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## THE ENFORCEABILITY OF PRIZE FIGHT STATUTES

By ELMER M. MILLION\*

The hypothesis has been advanced elsewhere<sup>1</sup> that the dominant opinion of a particular time and place with regard to any described activity exercises a controlling influence not merely upon the enactment of legislation and the attempted prosecution of offenders, but also upon appellate decisions which ostensibly are rendered solely according to principles of procedure, proof, and constitutionality. In other words, changes in this dominant opinion may cause concomitant changes in the "constitutionality" of particular legislation, and vary the interpretation placed upon statutory phrases.

The history of prize fight statutes and their interpretation by the courts affords a clear illustration of the extent to which changing conditions and changing attitudes affect the enforceability of the criminal law. For this reason, and because the cases dealing with prize fights are intrinsically interesting and have thus far never been collected and treated by the law writers, this particular study suggests itself.

Courts have differed as to whether prize-fighting was indictable at common law<sup>2</sup> or came into existence only with the enactment of specific prohibitory legislation.<sup>3</sup> The truth seems to be a little of both views. While not *eo nomine* an offense at common law, prize fighting was nevertheless punishable as a breach of the peace, assault and battery, riot, or some similar offense. The term "prize-fighting" was originally applied to many forms of encounters waged for reward, including those in which the contestants used swords, staffs, or merely their

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<sup>1</sup> Million, *Limitations on the Use of Criminal Sanctions* (J. S. D. Thesis, 1938. Yale law school library).

<sup>2</sup> *Commonwealth v. Whitehead* (Penn. 1839), 2 Law Rep. (O. S.) 148 (in 40 Cent. Dig., col. 2497).

<sup>3</sup> *People, ex rel., Weiner v. Barr*, 131 Misc. 80, 225 N. Y. Supp. 346 (1927) (reversed on another ground, 223 App. Div. 310, 228 N. Y. Supp. 192). *Coliseum Athletic Assn. v. Dillon*, 204 Mo. App. 504, 223 S. W. 955 (1920).

bare fists.<sup>4</sup> It was only gradually that the latter variation became predominant, and also distinguishable from duelling on the one hand, and ordinary fistic affrays on the other.<sup>5</sup> It was not until 1719 that England first recognized the existence of a champion of the sport, in the person of James Figg. Because of the relative modernity of the sport's rise to public notice, it was not yet expressly outlawed by the English common law at the time of American Independence, hence the illegality of such conduct in America has arisen almost<sup>6</sup> entirely from specific statutes in the different states, quite independently of the scattered decisions of the nineteenth century English courts.

These early fights, according to all reports, were often very barbarous encounters in which there was no observance of any rules. The London Prize Fight Rules, which purportedly were followed, were themselves barbarous enough, permitting the wearing of spiked shoes, the use of bare fists, and continued rounds of fighting until one contender surrendered or fell to rise no more. The fighters were a tough assortment, far removed from modern Shakespearean lecturers, and often had difficulty confining their fistic activities to the ring. The character of many of the fight-followers was also objectionable, and the fights themselves often took the form of riots before the finish. In view of these facts, and the fact that the enfranchised citizens were struggling to wrest a living and at the same time curb ever recurrent lawlessness, it may be conceded that the dominant force of American public opinion stood behind those early statutes.

The Massachusetts courts, both in the days before and in the years following the Civil War, upheld convictions for violations of the prize fighting statute<sup>7</sup> despite a barrage of objections which other courts later professed to consider important. The statute applied to all fights by previous appointment, and

<sup>4</sup> Enc. Brit. (11th ed. 1911), vol. xxii, p. 637.

<sup>5</sup> Many precedents relied upon by the courts actually involved duelling or street fights. For instance, *Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230 (1870), has been cited as holding prize fights illegal. The case involved a fight in which one of the contestants stabbed his opponent three times with a knife. Several of the English cases similarly cited involved duels.

<sup>6</sup> One of the few exceptions appears in *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 301 (1884), in which the court affirmed a conviction of breach of the peace, arising from engagement in a boxing match.

<sup>7</sup> Stat. (1849), c. 49, ss. 1, 2.

the court held that the absence of a prize, or the fact that the actual bout was in another jurisdiction, or that a particular defendant acted only as a second, would be no bar to a conviction.<sup>8</sup> In *Commonwealth v. Welsh*,<sup>9</sup> the fight ended in a mêlée in which several persons attacked the until then victorious contender and knocked him down. The conviction of a second of one of the fighters was affirmed along with that of the fighter. In *Commonwealth v. Collberg*,<sup>10</sup> the Massachusetts court in 1876 affirmed the conviction of two prize fighters on indictments for assault and battery. The court ruled that:

"Prize-fighting, boxing matches, and encounters of that kind serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or ill will."

An earlier Ohio decision thought to be contrary<sup>11</sup> was condemned as opposed to the weight of authority. In a number of states the issue was raised as to what constituted a prize fight, but it was held that the change from the London Prize Fight Rules to the Marquis of Queensberry rules,<sup>12</sup> the fact that the contestants wore gloves, shook hands at the beginning of the match, divided the prize money evenly,<sup>13</sup> did not have an arena roped off, and called the encounter by some other name, did not avoid the statute.

