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Constitutional Law - Exceptions to the Prohibition Against Considering Moot Questions

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marble stone, perhaps not making a noticeable difference in the immediate appearance of the due process structure, but no less essential to the emerging form than the larger areas chiseled out by such cases as *Escobedo*[44] and *Wade*.[45]

Terrance Norton

[44] Escobedo v. Illinois, 378 U.S. 478 (1964).

[45] *Supra* note 25.

CONSTITUTIONAL LAW—EXCEPTIONS TO THE PROHIBITION AGAINST CONSIDERING MOOT QUESTIONS

Eviction proceedings under the Georgia Code were instituted against petitioners, two indigent Negroes living in low rental apartments. Under the Georgia Code a defendant is required to post a security bond as a condition precedent to any offer of defense in such an action.[1] Yet, because of their indigency, defendants were unable to post the bond. The Superior Court of Fulton County denied a petition for an injunction staying the dispossessory proceedings and the Supreme Court of Georgia dismissed the complaint for declaratory judgment on the constitutionality of the statute as moot because the sheriff of Fulton County had already evicted the tenants in the interim. The Supreme Court of the United States denied certiorari, Justices Douglas, Warren and Brennan dissenting. *Williams v. Shaffer*, 385 U.S. 1037 (1967).

In its dismissal of the complaint, the Georgia Supreme Court stated:

> Where, as here, the petition shows that the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiffs' rights is necessary in order to relieve the plaintiffs from the risk of taking any future undirected action incident to their rights, which action without direction would jeopardise their interests, the petition fails to state a cause of action for declaratory judgment.[2]

The petition was dismissed because the Georgia court was of the opinion that there were no longer rights in question subject to adjudication; the denial of certiorari by the United States Supreme Court was based on the same premise. Justice Douglas, in his dissenting opinion, glossed over any legal rebuttal to this argument, stating only that, "The finding of mootness

[1] GA. CODE ANN. § 61-303 (1966): "The tenant may arrest the proceedings and prevent the removal of himself and his goods . . . . Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

[2] Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966).

by the State Supreme Court is not binding on us."[3] His dissent is primarily based on the emotional appeal that the poor need assistance in the housing area, and that therefore the Court should hear argument on this case. It is the purpose of this case note to examine more deeply the law supporting the doctrine of mootness, and the legal argument that Justice Douglas could have presented to support his dissenting opinion.

A moot question results when events occur which dispose of the controversy so that an actual dispute no longer exists over the interests or rights of the parties.[4] Because of the "case or controversy" requirement of Article II of the Constitution of the United States, "A federal court is without power to decide moot questions . . . ."[5] The Illinois judiciary has likewise held that the existence of an actual case or controversy is essential for state appellate jurisdiction.[6]

The rationale underlying dismissal of a case which does not meet the case or controversy requirement is a sound one. By requiring that there be adverse parties, each with a legal interest in the suit, actively opposing one another, where a judicial decision will determine the rights of the parties with regard to an existing set of facts in dispute, the court attempts to ensure that the question before it will be vigorously argued, with the parties assisting the court in rendering its decision. A real set of facts aids in an accurate formulation of the legal issues involved, and an adversary presentation of argument is important for the decision on the legal issues raised by the facts.[7] This requirement permits the efforts and attention of the judiciary to be focused on issues and problems which are susceptible to final solution.

The courts have, however, under certain circumstances, developed exceptions to the general rule requiring a case to be dismissed if it becomes moot, one of which is commonly known as "the public interest" exception. It is an extension of principles of equity jurisprudence,[8] and rather than relying

[3] Williams v. Shaffer, 385 U.S. 1037 (1967).

[4] Chicago City Bank & Trust Co. v. Board of Educ. of Chicago, 386 Ill. 508, 54 N.E.2d 498 (1944).

[5] St. Pierre v. United States, 319 U.S. 41 (1943).

[6] People v. Redlich, 402 Ill. 270, 83 N.E.2d 736 (1949); People *ex rel.* Cairo Turf Club, Inc. v. Taylor, 2 Ill. 2d 160, 116 N.E.2d 880 (1954); Jones v. Clark, 355 Ill. App. 527, 189 N.E. 870 (1934); Case v. Rewerts, 15 Ill. App. 2d 1, 145 N.E.2d 251 (1957); Harney v. Cahill, 57 Ill. App. 2d 1, 206 N.E.2d 500 (1965); Johnson v. Board of Educ. of Chicago, 79 Ill. App. 2d 22, 223 N.E.2d 434 (1967).

