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Recent Decisions: Motion Picture Censorship

"No one has the moral or legal right to exhibit obscene movies."¹ This seems to be a fundamental principle, yet much difficulty has been encountered in attempting to enact legislation to implement it. In *William Goldman Theatres, Inc. v. Dana*,² the Supreme Court of Pennsylvania indicated to the legislature this difficulty of implementation by striking down that state's Motion Picture Control Act of September 17, 1959 as unconstitutional.

On two prior occasions³ the Pennsylvania court had similarly condemned statutes passed to protect the people "against the flood of cinematic filth always pounding at the borders of . . . [the] Commonwealth."⁴ The Motion Picture Censorship Act of May 15, 1915, as amended by the Act of May 8, 1929,⁵ which prohibited the censorship board from approving such films "as are sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals,"⁶ was struck down in 1956 as being too vague and indefinite in its terms so as to offend the due process clause of the fourteenth amendment.⁷ The same fate befell Section 4528 of the Pennsylvania Penal Code which prohibited "the exhibition of fixed or moving

pictures, of a lascivious, sacrilegious, obscene, indecent, or immoral nature and character, or such as might tend to corrupt morals. . . ."⁸ The 1959 statute, declared unconstitutional in the instant case, was enacted as a result of the two prior failures of the state's attempts at censorship. The wording of the statute is indicative of the consideration given to numerous United States Supreme Court cases dealing with the problem.⁹

The Pennsylvania statute¹⁰ in the instant case provided for a board of three members, whose only qualification was that they be residents of Pennsylvania.¹¹ The board had to be notified at least forty-eight hours prior to any sale, lease, loan, exhibition or use of any film.¹² At any time after the first showing of a film, the board, for the purpose of review, could request that it be furnished a copy of the film.¹³ The standard adopted by the act was: "The board shall have the power to examine any film . . . which shall have been exhibited at least once . . . in order to determine whether such film . . . is *obscene* or *unsuitable for children*."¹⁴ The terms are clearly defined in the statute in what appears to be an obvious attempt by the legislature to escape the "too vague and indefinite" condemnation imposed upon prior censorship statutes.¹⁵ These two cri-

¹ *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, —, 173 A.2d 59, 70 (dissenting opinion), cert. denied, 368 U.S. 897 (1961).

² 405 Pa. 83, 173 A.2d 59, cert. denied, 368 U.S. 897 (1961).

³ *Commonwealth v. Blumenstein*, 396 Pa. 417, 153 A.2d 227 (1959); *Hallmark Prods., Inc. v. Carroll*, 384 Pa. 348, 121 A.2d 584 (1956).

⁴ *William Goldman Theatres, Inc. v. Dana*, supra note 1 at —, 173 A.2d at 79 (dissenting opinion).

⁵ PA. STAT. ANN. tit. 4, §§ 41-58 (1930).

⁶ PA. STAT. ANN. tit. 4, § 43 (1930).

⁷ *Hallmark Prods., Inc. v. Carroll*, supra note 3 at —, 121 A.2d at 589.

⁸ PA. STAT. ANN. tit. 18, § 4528 (1945).

⁹ See, e.g., *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Roth v. United States*, 354 U.S. 476 (1957); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁰ PA. STAT. ANN. tit. 4, §§ 70.1-14 (Supp. 1960).

¹¹ PA. STAT. ANN. tit. 4, § 70.2 (Supp. 1960).

¹² PA. STAT. ANN. tit. 4, § 70.3 (Supp. 1960).

¹³ *Ibid.*

¹⁴ PA. STAT. ANN. tit. 4, § 70.5 (Supp. 1960) (emphasis added).

