale was not one of those articles specifically excepted from the general prohibition, the court found that since the sale itself constituted no serious interruption of the repose and religious liberty of the community, section 2147 did not apply. In reaching this decision emphasis was placed upon the locality where the alleged violation took place. The court noted that most people who frequent that particular neighborhood do so in quest of amusement and relaxation rather than religious observance.

This decision is significant as a departure from the traditional interpretation the courts have placed upon "Sunday laws." The tendency, heretofore, has been to construe such statutes liberally in favor of protecting the Sabbath.[1] In the present case, the complaint was dismissed on the grounds that the alleged sale was not within the prohibition intended by the legislature. The court stated that section 2147 must be construed in conjunction with section 2140 "The basic section of the statue . . . which is plainly explanatory of the meaning of . . . [the] section." Section 2140 reads, in part, as follows:

> . . . the law prohibits the doing on that day [the Sabbath] of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community.

"Sunday laws" have a dual purpose; first, to protect the religious observance of the community from interference; and, second, to offer working people a compulsory day of rest and relaxation. Such legislation has been justified as an exercise of police power

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5 See Donaldson v. Donaldson, 38 Wash. 2d 748, 231 P. 2d 607 (1951).

6 Krauss v. Krauss, 163 La. 218, 111 So. 683 (1927). (dictum).

1 People *ex rel.* Moffatt v. Zimmerman, 48 Misc. 203, 95 N.Y. Supp. 136 (Sup. Ct. 1904).

in protecting the morality and general welfare of its citizens.[2]

In *People* ex rel. *Moffatt* v. *Zimmerman*,[3] an earlier New York decision treating of the "Sunday laws," the court stated:

> It is the selling and offering for sale of *any articles of merchandise* that constitutes the offense, and not the character of the article, unless it is among the exceptions to the act. [Emphasis supplied.]

It is apparent that in the instant case, the sale of books was not expressly excepted from the prohibition of which the court took cognizance. This sale, judged in the light of the language in the *Moffatt* case might well have been held to be within the scope of the statute and thereby proscribed.

In *People* v. *Moses*,[4] the defendant was arrested for violating former Penal Code section 265 prohibiting fishing on Sunday. The defendant contended that he was fishing on private property and did not interfere with the repose and religious liberty of the community. The court, in affirming the decision of the lower court finding the defendant guilty, refuted his contention. The court said:

> It is not the meaning of this section that every act which is claimed to be a violation thereof must, in fact, be a serious interruption of the repose and religious liberty of the community; but the legislature . . . specified certain acts which are declared to be serious interruptions of the repose and religious liberty of the community—acts necessarily described in general and comprehensive terms. . . . It is quite unreasonable to suppose that the legislature meant that whenever any of these acts are charged . . . an issue can be framed and tried as to their public, offensive or disturbing character. The legislature has settled that matter by prohibiting them absolutely.[5]

The language in the *Moses* case would seem to rebut any defense based upon the locality or nature of the neighborhood in which the sale was perpetrated. Since the legislature is the only competent body to declare which acts interfere with the repose and religious liberty of the community, and since it appears from the express wording of the statute that all sales of merchandise except those enumerated were deemed objectionable, the decision in the instant case would appear to be an attempt at judicial legislation.

This conclusion is bolstered by the decision in *People* v. *Gill*,[6] wherein the defendant contended that the washing of cars on Sunday was a work of necessity and therefore exempt from the statute prohibiting labor on Sunday. The court, after finding that the washing of cars was not a work of necessity, stated that if the defendant were of the opinion that the prohibition was illogical, recourse to the legislature to change the law was available.

Freedom of the Press

The Supreme Court of New York recently upheld the constitutionality of a state law which enables certain specified officials to obtain an injunction preventing the distribution, selling or acquiring possession of obscene materials and to obtain an order

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2 United Vaudeville Co. v. Zeller, 58 Misc. 16, 108 N.Y. Supp. 789 (Sup. Ct. 1908); Am. Jur. pp. 805, 808-09.

3 People *ex rel.* Moffatt v. Zimmerman, *supra* note 1, at 205, 95 N.Y. Supp. at 137.

4 140 N.Y. 214, 35 N.E. 499 (1893).

5 *Id.*, at pp. 215-16.

6 206 Misc. 585, 134 N.Y.S. 2d 622 (Magis. Ct. 1954).

directing the surrender of the materials to the Sheriff, who is to seize and destroy them. *Burke* v. *Kingsley Books, Inc.*, 208 Misc. 150, 142 N.Y.S. 2d 735 (Sup. Ct. 1955). The Corporation Counsel brought an action under section 22-a of the Code of Criminal Procedure[1] to enjoin the defendant from circulating a book entitled NIGHTS OF HORROR. The court in granting the injunction, felt constrained to discuss the various contentions in some detail because of the constitutional questions involved.

