St. John's Law Review

Volume 32
Number 1 *Volume 32, December 1957, Number 1*

Article 20

Motion Picture Censorship--License Denial on Grounds of Indecency--Held Invalid (Excelsior Pictures Corp. v. Regents, 3 N.Y.2d 237 (1957))

St. John's Law Review

the dissent's interpretation of *Gruner*[26] that the judgment lienor would have priority *only* if its lien had been perfected first. They also restricted the application of the majority's "general rule" to pledges of future crops[27] and mortgages of after-acquired property.[28] That rule would not apply here where there is an assignment of a future fund which is to arise out of a present property right, and which was originally advanced by the assignee. However valid this may appear,[29] the law now seems to be that an assignment of after-acquired property is inferior to a subsequent judgment creditor's lien. This is true even if the property had come into existence before the creditor's lien was obtained.[30]

Absent successful legislative action,[31] we may expect a decrease in the use of such assignments of future property as security, since such assignees will never be "secured" unless they enter into litigation. One wonders if justice, and business, would not be better served by giving priority to the first perfected claim.[32]

MOTION PICTURE CENSORSHIP—LICENSE DENIAL ON GROUNDS OF INDECENCY—HELD INVALID. — The New York State Board of Regents unanimously denied a license[1] to exhibit the film *Garden of*

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[26] See Matter of Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1947); Matter of Gruner, 4 M.2d 471, 74 N.Y.S.2d 38 (Surr. Ct. 1947).

[27] Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894).

[28] Zartman v. First Nat'l Bank, 189 N.Y. 267, 82 N.E. 127 (1907).

[29] It is to be noted that the reason for the "general rule" (see note 11 *supra*) actually does not apply. Only the proceeds of the assignee's extension of credit are governed by the assignment. Hence the proceeds of the property furnished by subsequent creditors do not go to the assignee.

As to the correct interpretation of *Matter of Gruner*, it is important to note that the state made no claim for taxes due for 1942 since it had not filed a claim for them until after the perfection of the assignee's lien. Matter of Gruner, 4 M.2d 471, 473, 74 N.Y.S.2d 38, 40 (Surr. Ct. 1947). Also, Chief Judge Conway, who concurred with the dissent in the instant case, wrote the majority opinion in the *Gruner* case.

[30] City of New York v. Bedford Bar and Grill, 2 N.Y.2d 429, 141 N.E.2d 575 (1957).

[31] In 1953, 1954 and 1955, the legislature introduced bills to give priority to bank-assignees. While both houses passed the bills in 1954 and 1955, the governor vetoed them without memoranda. See City of New York v. Bedford Bar and Grill, *supra* note 30, at 434, 141 N.E.2d at 577. This could be construed to mean that the legislature attempted to either nullify the lower court decisions in this area, or to change the existing law as expressed by the majority in the instant case.

[32] See Matter of Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1947); Matter of Gruner, 4 M.2d 471, 74 N.Y.S.2d 38 (Surr. Ct. 1947).

[1] N.Y. EDUC. LAW § 122, which provides that the Regents may refuse a license to exhibit if it finds the motion picture to be ". . . obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime. . . ."

Eden on the grounds that it was "indecent." The film depicts, in color, life in a nudist camp wherein both sexes appear nude together, although their private parts are not shown to the viewing audience. The Appellate Division, in an Article 78 proceeding brought by the exhibitor, reversed the Board's determination. The Court of Appeals *held* that indecency cannot be the basis for movie censorship unless it is construed to mean obscene [2] and that this picture was not obscene as a matter of law.[3] *Excelsior Pictures Corp. v. Regents*, 3 N.Y.2d 237, 144 N.E.2d 31 (1957), *reargument denied*, — N.Y.2d — (1957).

It is admitted that freedom of speech is not absolute.[4] That certain types of expression, particularly obscenity, can be punished by law is universally accepted [5] and is the rule today as evidenced by obscenity statutes in every state in the union.[6] However, it has

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[2] The majority opinion stated that "indecency" has always been construed, in New York, to mean "obscenity." Excelsior Pictures Corp. v. Regents, 3 N.Y.2d 237, 243, 144 N.E.2d 31, 35 (1957). This construction is based on the maxim "noscitur a sociis". It should be noted that the Court of Appeals previously attempted to do this with the term "immoral" but the Supreme Court nevertheless reversed the decision. Superior Films Inc. v. Department of Educ., 346 U.S. 587 (1954) (per curiam).

[3] The Court distinguished the traditional definition of obscenity as stated in Regina v. Hicklin, L.R. 3 Q.B. 360 (1868). The *Hicklin* test was that the tendency of the matter, charged as obscenity, is to deprave and corrupt those whose minds are open to such influences and who may come into contact with the matter. The traditional test is based on the matter's influence on the average person.

