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Pennsylvania—A Cinematic Gomorrah?

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RECENT DECISIONS

PENNSYLVANIA—A CINEMATIC GOMORRAH?

In the past few years, our sister state of Pennsylvania has fallen victim to a series of judicial decisions which have done much to preclude any formal control over the quality of movie films which may be exhibited. Pennsylvania is here examined because of a recent decision of its Supreme Court, *William Goldman Theatres, Inc. v. Dana*,[1] and because its present situation reflects the increased reliance which must now be placed on informal means of control in this important area.

Three United States Supreme Court decisions of recent years have greatly affected judicial thought in most courts in the area of obscenity. *Burstyn v. Wilson* held for the first time that motion pictures as a medium of expression are protected by the free speech and press guarantees of the First and Fourteenth Amendments.[2] Consequently it invalidated a New York statute allowing censors to refuse licenses to films which were found by a board of censors to be "sacrilegious." The Court decided first that the standard is too vague for censors to apply without favoring one religion over another, and second, "that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views."[3]

Roth v. United States made three distinct points which should be kept in mind in examining the Pennsylvania decisions.[4] First, "obscenity is not within the area of constitutionally protected speech or press."[5] Second, the test of obscenity should be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[6] Third, the Court held that a statute is not constitutionally vague and thereby violative of due process if it "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[7]

Times Film Corporation v. City of Chicago,[8] the most recent of the major decisions in the area by the United States Supreme Court, held that prior censorship of motion pictures was constitutionally possible. Stressing that no question of vagueness of the standard to be applied by censors was involved, the Court denied that ". . . constitutional protection includes

1. 405 Pa. 83, 173 A.2d 59 (1961).
2. 343 U.S. 495 (1952).
3. Id. at 505.
4. 354 U.S. 476 (1957).
5. Id. at 485.
6. Id. at 489.
7. Id. at 491, quoting from United States v. Petrillo, 332 U.S. 1, 7-8 (1947).
8. 365 U.S. 43 (1961).

complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[9]

In 1956, the Supreme Court of Pennsylvania in *Hallmark Productions v. Carroll*,[10] struck down the Motion Picture Censorship Act of 1915.[11] This decision marked the beginning of the end for effective censorship. The Act of 1915 authorized a board of censors to disapprove films which are "sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals." Use of films without approval of the censor was unlawful. Reviewing decisions of the United States Supreme Court striking down as vague other state laws using similar phraseology,[12] the Pennsylvania Supreme Court held that the Act violated the due process clause of the Fourteenth Amendment. It did not reach the problem of whether a more definite statute would nevertheless be invalid as a precensorship of freedom of speech or press. The final words of the opinion are of interest in light of subsequent cases. "It need hardly be added that even if all precensorship of motion picture films were to be held invalid this would not in and of itself affect the right to suppress objectionable films if exhibited, or to punish their exhibitor."[13]

Three years after the *Hallmark* decision, the court, in *Commonwealth v. Blumenstein*,[14] ruled on a statute, used for forty-eight years, punishing an exhibitor of any performance or movie "of a lascivious, sacrilegious, obscene, indecent, or immoral nature or character, or such as might tend to corrupt morals."[15] Following its reasoning in *Hallmark*, the court said that since the words of the statute had individually been ruled vague by the United States Supreme Court,[16] the statute was unconstitutional. But, as pointed out by Justice Musmanno's dissent, the majority appears to have glossed over the *Roth* decision's import. In *Roth*, in which the words "obscene," "lascivious," "filthy," "obscene," and "indecent" were parts of the questioned statutes, the Supreme Court clearly stated:

> Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys

9. Id. at 46.
10. 384 Pa. 348, 121 A.2d 584 (1956).
11. Pa. Stat. Ann. tit. 4, §§ 41-58 (1930). Repealed Sept. 17, 1959, Pa. Laws, ch. 902, § 15.
12. See, e.g., Burstyn v. Wilson, supra note 2, "sacrilegious"; Commercial Pictures Corp. v. Regents of the University of the State of New York, 346 U.S. 587 (1954), "immoral" and "would tend to corrupt morals"; Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1956), "obscene or immoral."
13. Hallmark Productions v. Carroll, supra note 10 at 358, 121 A.2d at 589.
14. 396 Pa. 417, 153 A.2d 227 (1959).
15. Pa. Laws 1939, ch. 872, § 528 (Now Pa. Stat. Ann. tit. 18, § 4528 (1959)).
16. See. e.g., authorities cited in Commonwealth v. Blumenstein, supra note 14 at 420, 153 A.2d at 228-29.

> sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ". . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . ."[17] (Citations omitted.)

