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## Constitutionality of Pennsylvania's Prison Escape Act

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circumstances, that his performance shall not be recorded without his consent; that his performance shall not be broadcast without his consent; that, if he broadcasts, his broadcast shall not be recorded without his consent; that if he records his performance, his recordings shall not be broadcast without his consent; that his recordings shall not be used upon the sound track of a film without his consent?

An American writer has recently stated that it is usually conceded that the performing artist is without remedy against the illicit reproduction of his works and argued that rights could and should be given him by making use of the familiar common law concepts of literary property, unfair competition, the right of privacy and defamation.<sup>2</sup>

The same writer later had an opportunity to present his views to the Supreme Court of Pennsylvania.<sup>3</sup> That court, asserting that the problems involved in the case had never been presented to an English or American court and that they challenged the vaunted genius of the law to adapt itself to new social and industrial conditions and to the progress of science and invention, decided that "performers—in this case an orchestra—have an enforceable right<sup>4</sup> in their artistic interpretation of the work of a composer," and afforded certain protection to this right by making use of the concepts of "a common law property right,"<sup>5</sup> unfair competition<sup>6</sup> and the right of privacy.<sup>7</sup> The anxiety of the court to recognize and protect the rights of a performing artist was so great that it brushed aside in a cavalier fashion certain objections which would otherwise have prevented their recognition and protection in the particular case.<sup>8</sup>

W. H. HITCHLER.

## CONSTITUTIONALITY OF PENNSYLVANIA'S PRISON ESCAPE ACT

The constitutionality of Pennsylvania's escape statute, which has operated without contest for more than 75 years, was recently upheld by the Supreme Court of the United States in the case of *Pennsylvania, ex. rel. Sullivan v. Ashe*, 82 L. Ed. 58 (1937).

The statute challenged in this case was that portion of the Act of 1860, P. L. 382, Section 3 (18 PS 251) which provides that:

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<sup>2</sup>Maurice J. Speiser in an Addendum to his translation of Homberg's book.

<sup>3</sup>*Waring v. WDAS Broadcasting Co.*, 327 Pa. 433, 194 A. 631, (1937).

<sup>4</sup>The court did not attempt to answer all of the questions previously stated in this note. It enjoined the unauthorized broadcast of a recording of the artists' performance.

<sup>5</sup>The opinion of the majority.

<sup>6</sup>The opinion of the majority.

<sup>7</sup>The concurring opinion of Justice Maxey.

<sup>8</sup>E. g., a stockholder was permitted to enforce the rights of a corporation altho the court said "It is the corporation, the orchestra organization, which alone is entitled to assert and enforce the right of property in its renditions."

“ . . . if any prisoner imprisoned in any penitentiary . . . upon a conviction for a criminal offense . . . shall break such penitentiary . . . such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped . . . .”

The case arose as a result of a petition for a writ of habeas corpus filed with the Supreme Court of Pennsylvania. The petitioner, who had been sentenced to the penitentiary for a term of three to six years for breaking and entering with intent to commit a felony, escaped from the penitentiary, was apprehended, and was sentenced, under the above quoted statutory provision, for a term of from three to six years to be computed from the expiration of his original sentence.

The petitioner objected to this sentence, contending that the statute violated Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it denied him the equal protection of the laws.

He based this contention upon the argument that prisoners escaping under identical circumstances might be subjected to different sentences, depending merely upon the duration of the sentences being served at the time of the escape. He pointed out that he was accompanied in his escape by another prisoner who was also apprehended but who received a sentence of only from one to two years because that was the extent of his original sentence.

Both the Supreme Court of Pennsylvania [325 Pa. 305 (1937)] and the Supreme Court of the United States concluded that the statute was constitutional. These decisions are undoubtedly sound and are based upon the well established principle that violators of the law may be classified, for the purposes of punishment, upon the basis of their past criminal records. [*Graham v. State of West Virginia*, 224 U. S. 616, 56 L. Ed. 917 (1912)].

It is interesting to note, however, that the Supreme Courts of three other states had declared analogous escape statutes to be unconstitutional. [*State v. Levin*, 53 Kan. 679, 37 Pac. 168 (1894); *In Re Mallon*, 16 Idaho 737, 102 Pac. 374 (1909); and *State v. Johnsey*, 46 Okla. Crim. Appeals, 287 Pac. 729 (1930)]. On the other hand, there were no appellate court decisions upholding the constitutionality of such statutes.