[4] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[5] See, *e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952); Thomas v. Collins, 323 U.S. 516 (1945); Near v. Minnesota, 283 U.S. 697 (1931); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Patterson v. Colorado, 205 U.S. 454 (1907); Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304 (1825).

[6] ALA. CODE ANN. tit. 4, § 373 (1940); ARIZ. REV. STAT. ANN. § 13-532 (1956); ARK. STAT. §§ 41-2702 to -2704 (1956); CAL. PEN. CODE ANN. § 311 (West 1955); COLO. REV. STAT. ANN. §§ 40-9-16 to -19 (1953); CONN. GEN. STAT. § 8567 (1949); DEL. CODE ANN. tit. 11, § 711 (1953); D.C. CODE ANN. § 22-2001 (1951); FLA. STAT. ANN. §§ 847.01, 847.06 (Supp. 1956); GA. CODE ANN. §§ 26-6301 to -6305 (Supp. 1956); IDAHO CODE ANN. §§ 18-4101 to -4102 (1947); ILL. ANN. STAT. c. 38, §§ 468-71 (Smith-Hurd 1956); IND. ANN. STAT. §§ 10-2803 to -2805 (Burns Supp. 1957); IOWA CODE ANN. §§ 725.3 to .11 (1950); KAN. GEN. STAT. ANN. §§ 51-112, 21-1101 to -1106 (1949); KY. REV. STAT. ANN. § 436.100 (Baldwin 1955); LA. REV. STAT. tit. 14, § 106 (Supp. 1956); ME. REV. STAT. ANN. c. 134, §§ 24-29 (Supp. 1957); MD. ANN. CODE art. 27, §§ 514-16 (Supp. 1957); MASS. ANN. LAWS c. 272, §§ 28-32 (Supp. 1956); MICH. COMP. LAWS §§ 750.142-43, 750.343-46 (1948); MINN. STAT. ANN. §§ 617.24 to .26 (1945), 5 MINN. SESS. LAW SERV. c. 323 (1957); MISS. CODE ANN. §§ 2286-89 (1956); MO. ANN. STAT. §§ 563.270 to .290, 563.310 (Vernon 1949); MONT. REV. CODES ANN. §§ 94-3601 to -3603 (Supp. 1957); NEB. REV. STAT. §§ 28-921 to -926 (1956); NEV. REV. STAT. § 201.250; N.H. REV. STAT. ANN. §§ 571:14 to :19 (1955); N.J. STAT. ANN. §§ 2A:115-1 to -4 (Supp. 1956); N.M. STAT. ANN. §§ 14-21-2, 14-21-12 (1953); N.Y. PEN. LAW §§ 1140-43 (Supp. 1957); N.C. GEN. STAT. §§ 14-189 to -194 (Supp. 1955); N.D. REV. CODE §§ 12-2107 to -2110, 40-0501(62) (1943); OHIO REV. CODE

been consistently maintained by many that any form of *previous restraint* [7] amounting to censorship of speech or press is unconstitutional.[8] But it was not until 1952, with the decision in *Burstyn v. Wilson*,[9] that censorship of motion pictures raised a constitutional question since before this time they were not considered part of the press or an organ of public opinion.[10]

It is now recognized that the protection of the first and fourteenth amendments ". . . even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . ." [11] The majority opinion in the instant case maintains that obscenity is such an exceptional case.[12] Judge Desmond, in his opinion, relied in part on the decision in *Roth v. United States* [13] in which Justice Brennan stated: "We hold that ob-

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ANN. §§ 2905.34 to .37 (Baldwin 1957); OKLA. STAT. ANN. tit. 21, § 1021 (Supp. Aug. 1957); ORE. REV. STAT. §§ 167.150, 167.152 (1955); PA. STAT. ANN. tit. 18, §§ 3831-33, 4524 (Purdon Supp. 1956); R.I. GEN. LAWS c. 610, §§ 13-15 (1938); S.C. CODE §§ 16-414 to -415 (1952); S.D. CODE §§ 13.1722 to .1723 (1939); TENN. CODE ANN. § 39-3001 (Supp. 1957); TEX. PEN. CODE ANN. art. 526-27, 612 (Vernon Supp. 1956); UTAH CODE ANN. §§ 76-39-1 to -39-4 (1953); VT. STAT. §§ 8490-92 (1947); VA. CODE ANN. §§ 18-113 to -113.1 (Supp. 1956); WASH. REV. CODE §§ 9.68.010 to .020 (1952); W. VA. CODE ANN. § 6066 (1955); WIS. STAT. §§ 944.21 to .22 (1955); WYO. COMP. STAT. ANN. §§ 9-513 to -514 (1945).

[7] For the purpose of this article, previous restraint is defined as interference with a publication or movie before it is published or produced and before it reaches the market for sale or exhibition. The terms "censorship" and "licensing" are used interchangeably and are defined as means of effecting previous restraint.