On the same day that *Commonwealth v. Blumenstein* was decided, the Pennsylvania Supreme Court handed down a decision in *Kingsley International Pictures Corp. v. Blanc.*[18] After viewing the film *And God Created Woman*, the District Attorney of Philadelphia, defendant, advised plaintiff, distributor of the film, that the showing of the film would in defendant's judgment violate Section 528 of the Penal Code (invalidated in *Blumenstein*) and that anyone showing it would be arrested. Two Philadelphia theater owners then advised plaintiff that they would thus be forced to breach their contracts to show the movie. Kingsley thereupon brought an action to enjoin the District Attorney from interfering with the exhibition. The complaint alleged that (1) the statute is so vague as to be unconstitutional; (2) the film is not obscene; (3) plaintiff would suffer irreparable injury if not given relief; (4) there would be a multiplicity of suits between plaintiff and its many exhibitors. After the action for injunction was begun, the two Philadelphia exhibitors showed the film and were arrested. The Pennsylvania Supreme Court held that an injunction could be granted staying criminal proceedings by the District Attorney against exhibitors pending the determination of plaintiff's claims that the statute is invalid and that the particular film is not obscene.

Although recognizing that equity usually will not interfere with criminal proceedings, the court distinguished the instant situations. The general rule is based on the idea that the individual has an adequate remedy at law by raising any possible defense at the criminal trial.[19] But here, the plaintiff's property would be seriously injured by the actions of the District Attorney; yet plaintiff would not be party to any resulting criminal action against the various exhibitors. Since Kingsley had no remedy at law, equity has jurisdiction.

Again Justice Musmanno felt compelled to dissent from the majority opinion which to him, combined with the *Hallmark* and *Blumenstein* cases, reduced prosecution machinery against obscene films "to a shambles." He disputes that plaintiff was without adequate remedy at law. By rapid disposition of the criminal case, as wished by the District Attorney but opposed by plaintiff and the exhibitors, the doubt as to the status of the law and the obscenity of the film would be determined without resort to equity. By this

17. Roth v. United States, supra note 4 at 491.

18. 396 Pa. 448, 153 A.2d 243 (1959); not to be confused with Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959).

19. In re Sawyer, 124 U.S. 200, 210 (1888); Duquesne Light Company v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954).

solution plaintiff would then be apprised of the facts and law in which he was interested without an undue loss of money; yet the public interest would be served by preventing display of an allegedly obscene movie. Justice Musmanno regrets that nowhere has the court expressed concern over the possible deleterious effects of the film on the pubilc and its interest in having laws enforced. The District Attorney is obligated to enforce laws passed by the General Assembly to protect the people from those who would attack the public morals by obscene movies. "That is what District Attorney Victor Blanc attempted to do in this case and it is incredible that he should be restrained through the processes of law from doing what the law required him to do." By means of the injunction and delay in final determination, Kingsley

> . . . has squeezed every possible lucrative return out of the film. It has been run and re-run in many theatres so that even if the injunction Kingsley asked for were denied it would lose nothing because the picture has by now completely exhausted its profits-making potentialities. Thus, Equity has been made the vehicle for a money-making scheme on a product which, so far as this Court knows, may be the filthiest film ever made.[20]

On July 26, 1961, The Pennsylvania court drove its latest coffin nail into Commonwealth regulation of obscenity and lewdness in publicly-shown movies. In *William Goldman Theatres, Inc. v. Dana*,[21] it resolved the question unanswered by *Hallmark* that no precensorship of the right to communicate thoughts and ideas was permissible under the Pennsylvania Constitution. The court held that the Motion Picture Control Act of 1959 was invalid as violative of the Federal and Pennsylvania Constitutions.[22] This law was the Pennsylvania legislature's attempt to fill the gap created by the *Hallmark* decision. Under the Act, a board of censors is created by gubernatorial appointment of members whose only qualification is residency. All films for public showing, with exceptions for organizations, schools or charities, must be registered with the board at least forty-eight hours before the first showing. At any time *after* the first showing, the board may require an exact copy of the film for review. A film may be generally disapproved as obscene or disapproved for showing to children because it is obscene or incites to crime. Anyone showing or advertising a disapproved film may be punished by six months imprisonment and/or a $500 to $1,000 fine. After disapproval of a film, the person who submitted it for examination may demand a re-examination by the board in his presence and then appeal to the county court of common pleas. An injunction to restrain showing of a prohibited film may be applied for by the board in the court of common pleas.