In *Seville v. State*,<sup>14</sup> the court upheld a conviction for prize fighting where the bout was conducted under the Queensberry rules, and approved the rejection by the trial court of an offer of expert testimony to show that a difference existed between "prize fighting" and "boxing".

In *State v. Burnham*<sup>15</sup> the Vermont court in 1884 affirmed the conviction of two prize fighters charged with breaching the peace. The lower court had refused to admit into evidence the boxing gloves worn by the combatants, and the appellate court

<sup>8</sup> *Commonwealth v. Welsh*, 73 Mass. 324 (1856); *Commonwealth v. Barrett*, 108 Mass. 302 (1871).

<sup>9</sup> 73 Mass. 324 (1856).

<sup>10</sup> 119 Mass. 350, 20 Am. Rep. 328 (1876).

<sup>11</sup> *Champer v. State*, 14 Ohio St. 437 (1863) (Memorandum opinion; indicating a fist fight rather than a prize fight or prearranged bout. Not contra to *Collberg* case.)

<sup>12</sup> *Commonwealth v. Sullivan*, 16 Wkly. Notes Cas. 14 (Penn. 1885) (in 40 Cent. Dig., col. 2497).

<sup>13</sup> *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280 (1903).

<sup>14</sup> 49 Ohio St. 117, 30 N. E. 621 (1892); Accord: *State v. Olympic Club*, 46 La. Ann. 935, 15 So. 190 (1894).

<sup>15</sup> 56 Vt. 445, 48 Am. Rep. 801 (1884).

ruled that since the gloves furnished no criterion by which to judge the character of the contest, their exclusion was harmless. Foreshadowing similar distinctions made by the New York courts in later years, the Vermont court remarked:

"It is true that sparring or boxing with gloves . . . is not unlawful. But such pugilistic exercise may be abused and carried beyond the limits of healthful exercise and sport. It may create a breach of the peace. *It may even degenerate into a prize fight.*"<sup>16</sup>

As prize fighters became more proficient in their art, and their performances somewhat less impromptu, public interest increased, and the difficulty of obtaining convictions increased accordingly. It was John L. Sullivan, most colorful of them all, upon whom public interest especially centered. Consequently, the opinions in cases involving Sullivan are unsurprisingly similar in result, if divergent in doctrine.

In *Sullivan v. State*,<sup>17</sup> the Mississippi court in 1889 reviewed the conviction of Sullivan under the prize fighting statute of that state. The indictment, based on Sullivan's fight with Kilrain, charged that Sullivan, on the date and at the place named "did . . . by previous appointment . . . meet in a prize fight with Kilrain . . . for a large sum of money . . . and did . . . in said ring, beat, strike and bruise said Kilrain". In reversing the conviction, the court found the indictment fatally defective in several respects:

(1) It will not clearly specify the act which was made unlawful, to the exclusion of other acts not unlawful, thus depriving the defendant of notice of the nature of the offense charged.

(2) It failed to allege that Kilrain also had committed the offense, but Sullivan's guilt was possible only if two persons were guilty. (It is submitted that the words "fight with Kilrain" of themselves amply charged that Kilrain was the other offender, and that there was another offender.)

(3) The dictionary definition made it doubtful whether prize fights had to be in public to be unlawful, but the statute must have intended to outlaw only public encounters, permitting private encounters between amateurs or professionals, even though for a prize. The words of the indictment included the later class of acts, so were too broad.

That the Mississippi court construction of the statute was clearly wrong is shown by later decisions the country over, but the Roxbury Strong Boy was free again.

<sup>16</sup> Italics supplied.

<sup>17</sup> 67 Miss. 346, 7 So. 275 (1890). A graphic account of the Sullivan-Kilrain fight, last of the great bare fist encounters, appeared in *The American Mercury*, Jan., 1938, p. 30.

In 1893 the Texas Court of Criminal Appeals<sup>18</sup> reversed a \$500 fine imposed on Sullivan for violation of an 1889 statute<sup>19</sup> which required a \$500 occupation tax of persons engaged in prize-fighting. The court held that the statute of 1891,<sup>20</sup> which made prize fighting a felony, impliedly repealed the former statute. Sullivan's release was not unpopular, but the attitude of the court seems inconsistent with the general principle of liberal construction of tax statutes.<sup>21</sup> This is all the more true when it is noted that the tax statute in question, classifying prize fights with bear-baiting and bull-fighting, and also imposing \$1,000 occupation taxes on fortune-tellers, etc., was primarily a preventive, rather than a revenue measure. Al Capone's imprisonment at Alcatraz for income tax violations was not avoided by the fact that his income was from a source prohibited by law. There is no report on any criminal proceeding against Sullivan under the Texas prize fight statute.<sup>22</sup>

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<sup>18</sup> *Sullivan v. State*, 32 Tex. Cr. 50, 22 S. W. 44 (1893).