In finding that the booklets comprising NIGHTS OF HORROR were "obscene" within the meaning of the section, the court described the material as "lustful and vicious concupiscence," that would ". . . invite crime and voluptuousness, and excite lecherous desires. . . . The publications have libidinous effect upon ordinary, normal, healthy persons; their effect upon the abnormal individual may be disastrous to him as to others as well." The court further noted "That there is no attempt to achieve any literary standard is obvious. The volumes are replete with misspelled words, typographical errors, faulty grammar, misplaced pages and generally poor workmanship."[2]

The defendants contended, among other things, that the statute violated the constitutional protection against unreasonable seizures and was also an unconstitutional restraint on freedom of the press as set forth in the First Amendment to the Federal Constitution and section 8, article I of the Constitution of the State of New York.

With respect to the objection that the action involved a violation of the constitutional safeguard against unreasonable seizures, the court held that the key word was *unreasonable*. Citizens are not immune from reasonable searches and seizures.[3] The order of seizure in the present case was preceded by due notice and a fair and speedy trial.[4] Moreover, the materials were subject to seizure under an alternative theory, *i.e.*, that the legislature had made them contraband.[5] Contraband is a public nuisance and as such can be abated.[6]

In light of developments within the last few years, defendant's objection that section 22-a was an unconstitutional restraint on freedom of the press guaranteed in the First Amendment to the Federal Constitution, posed serious questions. There is no doubt that the safeguards of the First Amendment are applicable to the states by reason of the Fourteenth Amendment's due process

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[1] Laws of N.Y. 1941, c. 925, §2, as amended, Laws of N.Y. 1954, C. 702.

[2] Burke v. Kingsley Books, Inc., 208 Misc. 150, 158, 142 N.Y.S. 2d 735, 741-42 (Sup. Ct. 1955).

[3] People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923); People v. Richter's Jewelers, Inc., 265 App. Div. 767, 771, 40 N.Y.S. 2d 751, 754 (1st Dep't) (dictum), *aff'd*, 291 N.Y. 161, 51 N.E. 2d 690 (1943).

[4] "The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." N.Y. Code Crim. Proc. §22-a(3).

[5] ". . . [S]uch final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described . . . and such sheriff shall be directed to seize and destroy the same." N.Y. Code Crim. Proc. §22-a(3).

[6] Lawton v. Steele, 152 U.S. 133, 140 (1894); People v. Whitcomb, 273 App. Div. 610, 79 N.Y.S. 2d 230 (4th Dep't), *appeal dismissed*, 298 N.Y. 635, 82 N.E. 2d 30 (1948); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926) (dictum), *cert. denied*, 270 U.S. 657. See N.Y. Penal Law §§982-85, 1899.

clause.[7] However, it must be pointed out, it is just as well settled that an abuse of basic human liberties may be prevented by the proper exercise of the police power if there is a clear and present danger and the action taken is designed to relieve it.[8] In view of the recent hearings of the Special United States Senate Judiciary Subcommittee on Juvenile Delinquency and the Select Committee of the United States House of Representatives on Current Pornographic Materials, it cannot be seriously questioned that the book seized herein presents a "clear and present danger." In upholding the constitutionality of section 22-a, the court necessarily held that the term "obscene" was sufficiently definite to serve as a standard of prohibition. In this regard it is interesting to compare section 122 of the New York State Education Law which specifies films which may not be given licenses. This law has undergone a stormy period in the last three years.[9] Two of its provisions have been found unconstitutional. In the case of *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), the Supreme Court held that motion pictures are within the ambit of protection which the First Amendment through the Fourteenth secures to "speech" and "the press," and that the standard "sacrilegious" is so vague and indefinite as to violate the due process clause. The second provision of the statute found to be unconstitutional for the same reasons as set forth in the *Burstyn* case, was the refusal to license an "immoral" picture.[10] Subsequently, a new section which defined the terms used in section 122, 122-a was added to the Education Law.[11]

It should be noted that the New York Motion Picture Censorship Law has not been declared unconstitutional because of any vagueness or indefiniteness in the use of the term "obscene." In fact, the opinion in the *Burstyn* case specifically referred to the fact that the Supreme Court was *not* holding censorship of an "obscene" motion picture to be unconstitutional.[12] The term "obscene" has always been considered sufficiently definite to meet constitutional requirements.[13] In this connection, it should be observed that subsequent to the *Burstyn* case, the Supreme Court of Illinois upheld the right of the City of Chicago to ban a film on the ground that it is "obscene."[14] Ironically, the film was "The Miracle," the same film which New York unsuccessfully attempted to ban on the ground that it was sacrilegious.

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7 Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

8 Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919); Lawton v. Steele, 152 U.S. 133 (1894); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (dictum).

9 For a comment on the New York Motion Picture Censorship Law, see 1 THE CATHOLIC LAWYER 58 (Jan. 1955).

10 Commercial Pictures Corp. v. Board of Regents, 346 U.S. 587 (1954).

11 Laws of N.Y. 1954, c. 620.

12 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505-06.

13 Winters v. New York, 333 U.S. 507, 518 (1948) (dictum); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (dictum); People v. Muller, 96 N.Y. 408 (1884).

14 American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954).