¹⁵ Section 70.1, in defining the word "obscenity," adopted the definition as set out in the *Roth* case,

teria were the only grounds upon which a film could be censored. A party receiving an adverse finding of the board had the right to demand a re-examination by the board in his presence and, from this re-examination, a right to appeal to a court of law.¹⁶

The Court predicated its finding of unconstitutionality on two bases. First, the act violated the constitutional guarantee of a jury trial in that it provided for a hearing before the board members and not before an impartial jury of the vicinage; second, the act violated the constitutional prohibition of prior restraint on communications. Regarding the first, the Court reasoned that the statute was an expression of the common-law crime of uttering an obscene statement.¹⁷ And since a crime was committed the accused was entitled, not merely to a board hearing as provided for in the act, but to a trial by an impartial jury. The Court predicated this right to jury trial on the Pennsylvania constitution which states that "trial by jury shall be as heretofore . . ."¹⁸ (*i.e.*, it shall exist in all cases in which such right existed prior to the constitution), and *i.e.*, if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient [interests]," the film is "obscene." *Roth v. United States*, *supra* note 9 at 489. This is the accepted test of obscenity applied today. This section goes on to define "unsuitable for children" to mean "a film . . . which is obscene or which incites to crime." "Incites to crime" is defined as "a film . . . which represents or portrays as acceptable conduct or as conduct worthy of emulation the commission of any crime, or the manifesting of contempt for law." It appears that the legislative standard incorporated in this act is far from being "too vague and indefinite."

¹⁶ PA. STAT. ANN. tit. 4, § 70.9 (Supp. 1960).

¹⁷ *William Goldman Theatres, Inc. v. Dana*, 405 Pa. 83, —, 173 A.2d 59, 64, *cert. denied*, 368 U.S. 897 (1961); see *Barker v. Commonwealth*, 19 Pa. 412 (1852), wherein defendant was convicted of uttering obscene matters.

¹⁸ PA. CONST. art. I, § 6.

which guarantees the accused, in a *criminal prosecution*, a trial by jury.¹⁹ The second basis for the decision was that the act violated the federal and state constitutional prohibitions of prior restraint on communications, such violations being contrary to the freedoms of speech and press.²⁰ The majority bottomed this conclusion on *Joseph Burstyn, Inc. v. Wilson*²¹ which brought motion pictures into the realm of the constitutional protections of freedom of speech and press. Thus, something impinging on these indispensable democratic freedoms is violative of the first and fourteenth amendments of the federal constitution and article I, section 7 of the Pennsylvania constitution. The Court found that section 3 of the act, requiring forty-eight hours notice to the board before a film is shown, is an express prior restraint on the initial showing.

[S]ubsequent showings are likewise subjected to previous restraint for the reason that, if the motion picture is exhibited after the censors have disapproved it, the exhibitor may be criminally punished upon proof, *not of showing a picture that is obscene or unsuitable for children, but merely upon proof of showing a picture the exhibition of which had been priorly restrained by the administrative action of the Board of Censors.*²²

Both of these conclusions of the majority

¹⁹ PA. CONST. art. I, § 9.

²⁰ *William Goldman Theatres, Inc. v. Dana*, *supra* note 17 at —, 173 A.2d at 61-64; see U.S. CONST. amend. I; PA. CONST. art. I, § 7.

Prior restraint is adequately defined as "administrative controls *prior to any publication*, such as licensing or other devices according to which no publication whatever may take place without prior approval of a public official." *William Goldman Theatres, Inc. v. Dana*, *supra* note 17 at —, 173 A.2d at 69 (dissenting opinion).

²¹ 343 U.S. 495 (1952).

²² *William Goldman Theatres, Inc. v. Dana*, *supra* note 17 at —, 173 A.2d at 64.

opinion were attacked in two dissenting opinions. They interpreted the act as simply establishing a system of administrative control, rather than creating a penal sanction. The act, according to the dissents, is analogous to the Pennsylvania Liquor Code and other administrative provisions which allow a commissioner or a board to make findings and levy penalties for violations of statutes in issue and which make no provision for a trial by jury.²³ On the issue of prior restraint, the dissents pointed out that it was recognized in *Near v. Minnesota*²⁴ that freedom of speech and press are not absolute rights and may be subject to prior restraint in certain limited areas. While thus finding that prior restraint per se is not a violation of either the federal or state constitution, the dissents stressed that the act does not, in fact, impose a prior restraint. It was their contention that the requirement of an initial showing before the board can view the film renders the issue of prior restraint moot.²⁵