<sup>19</sup> Acts, 21st Leg., c. 32, p. 24, amending Rev. Stat. (1879), art. 4662.

<sup>20</sup> Acts, 22d Leg., p. 54.

<sup>21</sup> The fact that a business is declared unlawful by one statute does not prevent the collection of a tax imposed upon such business by another statute. An illegal act may be taxed. *Cooley on Taxation* (4th ed. 1924), ss. 1689; 37 C. J. 216, *Licenses*, ss. 71; *United States v. Constantine*, 296 U. S. 287, 30 L. Ed. 233, 56 S. Ct. 223 (1935); *State ex rel. Melton v. Rombach*, 112 Miss. 737, 73 So. 731 (1917); (that a statute taxing usury was not unenforceable because usury was made unlawful by another statute); *Foster v. Speed*, 120 Tenn. 470, 111 S. W. 925 (1908); *Stein v. Kentucky State Tax Commission*, 266 Ky. 469, 99 S. W. (2d) 443 (1936). See also *State et rel. Bonner v. Andrews*, 131 Tenn. 554, 175 S. W. 563 (1915) in which a subsequent statute prohibiting liquor sales was held not to prevent enforcement of an earlier statute taxing liquor sales. While some Texas cases exist that are in accord with the *Sullivan* decision, in *Barnes v. State*, 75 Tex. Cr. 188, 170 S. W. 548 (1914), the same court is directly contra to its *Sullivan* ruling and in accord with the *Bonner v. Andrews* rule.

<sup>22</sup> Two years after the court held that the 1891 statute prohibiting prize fights repealed the 1889 statute taxing them, the prize fight question arose again, this time in connection with the proposed Corbet-Fitzsimmons bout. By a curious combination of errors, the 1889 statute was then held to have repealed the 1891 statute. On the same day that the 1891 statute was enacted, a law was passed providing for the revision of the civil and penal codes. In 1895 these revisions were adopted. Either as the result of oversight, or because the revision committee deemed itself without authority to omit constructively repealed statutes from the revision, the 1889 statute appeared in the revised civil code. Since the revised penal code, containing the 1891 statute, was adopted four days before the revised civil code, the 1889 provisions became "subsequent" to the penal statute and were held to repeal it. The outraged governor convened a special session of the legislature which enacted a new penal statute declaring prize fights

In 1893 the Michigan court reversed a conviction under that state's statute, for failure of the trial court to instruct that the offense could not be complete without both an expectation of a reward by the contestants and an intention to inflict personal injury upon the opponent.<sup>23</sup>

In 1894 the Louisiana court reversed<sup>24</sup> the action of a lower court in revoking the license of a club found guilty of maintaining prize fights. Upon rehearing, a new trial was granted because of error in admitting expert testimony as to the difference between prize-fighting and boxing, since the statute outlawed the act "*commonly* called a prize fight".<sup>25</sup> In 1895 the court heard a second appeal in the same matter, affirming an injunction restraining the club from further fight activities, but not ordering a revocation of its character.<sup>26</sup> In latter years many courts resorted to the distinction between "prize-fighting" and "boxing" attempted unsuccessfully in the 1894 appeal, but the 1895 decision not only reaffirmed the stand of the former holding, but declared the statutory exemption of "exhibitions and glove contests . . . within the rooms of regularly chartered athletic clubs" void as being entirely irrelevant. An Ohio decision of 1896 declared that the statutory exemption of sparring contests or exhibitions in a public gymnasium or arena, afforded no protection to a gymnasium holding encounters for which the contestants were to receive a prize, or were attended by backers, referees and umpires.<sup>27</sup>

In 1896 the Kansas Supreme Court reversed a conviction under that state's fight statute in which the defendant had been sentenced to one year in the penitentiary. The defendant had appeared in a twenty-five round "boxing exhibition" under the Marquis of Queensberry rules, using five ounce gloves, with a referee officiating, and a \$50 award paid to each contender.

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to be felonies. No case arising under that statute has been reported as yet, but if the Texas precedents are followed and a case involving it ever arises, it will be held inoperative and impliedly repealed by the subsequent statute of 1933 which regulates "fistic encounters".

<sup>23</sup> *People v. Taylor*, 96 Mich. 576, 56 N. W. 27 (1893).

<sup>24</sup> *State v. Olympic Club*, 46 La. Ann. 935, 15 So. 190 (1894).

<sup>25</sup> Italics supplied.

<sup>26</sup> *State v. Olympic Club*, 47 La. Ann. 1095, 17 So. 599 (1895).

<sup>27</sup> *In re Athletic Clubs*, 5 Ohio S. & C. P. Dec. 696 (1896), (in 40 Cent. Dig., col. 2496).