The majority opinion by Chief Justice Charles Alvin Jones rests upon

20. Kingsley International Pictures Corp. v. Blanc, supra note 18 at 467-8, 153 A.2d at 252.
21. Supra note 1.
22. Pa. Stat. Ann. tit. 4, §§ 70.1-70.14 (1959).

several points varying in weight. Perhaps its strongest argument is that the statute offends the due process clause of the Fourteenth Amendment. Criticism is directed at the lack of qualifications of the censors and the vagueness of the standard by which they would decide. This criticism is not without merit. In an area so touched by controversy even among "experts" (who may be sociologists, literary authorities, et cetera), it is difficult to justify a determination by two persons whose only qualification is residency. Perhaps a number closer to the number in juries would decrease the possibility of arbitrary or prejudiced decisions. Chief Justice Jones notes that the board's determination is made without opportunity for the registrant to present his evidence and opinion, and that upon appeal to the court of common pleas registrant may win only by establishing that the board acted unreasonably and arbitrarily. There is not a trial *de novo*.

The court views the statute as an attempt to meet the standard of obscenity adopted by the United States Supreme Court in *Roth*, but it maintains that the *Roth* test required that the allegedly obscene utterance be considered "as a whole." Here the board *may* condemn a single frame or view. This distinction is believed by the court to be sufficient, but a differently-inclined court might well have looked to the spirit which was implicit in *Roth* rather than stretching to find a point of distinction.

Objection is made to a one dollar annual registration fee and a fee of fifty cents for each twelve hundred lineal feet of film listed with the board. This is "a plain attempt to tax the exercise of the right of free speech, a right that exists wholly apart from State authority and whose utilization a State may not, therefore, license."[23] But this sum is small compared to the profits of movie exhibitors. It is not an attempt to regulate expression by this exaction, but a demand by the State for a reasonable fee to cover the expenses of a control board.[24]

The main objection of the court to the Act is that it is a precensorship of expression which is forbidden by the Pennsylvania Constitution. Article I, Section 7, declares that "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." The Chief Justice says this sentence "is a direct inhibition on previous restraint of an exercise of the protected rights. . . ."[25] The Act "expressly restrains" the first showing of a film for forty-eight hours after notice has been given to the board. However, this is looking at the statute backwards. The exhibitor is free to show the film. When he makes his decision as to time, he must then give the board two days notice. The board may take no action to interfere with that first showing.

23. William Goldman Theatres, Inc. v. Dana, supra note 1 at —, 173 A.2d at 67.
24. Clyde Mallory Lines v. Alabama, 296 U.S. 261, 267 (1935).
25. Supra note 1 at —, 173 A.2d at 61.

The court maintains that unless there has been a court determination (in a criminal proceeding for showing an obscene movie) that a movie is obscene, and thus not constitutionally protected speech, the exhibitor must be free to show it. Several cogent and appealing arguments against the majority's invalidation of the statute have been made by Justice Eagen dissenting. Addressing himself to the contention that prior censorship of speech is allowable in Pennsylvania, he notes that many of the same men who worked on the Pennsylvania Constitution were present at the framing of the Federal. Their actions and fears were in the same context in both instances. Throughout the years Pennsylvania courts have consistently relied on federal decisions on the United States Constitution in interpreting the State document, and the United States Supreme Court has ruled that prior restraint is not precluded.[26]

The majority opinion also holds that the Act conflicts with the right to trial by jury as guaranteed by Article I, Sections 6 and 9. Since obscenity was a crime at common law which allowed a jury trial, exhibitors here should have the obscenity of a film determined by a jury. Justice Eagen's dissent notes, however, that the legislature is free to create new offenses and preclude trial by jury. Here the board makes a determination as to the obscenity of a film *before* anyone is charged with a crime. The new offense created is the showing or advertising of a disapproved film. Before making himself subject to criminal penalties, the exhibitor may appeal the board's finding to a court. Justice Musmanno analogizes:

> When meat inspectors condemn certain meat as tainted, the butcher may not ask for a jury to smell the meat and count the organisms in it before the government may act. When a barber maintains an unhygienic shop and he is ordered to close his shop he may not insist that a jury be called to examine the sink and cuspidors before he may be cited for violating the health laws.[27]

Two major objections may be made to the majority's handling of this problem. First, the court does what Justice Eagen calls "a little selective picking" from the State and Federal Constitutions. The *Burstyn* decision, based on the First and Fourteenth Amendments, held that motion pictures were included under free speech and press protection. From this decision, the court concludes impliedly that they are also protected by the State Constitution. Then, however, the court strikes off on its own, ignoring what United States Supreme Court decisions do not suit its purposes. It uses *Winters v. New York* to the effect that a statute so vague and indefinite as possibly to permit sanctions against protected free speech is void;[28] yet, it ignores the clear import of *Roth* that impossible standards of definiteness are not required. It cites *Thomas v. Collins*[29] to demonstrate the priority and