[8] The main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments. . . ." Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313 (1825), quoted with approval in Patterson v. Colorado, 205 U.S. 454, 462 (1907). "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly. . . ." Whitney v. California, 274 U.S. 357, 378 (1927) (concurring opinion). *Accord*, Saia v. New York, 334 U.S. 558 (1948); Thomas v. Collins, 323 U.S. 516 (1945); Patterson v. Colorado, 205 U.S. 454 (1907); 4 BLACKSTONE, COMMENTARIES *151-52; 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 600 (2d ed. 1851).

[9] 343 U.S. 495 (1952).

[10] Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915).

[11] Near v. Minnesota, 283 U.S. 697, 716 (1931). In Dennis v. United States, 341 U.S. 494, 503 (1951), the Court stated, "An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and consideration." And in Burstyn v. Wilson, 343 U.S. 495, 502 (1952), the Court, although refusing to make an exception to the rule against previous restraint in this particular case, stated: "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."

[12] Excelsior Pictures Corp. v. Regents, 3 N.Y.2d 237, 241, 144 N.E.2d 31, 34 (1957).

[13] 354 U.S. 476 (1957).

scenity is not within the area of constitutionally protected speech or press." [14] Since the *Roth* case determined the constitutionality of obscenity statutes, not of previous restraint statutes,[15] it might be argued that the above quoted phrase was in reference to punishment for past abuses and that an application of the decision to censorship is beyond its scope.[16] But it appears that the *Roth* case affirmed that which the Court has long presumed; that obscenity is subject to censorship. In *Near v. Minnesota,*[17] the Court in listing several exceptions to the general rule against previous restraints stated: "On similar grounds, the primary requirements of decency may be enforced against obscene publications." [18] And in *Chaplinsky v. New Hampshire:* [19] "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . ." [20]

In fact there is substantial justification for the belief that the Court does not even include the prohibition of obscenity within its concept of previous restraint. It is the character of the right, not the limitation, which determines where the individual's freedom ends and the state's power begins.[21] "Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances: the lewd and obscene. . . ." [22] Even Justice Douglas, a relentless foe of all types of previous restraint, stated that ". . . the freedom to speak is not absolute; the teaching of methods of terror and other seditious

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[14] Roth v. United States, 354 U.S. 476, 485 (1957).

[15] 18 U.S.C. § 1461 (1952); CAL. PEN. CODE ANN. § 311 (West 1955).

[16] This argument receives support from further statements by Justice Brennan in the *Roth* case. ". . . [W]e hold that these statutes . . . do not offend constitutional safeguards against convictions based upon protected material or fail to give men in acting adequate notice of what is prohibited." Roth v. United States, 354 U.S. 476, 492 (1957). And Justice Brennan's individual position on censorship might well have been voiced in his dissenting opinion in Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), wherein he stated: "A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." Roth v. United States, *supra* at 448.

[17] 283 U.S. 697 (1931).

[18] *Id.* at 716.

[19] 315 U.S. 568 (1942).

[20] *Id.* at 571-72. In a concurring opinion in the *Burstyn* case, Justice Frankfurter indicated that the problem is not so easy of solution that it can be decided that motion pictures ". . . may be subjected to unrestricted censorship, or that they must be allowed to be shown under any circumstances. . . . [O]nly the tyranny of absolutes would rely on such alternatives to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities." Burstyn v. Wilson, 343 U.S. 495, 517-18 (1952) (concurring opinion).

[21] Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

[22] Dennis v. United States, 341 U.S. 494, 544 (1951) (concurring opinion).

conduct should be beyond the pale [of the first amendment] along with obscenity and immorality." [23] In several cases the Court has declared a statute unconstitutional as an attempt to license or censor the press, but in these cases it is strongly indicated that the same statutes would not be licensing or censorship if they were limited to restraining obscenity or other matter offensive to public morals.[24]

However, the fact that obscene publications are not protected from previous restraint does not permit a state to establish a complete and unbridled system of censorship.[25] A licensing statute must be clearly drawn and well-defined.[26] For example, an Illinois obscenity statute [27] was held constitutional in *Beauharnais v. Illinois* [28] because it was ". . . not a catchall enactment . . ." but was ". . . specifically directed at a defined evil. . . ." [29]

By a series of Supreme Court decisions,[30] many of the grounds for refusal of a license listed in Section 122 of the New York Education Law [31] have been declared unconstitutional. The terms "obscene" and "indecent" remain, but without any definition or ex-

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[23] *Id.* at 581 (dissenting opinion).

[24] See, *e.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938).

[25] Burstyn v. Wilson, 343 U.S. 495 (1952). "If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here. . . ." *Id.* at 503.

[26] Connally v. General Construction Co., 269 U.S. 385 (1926). ". . . [T]he decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. . . ." *Id.* at 391, quoted with approval in Winters v. New York, 333 U.S. 507 (1948).