The trial court had instructed that "prize fight" meant a fight or physical contest between two persons for a prize or reward. The appellate court deemed the instruction too broad, and restricted the definition to cases where there was an intent to use violence for the purpose of inflicting injury. After thus restricting the statute and turning the defendant loose, the court sagely held that a prize fight was still a prize fight even though the loser as well as the winner was given a reward, since the statute was aimed at preventing "that class of brutal exhibitions for which money is paid the participants".<sup>28</sup>

Although a selection of quotations from the reported New York cases, arranged chronologically, indicate an ever broadening definition of "prize-fighting" by those courts, the attendant circumstances harmonizes those holdings with the premise of changing conditions already stated. The original New York statute outlawing prize fights was passed in 1856,<sup>29</sup> but the first reported case interpreting it came in 1889, reversing the conviction of a fight promoter who had in New York arranged a bout between two women boxers. The actual fight took place in Canada, apparently in public, but the court viewed the facts as showing the bout to be merely an exhibition to increase the notoriety of one of the contestants, with no prize being offered the winner, soft gloves being used, and no intention on the part of either participant to injure the other.<sup>30</sup> The court was silent concerning whether admission fees had been charged the spectators. It seems doubtful, however that the victim chosen to face the defendant's fighter would permit herself to be used as a "set up" for the other without pay.

In 1896 the legislature tried to adapt the statute to the shift in public opinion by exempting from its operation sparring exhibitions held in buildings owned or leased by athletic associations,<sup>31</sup> but the amendment failed to stop the objectionable practices, so was repealed in 1900.<sup>32</sup> In *People v. Johnson*,<sup>33</sup> a decree was granted requiring the defendant to give \$100 bond that he would not violate the statute during the following year, but no other sanction was attempted. In 1903 a

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<sup>28</sup> *Kansas v. Purtell*, 56 Kans. 479, 43 Pac. 782 (1896).

<sup>29</sup> C. 98.

<sup>30</sup> *People v. Floss*, 7 N. Y. Supp. 504 (1889).

<sup>31</sup> C. 37.

<sup>32</sup> C. 270.

<sup>33</sup> 22 Misc. Rep. 150, 49 N. Y. Supp. 382 (1897).



conviction under the statute was affirmed, but the facts disclosed an extreme case. The defendant promoter had leased a barn for a "smoker", and had printed tickets reading, "Smoker! Collier, Chissel, \$1". Collier and Chissel fought, the bout continuing until Chissel was knocked out. Then everybody went into the barroom and had a free-for-all in which the defendant lost his money and diamond pin.<sup>34</sup>

In 1911 the New York State Athletic Commission was created, and given broad powers of control over professional boxing. Contests licensed by the commission were exempted from the operation of the statute, but failure to secure a license made a person liable both under the original statute and under a new section declaring it a misdemeanor to fight without a license.<sup>35</sup>

In *Fitzsimmons v. The Commission*,<sup>36</sup> the court upheld the power of the Commission to examine and reject prospective fighters, declining to enjoin it from refusing the fifty-one year old warrior a license for another bout. The opinion stated that prize fighting was still a crime, but that boxing was permitted by statute when properly licensed. The court apparently tried to treat "prize-fighting" and "boxing" as two quite distinct activities, but the fictitiousness of the distinction is apparent in the court's subsequent assertion:

"The profession of prize-fighting is an occupation subject to government control".<sup>37</sup>

Later decisions have been principally concerned with the boxing commission statute, rather than with the criminal statute. In *People ex rel. Weiner v. Barr*,<sup>38</sup> a prosecution under the prize fight act was upheld against *habeas corpus*, but the offender was a stakeholder, and not a fighter. In *McHugh v. Mulrooney*,<sup>39</sup> it was held that amateur exhibitions did not

<sup>34</sup> *People v. Finucan*, 80 App. Div. 407, 80 N. Y. Supp. 929 (1903).

<sup>35</sup> *Laws*, 1911, c. 779.

<sup>36</sup> 146 N. Y. Supp. 117 (1914), affirmed, 162 App. Div. 904, 147 N. Y. Supp. 1111 (1914).

<sup>37</sup> *Id.*, p. 120.

<sup>38</sup> *People, ex rel., Weiner v. Barr*, 223 App. Div. 310, 228 N. Y. Supp. 192 (1928), reversing order of 131 Misc. 80, 225 N. Y. Supp. 346 (1927).

<sup>39</sup> 258 N. Y. 321, 179 N. E. 753 (1932), reversing 234 App. Div. 736, 252 N. Y. Supp. 965. *Accord*: *Bridge City A. C. v. Salberg*, 234 App. Div. 309, 254 N. Y. Supp. 777 (1932). *Contra*: *City Island Club v. Mulrooney*, 141 Misc. 733, 253 N. Y. Supp. 768 (1931). The court in the *McHugh* case could easily have reached the opposite result but for the fact that during its first ten years the commission had made no attempt to control amateur fights.

require a license, even though an admission fee was charged. This decision was followed by an amendment giving the boxing commission control over amateur bouts in which admission fees were charged.<sup>40</sup>

However popular the prize fight statute was in its early days, the shift in public opinion made it unenforceable. Not only did the opposition to the sport lessen, but its adherents increased in number, so that the passive uninterest which had enabled the statute to slumber in former years changed to interest in the fighters and their craft. The attempt to adapt the statute to changed conditions by exempting athletic club exhibitions proved ineffective, so state licensing was adopted. Such a regulatory statute is enforceable because:

(1) It does not unduly interfere with bouts conducted with a measure of decorum and in accordance with reasonable and humane rules.