In the case of *State v. Levin*, 53 Kan. 679, 37 Pac. 168 (1894), there was involved an escape statute which provided that any person escaping from prison should receive a sentence equal to the original sentence, to commence from the conviction for the escape, and the time previously served should not be counted in computing the sentence for escape. The Court said:

"So it may happen under this section that two men attempting or effecting an escape from the penitentiary on the same day in concert under precisely the same circumstances and with exactly equal guilt would receive wholly different punishment. If one had been confined but for a day while the other who might have been confined for 20 years would be sentenced to a further confinement for that number of years. Is not this, in effect, not merely placing a defendant twice in jeopardy for the same offense, but in fact punishing him twice? Can this be said to be an impartial administration of justice? Can it be said to be affording to all individuals the equal protection of the laws?"

As an answer to these rhetorical questions the Court held that the statute was invalid as a violation of the Constitutions of Kansas and the United States.

In *In Re Mallon*, 16 *Idaho* 737, 102 *Pac.* 374 (1909), the statute before the Court provided that a prisoner escaping from the state prison should be punishable by imprisonment in the state prison for a term equal in length to the term being served at the time of such escape, and that the second term of imprisonment should commence from the time the prisoner would otherwise have been discharged.

The Court held that this act violated the Fourteenth Amendment to the Constitution of the United States stating:

"This classification is not natural, but arbitrary. To justify a classification of grades of crime, there must appear some good and valid reason why the classification should be made as made."

The Supreme Court of Pennsylvania stated that the conclusions reached in these two cases could not be followed (p. 310) and the Supreme Court of the United States indicated that the statutes involved therein differed essentially from the Pennsylvania statute. (L. Ed. p. 59).

The difference, which the Supreme Court of the United States had in mind, between the Pennsylvania statute and the statutes of Kansas and Idaho evidently lay in the fact that the Pennsylvania act provides for a punishment *not exceeding* the original sentence, while the latter acts allowed the sentencing judge no discretion in fixing the punishment.

In view of the fact that the decisions in *Commonwealth of Pennsylvania v. Ashe*, *supra*, were based upon the principle that the past criminal record of law violators is a proper basis for classification, it is difficult to see why the presence or absence of the element of discretion should be the controlling consideration.

It might be noted, nevertheless, that the Court, in the case of *In Re Mallon*, *supra*, made the following comments upon that phase of the question:

"It is argued by the Attorney General that a critical examination of this statute will lead to the conclusion, that the legislature, in prescribing the punishment for escape, intended to fix the maximum penalty to be inflicted at not to exceed the term which the convict was serving at the time of his escape, and to leave to the discretion of the trial court the punishment not exceeding the maximum . . . . *To give this construction to this statute it seems to us would be to legislate upon the subject, and supply what we might conceive to be necessary in order to sustain the constitutionality of the statute.* If this be the rule which would guide courts in determining the constitutionality of a statute, the court would have little difficulty in sustaining all legislative acts, because they might supply all such defects or alterations by judicial legislation. We, however, must take this statute as it reads, and when so taken, the punishment is fixed arbitrarily, and is not in any sense left to the discretion of the trial court . . . ." (16 Idaho 737 at 749, 750, 102 Pac. 374, at 377, 378). (Italics added).

The statute involved in the case of *State v. Johnsey*, 387 Pac. 729, 46 Okla. Cr. App. 233 (1930) was very similar to the Pennsylvania act. That statute provided that any person who escaped from or broke the state prison, should upon conviction be punished by imprisonment for a term *not exceeding* double the term for which he was originally sentenced.

Notwithstanding the discretionary features of the act before it, the Court of Criminal Appeal of Oklahoma, relying upon *In Re Mallon*, *supra*, held that the classification set up in the act was unreasonable and that the act violated the provisions of the Fourteenth Amendment of the Constitution of the United States.

Because the decision of the Supreme Court of Pennsylvania, upholding the Pennsylvania Statute, was felt to be in conflict with this decision of the Oklahoma Court, the Supreme Court of the United States issued a writ of certiorari for the purpose of reviewing the question, and, as indicated above, affirmed the views expressed by the Pennsylvania Court.

William Wood.

## TRANSMISSIBILITY OF FUTURE INTERESTS IN PENNSYLVANIA

It is the purpose of this note to discuss the extent to which Pennsylvania will permit the alienation of contingent future interests. Each method of alienation or transfer will be treated separately to discover what progress has been