[27] ILL. ANN. STAT. c. 38, § 471 (1934).

[28] 343 U.S. 250 (1952).

[29] *Id.* at 253.

[30] Butler v. Michigan, 352 U.S. 380 (1957) ("tending to the corruption of the morals of youth"); Superior Films Inc. v. Department of Educ., 346 U.S. 587 (1954) (per curiam) ("harmful," "immoral" and "tend to corrupt morals"); Burstyn v. Wilson, 343 U.S. 495 (1952) ("sacrilegious"); Gelling v. Texas, 343 U.S. 960 (1952) (per curiam) ("prejudicial to the best interests of the people of the city").

[31] In addition to New York, there are twelve states which have licensing statutes. Since, for the most part, they are similar in substance to the New York statute the Supreme Court decisions apply equally to all. The other states are: FLA. STAT. ANN. §§ 521.01 to .04 (1943); GA. CODE ANN. §§ 26-6301a to -6307a (1953) (excludes motion pictures); KAN. GEN. STAT. ANN. §§ 51-101 to -112 (1949); LA. REV. STAT. tit. 4, §§ 301-07 (1950); MD. ANN. CODE art. 66A (Supp. 1956); MO. ANN. STAT. § 74.143(5) (Vernon 1949) (delegates power of censorship to cities of the first class); OHIO REV. CODE ANN. § 3305.01 (Baldwin Supp. 1957); PA. STAT. ANN. tit. 4, §§ 41-58 (Purdon 1956); TENN. CODE ANN. § 6-202(9), (11) (1956) (delegates licensing power to municipalities); TEX. PEN. CODE art. 612 (Vernon 1952) and TEX. REV. CIV. STAT. art. 1175(22) (Vernon 1953) (delegating power of censorship to municipality, as interpreted by Zydias Amusement Co. v. City of Houston, 185 S.W. 415 [Tex. Civ. App. 1916]); UTAH CODE ANN. § 10-8-41 (1953) (delegates municipality authority to suppress obscenity); VA. CODE ANN. §§ 2-98 to -116 (1950).

planation.[32] Judge Burke, in *Excelsior Pictures Corp. v. Regents*,[33] maintained that "indecency" was clearly defined, for the purpose of the instant case, by reference to Section 1140b of the Penal Law [34] which makes a misdemeanor any exposition by a person of his private parts in the presence of two or more persons of the opposite sex, whose private parts are similarly exposed. That a term in one statute can satisfy the requirement of a "clearly drawn" statute by reference to an entirely different statute is questionable. In any case, the definition is insufficient as a full definition of "indecent," since, as conceded by Judge Burke, it is applicable only to facts similar to those of the instant case.[35] Since licensing statutes will be subject to close examination by the Supreme Court [36] some revision of the New York statute seems necessary. It is unfortunate, therefore, that Judge Desmond's opinion is not too helpful to the legislators who will be faced with the task of defining and clarifying so nebulous an area.

NEW YORK PRACTICE — EVIDENCE — TESTIMONY GIVEN AT LUNACY INQUEST BY DECEASED WITNESSES HELD ADMISSIBLE IN PROBATE PROCEEDING. — Decedent was declared insane in 1930, approximately nine months after executing a will. When she died in 1952, the will was denied probate on the basis of testimony given by two witnesses at the lunacy proceeding. These two witnesses were themselves deceased at the time of probate, but their prior testimony was admitted under Section 348 of the New York Civil Practice Act.[1] The Court of Appeals, by a divided court, *held* that the testimony

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[32] N.Y. EDUC. LAW § 122a (Supp. 1957) defines those terms previously held unconstitutional (see note 31 *supra*), but gives no definition of "obscene" or "indecent."

[33] 3 N.Y.2d 237, 253, 144 N.E.2d 31, 41 (dissenting opinion).

[34] N.Y. PEN. LAW § 1140b (1951).

[35] Excelsior Pictures Corp. v. Regents, 3 N.Y.2d 237, 253, 144 N.E.2d 31, 41 (1957) (dissenting opinion).

[36] "[A]ssuming that a state may establish a system for the licensing of motion pictures . . . our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored." Burstyn v. Wilson, 343 U.S. 495, 506 (1952) (concurring opinion). See also Times Film Corp. v. Chicago, 244 F.2d 432 (7th Cir.), *rev'd*, — U.S. — (Nov. 12, 1957).

[1] The statute provides that ". . . the testimony of the decedent . . . taken or read in evidence at the former trial or hearing . . . may be given or read in evidence . . . upon any subsequent trial or hearing . . . of the same subject-matter in the same or another action or special proceeding between the same parties to such former trial or hearing, . . . by either party to such subsequent action or special proceeding. . . ." N.Y. CIV. PRAC. ACT § 348.