(2) There has developed a realization of a need for regulation, to avoid not only the elements formerly objectionable (as some of them are no longer in disfavor) but also to insure against "fixed" and collusive matches.

But for the licensing device, the penal statute would be a virtual dead letter, except for occasionally prosecuting persons notoriously guilty of acts which are considered very objectionable.

Other states have met changed conditions with an exemption of "sparring contests",<sup>41</sup> the establishment of a boxing commission,<sup>42</sup> or similar legislative acts, but in some states the prize fight statute remains unmodified. The state of Oklahoma is a prime example of the latter class. In that state the statute has existed since statehood and has neither been repealed nor abrogated by any sort of licensing or regulatory act. Similar

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<sup>40</sup>Laws 1933, c. 625, *Cahill's Consol. Stat.* (1931-1935 Supp.), pp. 777, 778.

<sup>41</sup>See *Safro v. Lakofsky*, 184 Minn. 336, 238 N. W. 641 (1931); *In re Athletic Clubs*, 5 Ohio S. & C. P. Dec. 696 (1896); *State v. Olympic Club*, 47 La. Ann. 1095, 17 So. 599 (1895); *State v. District Court*, 56 Mont. 464, 185 Pac. 157 (1919).

<sup>42</sup>*Vernon's Tex. Stat.* (1936), art. 614-1 (giving Commissioner of Labor jurisdiction to regulate); *Dela. Rev. Code* (1935), art. 3898 and c. 164; *Ill. Rev. Stat.* (1937), c. 10 4/5; *Purdon, Penn. Stat.* (1937), tit. 4, ss. 1-23.

in its terms to the other early Acts, the statute begins with this provision:

"Every person who engages in, encourages or promotes any ring or prize fight, or any other premeditated fight or contention, whether as principal, aid . . . surgeon or otherwise, although no death or personal injury ensues, is guilty of a misdemeanor."<sup>43</sup>

The Oklahoma Criminal Court of Appeals has considered the statute only once. In *Sampson v. State*,<sup>44</sup> the defendant had been fined \$100 for promoting a prize fight held in Oklahoma City on May 15, 1917. The program included both preliminary and final bouts, each of the contestants in the latter receiving \$100. Ten rounds were the maximum length, referees and timekeepers were in attendance, the fighters wore six ounce gloves, and there was admittedly no display of intentional brutality. In affirming the conviction the court in unmistakable terms held that the bouts constituted "prize fights" within the meaning of the statute, and that the statute used the term in the popular and not in a technical sense. Despite the *Sampson* decision, devotees of the manly art continued to enjoy their fights, although the term "boxing match" was often applied to them in advertisements.

In 1923 an attorney general's opinion set up a distinction between boxing and prize fights, somewhat similar to that set out in *People v. Shirley*,<sup>45</sup> but the Criminal Court has never had occasion to pass on it again.

In 1930, however, the Oklahoma Supreme Court had occasion to consider the meaning of the statute. In *Teeters v. Frost*,<sup>46</sup> that court affirmed a judgment in favor of the mother of a boy who lost his life in a ring encounter sponsored by the defendant as a regular part of a theater program. The facts showed that the bouts were advertised as "athletic exhibitions" and "amateur fights", the contestants wore gloves, dressed in ring togs, fought six round matches, were attended by a referee and timekeeper, and were given an equal amount of money—\$1 apiece—regardless of the outcome. Waiving aside the defendant's attempt to class the performance as a sparring exercise or something else not covered by the statute, the court expressly

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<sup>43</sup> *Okl. Stat.* (1931), s. 2427.

<sup>44</sup> 18 *Okl. Cr.* 191, 194 *Pac.* 279 (1921).

<sup>45</sup> 72 *Colo.* 120, 210 *Pac.* 327 (1922).

<sup>46</sup> 145 *Okl.* 273, 292 *Pac.* 356 (1930).

followed the *Sampson* decision and held the encounters to be prize fights. Moreover, the court placed the defendant's liability upon the proposition that by instigating an illegal combat he became civilly liable to the injured parties.