[7] H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 78 (1953).

[8] *See* Virginian Ry. Co. v. System 40, Ry. Employees Dep't., AFL, 300 U.S. 515, 552 (1937) where the court stated, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

on a general plea to answer the needs of the poor, Justice Douglas could have, and should have, argued his dissent on the grounds that the *Williams* case was within the purview of this exception. The public interest exception is one of three theories, by which the courts have acted to retain jurisdiction over a case even though the original question may have already been disposed of. Each of these three alternatives could be applicable to *Williams*.

Courts have retained jurisdiction where an act sought to be enjoined is performed even though there is notice of a pending suit for an injunction. Retention here is based on the court's power to restore the status quo. In *Porter v. Lee*,[9] a suit was brought by the Price Administrator to enjoin the eviction of a tenant under the Emergency Rent Control Act. The suit was dismissed in the district court for lack of jurisdiction, and held to be moot by the court of appeals when the defendant-landlord filed an affidavit stating that the tenants had moved. The Supreme Court held that the removal of the tenant was not enough to end the controversy, and that the Court had the power to restore the status quo and because, "The issue as to whether further violations should be enjoined was still before the Court and was by no means moot."[10] Again, in a case brought under the Securities and Exchange Commission Act where the defendant sought to withdraw his registration statement, the court held that after defendant had been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction was not granted, the defendant acted at his peril and was subject to the Court's power to restore the status quo irrespective of the merits as they may ultimately be determined.[11] As in *Porter v. Lee*, the tenants could have been reinstated in *Williams*.

Courts have, in addition, held that a justiciable controversy may remain as long as the relief sought in an injunction suit is different from, or additional to, termination of acts which have already been discontinued.[12] In *United States v. Trans Missouri Freight Association*,[13] an injunction was sought against an association of railroads for alleged violations of the Sherman Act and to dissolve the association. Although the association voluntarily dissolved, the Supreme Court retained jurisdiction, stating that the case had not become moot because of the public nature of the right being asserted. The Court held that the dissolution of the association was not the most important object of the litigation, and that the Court's judgment was being sought on the validity of the underlying agreement so that such acts may be

[9] 328 U.S. 246 (1946).

[10] *Id.* at 252.

[11] Jones v. SEC, 298 U.S. 1 (1936).

[12] Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1946); Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955).

[13] 166 U.S. 290 (1897).

enjoined in the future.[14] And where a trial court's injunction expired prior to the case reaching the court on appeal, it was held in *Hedberg v. State Farm Mutual Automobile Insurance Co.*[15]

> . . . (a) that the plaintiffs' complaint embraced a request not only for injunctive relief but for damages as well . . . (b) that the controversy concerns not . . . the validity of the restrictive agreement as to which the injunction issued . . . for the issue of damages flows directly from it . . . (c) that it would be a waste of time and seemingly futile to dismiss this appeal as moot now only to have the very same issues brought to us once again after damages have been determined.[16]

An argument for the retention of jurisdiction in *Williams* could have been logically predicated on the reasoning in the above cases; the complaint requested not only an injunction staying the dispossessory writ but also that the tenants be allowed to pay into the Court any rents due or to become due during the pendency of the action, "and further relief as might appear just during the course of the proceeding."[17] As in *United States v. Trans Missouri Freight Association,* the question in *Williams* was, most importantly, the validity of the Georgia statute underlying the eviction, and the eviction of the tenants in this case did not moot that question.

In an action to enjoin a corporation from voting to merge with another, the court in *Ramsburg v. American Investment Company of Illinois*[18] held that the case was not moot in spite of the fact that the merger had been completed, stating:

> [E]ven where the subject matter of an injunction suit has been so completely destroyed as to preclude restoration of the status quo, the court still has jurisdiction to grant incidental relief and the cause is not moot.[19]

The court had the power to grant incidental relief in *Williams,* and therefore, jurisdiction could have correctly been retained, and the basic issue decided.

