City of St. Paul — Plaintiff

vs.

Harry Fredkove — Defendant

(Municipal Court, St. Paul

November, 1953)

(The defendant, Fredkove, was charged with selling a novel, "Women's Barracks" in the City of St. Paul in violation of an ordinance making it a misdemeanor to sell "any indecent or lewd book." The following excerpts are from the opinion of James Otis [then] Judge of the Municipal Court.)

The sole issue of law and fact for the Court to determine is whether or not the book, "Women's Barracks", is indecent or lewd within the meaning of the ordinance.

The story of "Women's Barracks" is that of 500 women whose ages varied from 16 or 17 to middle age, the group consisting of the children of disturbed or broken homes, servants, prostitutes, adventuresses, emancipated women and career women. Much of the book is devoted to a description of the routine barracks life endured by the French Women's Army Corps in London, dull, vexatious and uninteresting. There are descriptions of bombings of London and the devastation resulting from V-1 and V-2 weapons. In addition, considerable space is devoted to a consideration of the moral and spiritual justification for war and the objectives for which the French and English were fighting. References are made to the dream of a new homeland for persons of Jewish origin. One chapter is devoted in part to a description of General DeGaulle's visit and the reaction which the women had to his appearance at their headquarters. For the most part the duties of the women were routine and unchallenging, the period described being one in which they are waiting for an opportunity to serve in France after the formation of a second front. Their assignments, therefore, consisted mostly of make-work. With little or no opportunity to accomplish the objectives for which they entered the corps, loneliness and restlessness led some of them to seek excitement in the form of sexual experience. In the end, however, those who sought release from monotony in such adventures were frustrated and embittered. There is no suggestion that any of the Lesbian relationships had any sustained attraction or resulted in anything but disillusionment and revulsion. Two of the heterosexual relationships resulted in either suicide or attempted suicide.

Whether the book is well written or enduring is not for this Court to determine. It is enough that it appears to be a sincere effort to describe a period of recent history, one in which women were organized to replace men in non-combat units during the prosecution of a total war, and it suggests that women of varying ages and cultural background sometimes reveal an earthy common denominator when required to share together experiences which are alternately boring and terrifying.

As other courts have pointed out, a decision in matters of this kind should not depend on the instincts of the judge, but should be determined by tests applied by him pursuant to explicit rules of law.

In determining the meaning of the words "lewd" and "indecent", the standard dictionary is of little assistance, since all such words are defined only as synonyms of one another. For example, the word "lewd" is defined in Black's Law Dictionary, 4th edition, 1951, as "obscene, lustful, indecent, lascivious or lecherous." The word "indecent" is there defined as "offensive to common propriety, offending against modesty or delicacy, grossly vulgar, obscene, lewd, unseemly, unbecoming, indecorous, unfit to be seen or heard."

No discussion of the law of obscenity is complete without some mention of the probable effect of censorship laws in protecting the morals of youth. Bantam Books v. Melko, 96 A 2d 47 (Sup. Ct., N. J., 1953) indicates that surveys in New York and Maryland have disclosed the fact that virtually none of the young people interviewed designated obscene literature as a source of information on the subject of sex.

> "One may not single out the printed page as the one source of moral infection. The whole of our social complex is a more proper frame for investigation and study. There one may find many pernicious influences, tangible and intangible, any one of which is more harmful to child and to adult than a publication which some may deem obscene. The point has well been made that the censor is no substitute for the home, the church and the school. Individually and in combination they have their responsibilities in molding the mind and character of our young."

One of the first and leading cases on the question of obscenity was decided by the English Court in 1868, Regina v. Hicklin, 3 Q.B.360, English Reports Annotated, for the year 1868, page 1985. That case involved a criminal prosecution against the publisher of a pamphlet which purported to disclose obscene practices in the church. The Court in sustaining the defendant's conviction established a test of obscenity which was subsequently followed by many of the courts in the United States until about 1933, and is apparently still followed in Canada. Chief Justice Cockburn in that opinion stated the test thus:

> "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

The history of the obscenity laws following the Hicklin case is described in Bantam Books v. Melko as follows:

> "The impact of Regina v. Hicklin was much greater in the United States than in England. It gave men like Anthony Comstock their opportunity. He fathered the Postal Censorship