With these two decisions upholding the statute and applying it to sets of facts which are not materially different from any one of the vast majority of present day fights, with the statute still unrepealed, and with no provision having been made for licensing or regulation in order to avoid the statute, the present state of the law in Oklahoma seems clear; but public prize fights and boxing matches are held throughout the state with no apparent fear of the statute being called into use. The customary rules are followed, the bouts are scheduled in advance, advertised more or less extensively, charge whatever admission fee the fighting talent will command and are otherwise indistinguishable from that described in the *Sampson* decision. The bouts are not only free from police interference generally, but are well attended by peace officers and are accorded adequate protection from disorderly spectators, despite the Oklahoma statute expressly providing that any policeman or other peace officer knowing that such a fight is about to be held and wilfully failing to bring a complaint thereon, is guilty of a misdemeanor and shall forfeit his office.<sup>47</sup>

On the whole, the matches are conducted with little disorder and in accordance with the generally accepted rules. The programs put on by touring carnival groups occasionally become so disorderly, or the tactics of their fighters so objectionable to the local citizens that the show is closed by the local officers. Otherwise, no need for official control is felt and no attention is given the statute. If, as happened in the *Teeter* case, a boy dies as the result of such a contest, civil recovery against the management would still be probable, but the same result would obtain were the criminal statute repealed. If an ambitious county attorney were to press for convictions and obtain them in the lower court, it seems likely that the appellate court would find adequate reasons for reversal. The use of the words "or other . . . contention" in the statute provides ample ground for an interpretation excluding boxing matches of the type described, as not within the legislative prohibition.

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<sup>47</sup> *Okl. Stat.* (1921), ss. 2431, 2432.

Informations of this type are likely to prove duplicitous, and error might be found in either admitting or excluding expert testimony, or improperly instructing as to the elements of the offense. On the other hand there is considerable feeling against animal fights, and the statute forbidding and punishing such activities is fairly well enforced.<sup>48</sup>

To summarize, although many cases are cited as asserting the illegality of prize fights, in virtually every instance in the last forty years in which a conviction was affirmed, the defendant was either violating some other statute, or the fight was accompanied by brawls or other disturbance.<sup>49</sup>

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<sup>48</sup> *Okl. Stat.* (1931), s. 1841.

<sup>49</sup> In two Colorado decisions, *People v. Corbett*, 72 Colo. 117, 209 Pac. 808 (1922), and *People v. Shirley*, 72 Colo. 120, 210 Pac. 327 (1922), the appellate court overruled instructions favoring the defendants, but verdicts of acquittal had already been rendered in the lower court. Moreover, the defendants had failed to secure a license as prescribed by statute. The convictions in federal courts have usually been for violation of the statute (18 U. S. C. A., s. 405) forbidding interstate shipment of prize fight films. *U. S. v. Wilson* (D. C. W. Va., 1928), 23 F. (2d) 112; *Atlantic Enterprises v. Crawford* (D. C. Ga., 1928), 22 F. (2d) 834. This federal statute does not prohibit exhibitions of prize fight films within a state, but only prohibits their interstate transportation. *Noall v. Dickinson*, 49 Idaho 706, 292 Pac. 219 (1930). In *Commonwealth v. Mack*, 187 Mass. 441, 73 N. E. 534 (1905), the defendant had tried to evade the licensing statute by pretending to operate an athletic club, each spectator having to join the club before seeing the fight and the cost of "membership" varying with the location of the seat wanted. *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. (901 (1914), was only a *quo warranto* proceeding to forfeit the organization charter. In *Commonwealth v. McGovern*, 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280 (1903), the court enjoined Terry McGovern from holding a scheduled bout with Corbett, but no criminal sanctions were involved. In several other cases cited as upholding convictions under the fight statute, the question before the court was only the sufficiency of the indictment which had already been quashed. *State v. Patten*, 159 Ind. 248, 64 N. E. 850 (1902); *State v. Gregory*, 34 Del. 115, 143 Atl. 458 (1928) (one judge dissenting). *Of., Rev. Code* (Del., 1935), c. 164 (permitting boxing matches under state regulation). The other cases cited as upholding the statute were civil cases in which such statements were bare dicta. Typical of such cases are *Willard v. Knoblauch* (Tex. Civ. App., 1918), 206 S. W. 734, and *Coliseum Athl. Assn. v. Dillon*, 204 Mo. App. 504, 223 S. W. 955 (1920) (attachment proceedings). In addition to those already mentioned, only two decisions actually contain affirmances of convictions under the fight statutes. *State v. District Court*, 56 Mont. 464, 185 Pac. 157 (1919) (\$50 fine was sole punishment assessed). In *Dane v. U. S.* (App. D. C., 1927), 18 F. (2d) 811, certiorari denied, 275 U. S. 538, 72 L. Ed. 413, 48 S. Ct. 35, three persons had been indicted under the federal prize fight statute applicable to the District of Columbia. The actual fighters were acquitted but the ticket seller was convicted and his conviction affirmed, the court holding him a principal and therefore within the allegation of the indictment that the three engaged in a fight.

The English cases were similar in result to the American decisions, but while a few of the later cases were concerned with the difference between a prize fight and a lawful sparring exhibition,<sup>50</sup> and whether the encounter was a prize fight if held in a private building,<sup>51</sup> all of the cases were agreed that prize fighting was illegal and that the contestants were guilty of an offense, the most frequently arising question being that of the liability of spectators and other noncombatants. In at least four cases it was ruled that spectators were liable as aiders and abettors. In view of a later decision overruling this doctrine, an examination of the earlier cases is in point.