Even if Justice Douglas had not felt that the above two arguments were strong enough to support the granting of certiorari in the *Williams* case, he could have based his dissent on the remaining exception: the public interest involved in having the particular issue determined. This is the broadest and most abstract basis for retaining jurisdiction. "If there is a compelling and substantial reason for public interest an appeal concerning a moot question need not be dismissed."[20] This exception was developed most fully in

[14] *Accord,* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911); United States v. Bates Valve Bag Corp., 39 F.2d 162 (3d Cir. 1930).

[15] 350 F.2d 924 (8th Cir. 1965).

[16] *Id.* at 933.

[17] Petitioner's Brief for Certiorari at 6, Williams v. Shaffer, 385 U.S. 1037 (1967).

[18] 231 F.2d 333 (7th Cir. 1956).

[19] *Id.* at 336.

[20] Daley v. License Appeal Comm'n, 55 Ill. App. 2d 474, 476, 205 N.E.2d 269, 271 (1965).

People ex rel. Wallace v. Labrenz.[21] Following a blood transfusion administered to a child over the parent's objection, and under court order, the parents appealed to the Illinois Supreme Court. Replying to the State's contention that the case was moot as the blood transfusion had been given, the court stated:

> [W]hen the issue presented is of substantial public interest, a well recognized exception exists to the general rule that a case which has become moot will be dismissed upon appeal . . . . Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question. . . . [T]he very urgency which presses for prompt action by public officials makes it probable that any similar case arising in the future will likewise become moot by ordinary standards before it can be determined by the court.[22]

As Justice Douglas states, "The problem of housing for the poor is one of the most acute facing the Nation."[23] The petition for certiorari in *Williams* raised questions of denial of due process and equal protection, both matters of great public importance, but, unless the public interest exception is applied it is probable that any case arising under the statute in Georgia will become moot before there is a determination of the constitutionality of these provisions. The Illinois Supreme Court has held that,

> [M]ootness is not a defense of merit which may be raised by defendants to defeat the immediate litigation. Rather mootness is a doctrine which the court imposes for its own protection and it will not be applied where it is apparent that the controversy is a genuine one concerning valuable rights. . . .[24]

The rights involved in *Williams* are among the most valuable to men—the right to defend one's self from deprivation of property.

The right to defend one's self is implicit in due process as stated by Mr. Justice Field, reversing a lower court decision striking petitioner's answer.

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. . . . A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights. . . .[25]

In *Hovey v. Elliott*,[26] the Court reversed the conviction of the defendant for contempt, the defendant not being allowed to answer, not having paid the required money into court. *Hovey* held that refusal to allow defendant to

[21] 411 Ill. 618, 104 N.E.2d 769 (1952).

[22] *Id.* at 622-23, 104 N.E.2d at 772.

[23] Williams v. Shaffer, 385 U.S. 1037, 1040 (1967).

[24] Kern v. Chicago & E. Ill. R.R., 44 Ill. App. 2d 468, 477, 195 N.E. 2d 197, 201 (1963).

[25] Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

[26] 167 U.S. 409 (1897).

answer rendered the court without jurisdiction to enter a decision, which was therefore void.

The requirement of pre-payment of costs has been held to be a denial of equal protection, depriving the indigent of a right granted to the affluent.[27] By holding this type of eviction case moot on appeal the Court is bypassing the constitutional issues involved, although the question is of frequent occurrence, and is, in fact, in the process of being litigated in several cases in Illinois at the present time.[28] The Illinois cases involve the question of the posting of a security bond on appeal, under the Illinois Forcible Entry and Detainer Act,[29] rather than the posting of a security bond in the trial court, but the basic issue as to the constitutionality of the statute is the same as that presented in *Williams*. Perhaps a stronger argument by Justice Douglas in his dissent would have, at the least, been accepted by a majority of the Court when the next case is brought before the Court for a grant of certiorari, and a full argument granted.

It has been stated that the requirement of a security bond is necessary to protect the landlord's property right, a right which is as important as the tenant's ability to defend and appeal. It is to protect this right that statutes requiring a security bond to be posted are passed. The security bond "shall be in sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court."[30] This bond has been set as high as $50,000, in a recent Illinois case involving the eviction of an indigent tenant.[31] A solution to the problem of providing protection for the landlord, while still permitting the tenant to appear, defend, and appeal has been offered, and general acceptance of this solution would assure that constitutional questions such as raised in *Williams* would not be dismissed as moot before they were definitively decided.