Law of 1873 and obtained or inspired passage of obscenity laws throughout the country. That same year he organized the New York Society for the Suppression of Vice under a special act which gave its agents the right of search, seizure and arrest--a strange departure from accepted methods in the administration of the criminal law. Shortly there was a similar society in the mid-West, and the New England Watch and Ward Society with headquarters in Boston. The history of suppression in America is largely the history of the activities of these private censors. However sincerely motivated, they put literature in shackles. Their subjective judgment as to what were the vehicles of moral infection went for the most part unchallenged; the only check was the courts--strict in Massachusetts, more liberal in New York and in the federal system. The activities of these organizations under men like Comstock, Sumner and Chase, and of their local counterparts, indelibly underline the dangers of uncontrolled previous censorship."

It has been suggested by the defendant that his failure to read the book or have any actual knowledge of its contents prevents the City from proving criminal intent. However, it is the opinion of this Court that book-sellers may not escape their responsibility by pleading ignorance, and that defendant is charged with notice of the contents of the material which he sells.

By way of defense the argument has sometimes been advanced that other literature which is widely circulated contains material equally objectionable. Obviously there is no merit in this position. The fact that a prosecution has not, for one reason or another, been undertaken in a particular case does not constitute a defense when it is carried forward in a similar case.

The City bases its prosecution in this case on the complaining witness's testimony that the book is indecent and lewd by reason of eight or nine specific passages. The ordinance in St. Paul does not prohibit the sale of a book which contains indecent or lewd passages unless they contaminate the whole. This appears to be the law everywhere. In Pennsylvania Judge Bok held that the statute "does not proscribe articles or publications that merely contain obscent matter. This is now true in all jurisdictions that have dealt with the subject."

Applying. . . [this] . . . "Women's Barracks" cannot be held to be an obscene book merely because of passages which are, standing alone, undoubtedly indecent and lewd.

There appears to be a wide divergence of opinion among courts as to the admissibility of expert testimony in obscenity cases. Some have refused to permit experts to testify for any purpose; others have allowed testimony only regarding literary merit; and some have gone so far as to permit experts to testify on the question of whether or not the material is in fact obscene.

It is the opinion of the Court that the better reasoned rule does not permit testimony of this kind, but limits expert testimony to the question of whether the book has literary merit, and to the extent that witnesses testified on the question of obscenity, their testimony will be disregarded in the decision of this case. It seems clear that this is the ultimate question for the Court alone as the fact-finder to determine.

The City has advanced the argument that obscenity is self-evident, and suggests that its existence can always be determined by rigid, ageless and immutable moral laws. With such a concept this and other Courts vigorously disagree. The history of obscenity laws demonstrates conclusively that concepts of obscenity vary both as to time and space. Nearly all of the recent decisions recognize that the definition of "obscenity" is a fluid one, depending on the mores and conventions of the community itself. The rationale of these decisions is that it is more difficult to corrupt and deprave a community which is educated and enlightened in matters of sex than in communities where, by ignorance or bigotry, sex is made alluring by the very suppression of the facts concerning it.

With few exceptions, the modern decisions uniformly reject the Hicklin rule as putting the entire public in a straight-jacket intended only to protect the youthful and impressionable element from its own folly. Under the Hicklin rule anything is obscene which may deprave and corrupt anyone whose mind is susceptible to corruption if the material is likely to fall into such hands. The literal application of the rule would permit only the publication and distribution of literature which could not under any conditions adversely influence the most immature and purient fraction of the population. The effect would be to reduce the reading standards of everyone to those of the most ignorant and easily led minority.