In 1825, in *Rex v. Billingham*,<sup>52</sup> the court said:

"These fights are unlawful assemblies, and every one going to them is guilty of an offense."

In that case, however, the police had tried to prevent the fight, whereupon a defendant and some of the one thousand spectators scuffled with them, precipitating a general riot. In the 1831 decision of *Rex v. Perkins*,<sup>53</sup> the court said:

"If the defendants went out to see these men strike each other, and were present when they did, they are . . . guilty of an assault."

The evidence showed that the defendants had actively aided in the fight, however.

In another 1831 decision, *Rex v. Hargrave*,<sup>54</sup> the defendant was convicted of aiding and abetting the offense of manslaughter, and sentenced to fourteen years' transportation. The evidence is not clear as to what capacity the defendant filled, but he was not one of the fighters. The court also held that although all the spectators were guilty of the manslaughter as principals, still they were not such accomplices as to require corroboration, so the conviction based on their testimony alone was unobjectionable.<sup>55</sup> Needless to point out, this case arose from a fight in which a fatality had occurred.

In *Rex v. Murphy*,<sup>56</sup> decided in 1833, the court ruled that being a mere spectator was sufficient to make the defendant

<sup>50</sup> *Reg. v. Orton*, 39 L. T. 292, 14 Cox, C. C. 226 (1878).

<sup>51</sup> *Reg. v. Young*, 10 Cox, C. C. 371 (1866).

<sup>52</sup> 2 C. & P. 234, 172 Eng. Rep. Reprint 106 (1825).

<sup>53</sup> 4 C. & P. 537, 172 Eng. Rep. Reprint 814 (1831).

<sup>54</sup> 5 C. & P. 170, 172 Eng. Rep. Reprint 925 (1831).

<sup>55</sup> Accord as to non-necessity of corroboration: *Reg. v. Young*, 10 Cox, C. C. 371 (1866).

<sup>56</sup> 6 C. & P. 103, 172 Eng. Rep. Reprint 1164 (1833).

guilty without any acts or words on his part, the only requirement being that he were not casually passing by, but had stayed at the place of fighting. In that case, however, the defendant was accused of acting as a second, and had sought to defend on the ground of being merely a spectator. Moreover, one of the combatants had been killed, and as the spectators had several times burst the ropes and hit him with sticks, it was doubtful whether the blows of the other fighter or the blows of the spectators was the actual cause of the death.

The idea that a mere spectator was liable as aiding and abetting the offense was partially supported by the fact that paying spectators provided the money to be paid the contestants. The rule had been often applied in the cases of duels,<sup>57</sup> even subsequent to the time of the *Murphy* case, but in *Regina v. Coney*,<sup>58</sup> the doctrine was repudiated, and the trial court reversed for following the *Murphy* case. In overruling "these obiter dicta" of the *Murphy*, *Perkins*, and *Billingham* cases, the court insisted that for anyone to be liable as an abettor, he must actually have gone there for the purpose of encouraging it, not merely to see it. Admitting that presence alone was some evidence of encouragement, the majority of the court thought that "to constitute an aider and abettor some active steps must be taken by word or action, with the intent to instigate the principal". A subsequent decision involving a different type of offense has found this language inapplicable,<sup>59</sup> but the *Coney* decision is informative because it actually involved a person who was only a spectator, one of 150 who had gathered to watch the fight. No one was killed in the fight or as a result of it, so far as the evidence shows, and while both of the contestants were convicted, even the trial court had deemed Coney's offense trivial, sentencing him to only three weeks imprisonment.<sup>60</sup>

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<sup>57</sup> *Reg. v. Young*, 8 C. & P. 644, 173 Eng. Rep. Reprint 655 (1838); *Reg. v. Cuddy*, 1 C. & K. 210, 174 Eng. Rep. Reprint 779 (1843).

<sup>58</sup> (1882) 8 Q. B. D. 534. Noted (1882), 15 Cent. L. J. 217 (reprinted from 17 L. J. 322).

<sup>59</sup> *Du Cros v. Lambourne* (1907), 1 K. B. 40. The offense involved was that of improper operation of an automobile. The judge said: "*Regina v. Coney* was a case of spectators at a prize fight, and I do not think the general language used . . . was intended to be, or can be, treated as applying to every kind of case."

<sup>60</sup> *Regina v. Hodkiss*, decided in the same year as the *Coney* case and cited in that case, espoused the same doctrine, although the facts differed. *Cf.*, 9 *Halsbury's Laws* (1st Ed.), p. 470; *Wharton, Criminal Law* (11th Ed.), ss. 497, 49, 833.