[27] *See* Griffin v. Illinois, 351 U.S. 12 (1956) (transcript on appeal); Burns v. Ohio, 360 U.S. 252 (1959) (payment of filing fees before docketing appeal); Smith v. Bennett, 365 U.S. 708 (1961) (payment of application fee for writ of habeas corpus).

[28] Alexander v. Chicago Housing Authority, No. 16,623 (7th Cir., filed Dec. 15, 1967); Shore-Wood Realty, Inc. v. Lynch, No. 41014 (Sup. Ct. Ill., filed Oct. 31, 1967); Hartland Realty, Inc. v. Clark, No. 41090 (Sup. Ct. Ill., filed Dec. 5, 1967).

[29] ILL. REV. STAT. ch. 57, § 20 (1965), "If the defendant appeals, the condition of the bond shall be that he will: . . . (c) in case the judgment from which the appeal is taken is affirmed or appeal dismissed, pay all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue; which said bond shall be in sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court. . . ."

[30] ILL. REV. STAT. ch. 57, § 20 (1965).

[31] City of Chicago v. Brewer, No. 68 M1 51477, (Cir. Ct. of Cook Cty., 1st Mun. Dist., filed Jan. 18, 1968).

The alternative suggested is known as a "use and occupancy" bond. This type of bond would guarantee to the landlord that the rent for the use and occupancy of the premises pending the outcome of the trial or appeal would be paid as or before it became due each month, and that by accepting it the landlord would in no way prejudice his claims or judgment against the tenant. If the tenant failed at any time to comply with the terms of the bond, the landlord would have the right to immediately inform the court and have the trial or appeal dismissed.[32] This was the type of bond requested by petitioners in *Williams*, and denied by the Superior Court of Fulton County;[33] a similar bond has been requested in many cases in Illinois, and denied,[34] although one has recently been granted.[35] A use and occupancy bond was accepted by the District of Columbia Court of Appeals in *Edwards v. Habib*[36] and *Lee v. Habib*,[37] and more such bonds are being actively sought in Illinois.

An eviction proceeding, as in Georgia,[38] is a summary one, and "[d]efault judgments in eviction proceedings are obtained with machine gun rapidity, since the indigent cannot afford counsel to defend."[39] Application of the public interest exception to the doctrine of mootness,[40] or alternatively, the setting of a "use and occupancy" bond as described above, would enable the courts to reach the constitutional questions of denial of due process and equal protection, and perhaps mitigate the instability and disruption that eviction proceedings engender.

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[32] Petitioner's Brief for Leave to Appeal to the Illinois Supreme Court, Shore-Wood Realty, Inc. v. Lynch, *supra* note 28 at 4.

[33] Petitioner's Brief for Certiorari, *supra* note 17, at 6.

[34] *Supra* note 28.

[35] Hartland Realty, Inc. v. Clark, *supra* note 28.

[36] 366 F.2d 628 (D.C. Cir. 1965).

[37] No. 3679 (D.C. Cir. Oct. 17, 1967).

[38] Several other states have similar eviction statutes to that of Georgia. These include: Arkansas, ARK. STAT. ANN. § 34-1510 (1947); California, CAL. CIV. PRO. CODE § 1166a (Deering 1959); Indiana, IND. STAT. ANN. §§ 3-1304 through 3-1306 (1933); Mississippi, MISS. CODE ANN. tit. § 957 (1942); Texas, TEX. RULES OF CIV. PRO. Rule 740 (1955); Virginia, VA. CODE ANN. § 55-242 (1950); Washington, WASH. REV. CODE § 59.12.100 (1961); West Virginia, W. VA. CODE § 3672 (1961).

[39] Williams v. Shaffer, *supra* note 23, at 1060.

[40] Even where a recurrence of the issue involved would not effect the parties in the original suit, the court could retain jurisdiction. *See* Trust Co. of Chicago v. Covnot, 3 Ill. 2d 553, 121 N.E.2d 779 (1954); Smith v. Ballas, 335 Ill. App. 2d 418, 82 N.E.2d 181 (1948); East Meadows Community Concerts Ass'n. v. Board of Educ., 18 N.Y.2d 129, 219 N.E.2d 172 (1966).