The validity of administrative tribunals has long been recognized. The appointment of a board, commission or commissioner to determine both questions of law and fact is an essential part of our administrative procedure.²⁶ The Pennsylvania Motion Picture Control Act simply created an administrative board. In so doing, the legislature did not violate any constitutional guarantees.²⁷ The legislature may create new

²³ *Id.* at —, 173 A.2d at 76 (dissenting opinion); see PA. STAT. ANN. tit. 47, §§ 1-101 to 9-902 (1951). See especially § 7-741 which prescribes the duty of the board.

²⁴ 283 U.S. 691, 716 (1931).

²⁵ *William Goldman Theatres, Inc. v. Dana*, *supra* note 17 at —, 173 A.2d at 71-76 (dissenting opinion).

²⁶ See DAVIS, ADMINISTRATIVE LAW, § 1.01 (2d ed. 1959).

²⁷ A statute authorizing an administrative tribunal to hear claims against a municipal corporation

offenses and prescribe the mode of ascertaining the guilt of those violating them without providing for a jury trial.²⁸ The existence of administrative tribunals is predicated upon this legislative prerogative. And since the guarantee of trial by jury extends only to criminal proceedings and to those common-law offenses existing prior to the constitution,²⁹ the right to trial by jury is not violated in an administrative hearing. The act was apparently not intended to be a penal law, but merely administrative legislation passed to fulfill an immediate need of the people of Pennsylvania. The purpose of such an act is to secure decency and morality in the motion picture industry, a purpose which falls within the police power of the state.³⁰ The welfare of the state demands that every effort be made to sustain such legislation.

The majority opinion, for reasons not apparent, overlooked the legislature's obvi-

was held valid under the seventh amendment because the proceeding was "not in the nature of a suit at common law." *Guthrie Nat'l Bank v. City of Guthrie*, 173 U.S. 528, 537 (1899).

²⁸ *Buffalo Branch, Mutual Film Corp. v. Breiting*, 250 Pa. 225, —, 95 Atl. 433, 438 (1915). See *Commonwealth ex rel. McClain v. Locke*, 72 Pa. 491 (1873) wherein Judge Agnew comments: "What is more common than to appoint commissioners under a law to determine things upon the decision of which the act is to operate in one way or another? . . . [T]ake the case of granting a license to keep an inn and sell liquor. The judge determines whether the license is necessary, and if not necessary, the law says to the applicant, 'No license.' The law takes effect just as the judge determines, yet who says it is the court that legislates? . . . [T]he true distinction, I conceive, is this: The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Id.* at 498.

²⁹ PA. CONST. art. I, §§ 6, 9.

³⁰ *Block v. City of Chicago*, 239 Ill. 251, —, 87 N.E. 1011, 1013 (1909).

ous attempt at escaping condemnation of the act on grounds of prior restraint. The opinion failed to recognize how section 70.7, providing for one showing before the board could censor a film, avoided the constitutional bar of prior restraint. The Court, citing *Times Film Corp. v. City of Chicago*³¹ and *Near v. Minnesota*,³² conceded that not all prior restraint is unconstitutional and recognized the need for certain exceptions. While the issue of prior restraint formed the basis of the majority opinion, the dissents recognized that the act

³¹ 365 U.S. 43 (1961).

³² 283 U.S. 697 (1931).

made such a discussion an unrelated issue. The legislature was aware of this problem, and had attempted to escape involvement by providing for an initial showing prior to a board determination.

The difficulties involved in enacting censorship statutes are very apparent in the instant case. The Pennsylvania legislature took precautions to avoid the constitutional pitfalls to which similar legislation had fallen victim — yet the act was stricken down. An inescapable question has thus been created: What guides can a legislature utilize when drafting censorship statutes so as to be reasonably certain that the courts will sustain them?