. . . decisions since 1933 . . . have rejected the Nicklin rule. People v. Viking Press. . . (264 N.Y.S. 534 [1933]) held the test to be whether the tendency of the book as a whole, its main purpose, is to excite lustful desire and impure imaginations. The Court stated that a pornographic book is one where all other incidents and qualities are mere accessories to the primary purpose of stimulating immoral thoughts and declined to apply the statute to books of genuine literary value. In the Viking Press case the Court stated that the author has painted a realistic picture dwelling on the sex side of life with brutal frankness. It was not necessary, the Court said, to decide whether the book was an important work of literature if its subject matter constituted a legitimate field of literary effort and the treatment was legitimate. In 1933 and 1934 the Federal District and Circuit Courts in U. S. v. "Ulysses", 5 Fed. Supp. 182, 72 F. 2d 705 adopted rules for determining obscenity in a case which was a landmark in the American law of "obscenity". In addition to rejecting the Hicklin rule and holding that passages might be obscene without making the entire book obscene, the Court applied these tests: was the book dirt for dirt's sake? Did it tend to stir the sex impulses or lead to sexually impure and lustful thoughts? The lower court found that the book might be a strong draft for a sensitive but normal person. However, it also found that although it might be somewhat emetic, nowhere did it tend to be an aphrodisiac. The Circuit Court speaking through Judge Augustus Hand noted that James Joyce had adopted a new and original technique which might or might not become an enduring and classic literary masterpiece. But Judge

Hand says the erotic passages were submerged in the book as a whole and had little resultant effect. He stated in rejecting the Hicklin rule that works of literature have not been barred merely because they contain some obscene passages, since the confiscation for such a reason would destroy much that is precious in order to benefit a few. The test, Judge Hand said, was whether the work of literature viewed objectively was sincere and whether the erotic matter was introduced to promote lust or was the dominant role of the publication. In other words, does the publication, taken as a whole, have a libidinous effect?

> "While any construction of the statute that will fit all cases is difficult, we believe that the proper test of whether a given book is obscene is its dominant effect."

Other considerations which the Court in the "Ulysses" case held pertinent were these: the relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics if the book is modern, and the verdict of the past if it is ancient. In conclusion Judge Hand observes as follows:

> "The foolish judgments of Lord Eldon about 100 years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denham that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

The modern rules are well summarized in the Bantam Books case as follows:

> "The effect of the book as a whole, its artistic sincerity, the climate of current opinion, the changing nature of moral standards of thought, the fact that the book was not dirt for dirt's sake, the use of the normal person rather than the abnormal as a criterion, the book's literary worth, and particularly its reception at the hands of qualified critics."

The book, "Women's Barracks", may not be a great masterpiece of literature, and the likelihood of its becoming a classic is certainly slight. However, it is a writing which gives us a glimpse of history not extensively dealt with by other authors, apparently, and as such may contribute to our general knowledge. . . . It is the opinion of this Court that the emphasis on sexual experiences is not, under the circumstances described, necessarily exaggerated or distorted. Although many of the episodes are described quite graphically, they do not appear to dwell on the subject with more detail than the situation requires, and most of the scenes are handled with considerable restraint. The passages to which the complaining witness has objected are, in the opinion of the Court, relevant to the main theme of the book, the dominant purpose of which does not appear to be a glorification of perversion or an attempt to incite to

lust. On the contrary, as a whole, the book is permeated with an atmosphere of moribund despair and frustration and the resultant frantic but futile attempts to escape reality.

In arriving at this decision, the Court has given weight to the testimony of Professor Martin Steinmann, director of Freshman English at the University of Minnesota, and Mr. Robert Smith, literary critic for the Minneapolis Sunday Tribune. Professor Steinmann testified that in his opinion the book was written with sincerity and honesty of effort. He stated that he had considered its style, structure and theme and believed that the dominant purpose was to give a realistic picture of the lives of women in the Free French forces, rather than to depict dirt for dirt's sake. He felt the effect was to depress rather than to arouse.

Similarly, Mr. Smith testified that the episodes in his opinion were honestly portrayed, that he was somewhat surprised that the book had quality and that in his opinion it was an honest effort to describe reality without unduly emphasizing the sexual experiences of the characters. With these views the Court concurs.

In conclusion, therefore, it is the opinion of the Court that the book, "Women's Barracks", does not have a substantial tendency to deprave or corrupt by inciting lascivious thoughts or arousing lustful desire in the ordinary reader in this community in these times. It is the finding of the Court that the likelihood of its having such a salacious effect does not outweigh the literary merit it may have in the hands of the average reader.

For the reasons herein stated, the defendant, Harry Fredkove, is found not guilty of the charge set forth in the complaint and is discharged herewith.