26. Times Film Corp. v. City of Chicago, supra note 8.
27. Supra note 1 at —, 173 A.2d at 84.
28. 333 U.S. 507 (1947).
29. 323 U.S. 516 (1945).

sanctity of the First Amendment-type freedoms but holds that the *Times Film* decision that prior censorship of movies is valid under the United States Constitution does not apply to the Pennsylvania Constitution. As Justice Eagen relates, appellees in the instant case twice requested a postponement of the oral argument to await the decision in *Times Film* on the ground that it "involved a question intimately related to the instant appeals." The court granted the postponements, but since the decision was not to their liking, they passed over it. Such prejudicial picking and choosing cannot help but detract from the intellectual esteem in which the opinion is held.

The second major criticism to be leveled at the court is its utter disregard for the interests of the general public. The great solicitude for the "right" of movie-makers and exhibitors to show their products uninterrupted until a final court determination is clearly evidenced:

> No matter how laudably inspired or highly conceived a sumptuary statute may be, if its restrictions impinge upon the freedoms of the individual thus constitutionally guaranteed, it cannot stand. The harm to our free institutions, which the enforcement of such a statute would entail, would be of far greater portent than the evil it was designed to eradicate.[30]

This statement was made just after the court cited *Thomas v. Collins* on the preferred status of First Amendment freedoms. But why did the court then ignore *Times Film*? There it was said:

> Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of, such an evil, previous restraint cannot be justified. With this we cannot agree. We recognized in *Burstyn, supra*, that "capacity for evil . . . may be relevant in determining the permissible scope of community control," at p. 502, and that motion pictures were not "necessarily subject to the precise rules governing any other particular method of expression. Each method," we said, "tends to present its own peculiar problems." At p. 503. . . . It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of *unreasonable* strictures on individual liberty resulting from its application in particular circumstances.[31] (Emphasis supplied.)

Nowhere has the Pennsylvania court considered whether the restrictions of the Motion Picture Control Act of 1959 were unreasonable. Nowhere has it considered the effect on the public of unrestricted showing of any movie. It has not "balanced" the individual and the public interests. It has not given cognizance to the existence of the police power. Justice Eagen's dissent quoted a statement of the court in a previous decision:

> The possession and enjoyment of all rights are subject to such

30. Supra note 1 at —, 173 A.2d at 62.
31. Supra note 8 at 49, 50.

> reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.[32]

The plight of the oppressed movie-producer or exhibitor trying to make his next million is indeed touching. Now, thanks to the Pennsylvania Supreme Court's opinions in the above decisions, he is free to display his movies, no matter how corrupting and immoral, while he awaits (and perhaps by delaying tactics postpones) a court determination on his film. By that time, his film's appeal will have expended itself, and he may begin showing another more dangerous than the first. Indeed, Justice Musmanno may be correct in fearing his state may become "a cinematic Gomorrah." The legislature has once again been defeated in its attempt to protect a vulnerable public from obscenity. It would appear that even the so-called "stag movies" could now be shown in theaters to children and teen-agers. Hopefully, the legislature will continue trying to serve the public need for control, but how many times must it suffer reverses at the hand of an unbending court? This is the plight of Pennsylvania now. It still may be aided by informal means of control used in many states—self-regulation within the movie industry by the Production Code or private action groups such as the Legion of Decency, the National Board of Review, or the "green sheet" compiled through the efforts of several national organizations.[33] Although these unofficial controls have had years to develop, their effectiveness remains uncertain, and does not as yet approximate statutory regulation. In addition, most states have criminal statutes which can punish exhibitors for showing obscene movies although they have no boards of censors. These statutes have not been attacked as in *Blumenstein*. Pennsylvania has tried to give its citizens better protection than is afforded in other states, but apparently the court does not recognize the need.

ROGER V. BARTH

INVOLUNTARY WAGE ASSIGNMENTS: A NEW APPROACH FOR EFFECTIVE ENFORCEMENT OF SUPPORT OBLIGATIONS

Moral obligations to support dependent persons have been supplemented by both the common law and statute. As a moral duty alone is legally unenforceable, the common law courts and later the legislatures have been confronted with the problem of either imposing a legal duty upon the proper persons or allowing the moral obligation to result, through inaction, in a public burden. The development of the legal duty at common law was a restrictive

32. Buffalo Branch, Mutual Films Corp. v. Breitinger, 250 Pa. 225, 95 Atl. 433, 436 (1915).

33. See Note, Entertainment: Public Pressures and the Law, 71 Harv. L. Rev. 326 (1957).