*Regina v. Brown*<sup>61</sup> avoids this troublesome question by convicting the spectator of failing to aid an officer in restoring the peace, where one lone officer tried to stop the prize fight and requested the defendant to help. The court turned a deaf ear on the plea that the defendant was too busy holding his horses to help the officer. The evidence did show that the defendant was atop his carriage, with horses hitched, so the excuse is more plausible that the suggestion by the court in the *Coney* case that the defendant might have been vainly trying to get away but was held at the ringside by the pressure of the crowd. In addition to being forty years prior to the *Coney* case, the *Brown* case involved forcible resistance by the spectators to the uniformed constable and his helpers who sought to stop the fight, bringing the case within the observations already made concerning fights coupled with riots.<sup>62</sup>

*Seaward v. Paterson*,<sup>63</sup> decided in 1897, agreed with the doctrine of the *Coney* case as to the liability of a mere spectator, but found that the defendant in question had actively aided in the commission of the offense. The evidence showed that a twenty-five year lease of certain rooms had been made, the tenant covenanting to use them for club purposes and not to permit any noise or disturbance. When the tenant commenced holding prize fights in the rooms, the lessor and other tenants secured an injunction, for the breach of which the tenant and his employee were convicted, the latter having acted as "master of ceremonies" at the fights. The third defendant, although claiming to be a mere spectator, appeared to be interested financially in the venture.

Two other English cases, sometimes cited, in each of which one contestant was killed, are not squarely in point. In one, the deceased had goaded the defendant into the combat, while both were at a dance, and the death resulted from a fall while wrestling, not boxing.<sup>64</sup> In the other case, the fight, while pre-arranged, was likewise a grudge bout, the stakes being put up by each fighter more to compel attendance, rather than as the

<sup>61</sup> 1 C. & M. 314, 174 Eng. Rep. Reprint 522 (1841).

<sup>62</sup> See *Reg. v. Hunt*, 1 Cox. C. C. 177. (That a prize fight in the presence of a quiet crowd which departed quietly upon the appearance of officers, was not an affray.)

<sup>63</sup> (1897) 1 Ch. 545.

<sup>64</sup> *Reg. v. Lewis*, 1 C. & K. 419, 174 Eng. Rep. Reprint 874 (1844).



prize. The stakeholder, who was not present at the bout, and whom the court thought unaware of the serious nature the affair, assumed, was held not an accessory.<sup>65</sup> The English decisions, difficult of reconciliation from the standpoint of legal doctrine in the different opinions, may nevertheless and like the American cases, be reconciled from an analysis of the actual fact situations presented, and the time and place in which the prosecution arose. The English cases agreed that prize fights were illegal, without any specific statute on the point, but they too created a distinction between prize-fighting and boxing, despite the early opinions which used the words as synonymous.

If the English cases seem strangely to run toward convicting spectators, whereas the American cases do not, the difference is largely apparent. In most of the instances where conviction resulted, the defendant was more than a "mere spectator", either a backer, a second, or one who resisted police efforts to stop the fight. Somewhat similar results were reached in American cases in which the conviction of a promoter<sup>66</sup> or a second<sup>67</sup> was sustained. In neither country is there any material probability of a mere spectator at a large prize fight being prosecuted for any serious offense, despite any contrary statute<sup>68</sup> or court doctrine.

The English and American cases, while not identical in result,<sup>69</sup> are roughly parallel, similar enough to corroborate the hypothesis of the importance of the dominant local culture of the particular period, different enough to reflect the differences in the culture of two widely separated countries.

Lastly, concerning the legal problem of distinguishing between prize fighting and boxing, it can be said that originally there was no difference between the two. The statutes never intended to cover bona fide sparring exercises, but were in-

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<sup>65</sup> Reg. v. Taylor, Law Rep. 2 Crown Cases Reserved 147 (1875).

<sup>66</sup> People v. Floss, 7 N. Y. Supp. 504 (1889); Dane v. United States, 18 F. (2d) 811 (1927), cert. denied, 275 U. S. 538, 27 L. Ed. 413, 48 S. Ct. 35 (1927). (Promoter was convicted although the fighters were acquitted.)

<sup>67</sup> Commonwealth v. Welsh, 73 Mass. 324 (1856).

<sup>68</sup> Purdon, Penn. St. (1937) 18:1781 (every person present is guilty).

<sup>69</sup> It is to be noted that more of the English decisions were reported from inferior courts than in the case of the American decisions.

tended to cover ALL ring contests, whether or not admission was charged, whether or not gloves were used (although most of the statutes antedated the introduction of gloves for use in the actual bouts, as distinguished from the practice sessions), and despite the name used, the terms of the prize award, or the nature of the ring used. Later, with the introduction of humane rules, fair play, heavy gloves, and a limited number and length of rounds, the courts *found* a distinction between the two, a distinction which, under modern boxing commission laws such as the New York statute, are completely abandoned again. In a state whose latest revised statutes provide for commission control of "boxing, sparring, and wrestling" and penalties for unlicensed exhibitions, without mentioning "prize fights" what chance that an offending pugilist could avoid the penalty by pleading he was engaged in a prize fight, as distinct from a boxing match? Again, the federal act of 1896 which applied to the territories and the District of Columbia, forbidding "pugilistic encounters" for a prize or championship, or where admission was charged,<sup>70</sup> and which made the use or non-use of gloves immaterial,<sup>71</sup> obviously covers "prize fights". A 1929 amendment exempts Alaska and Hawaii from the act, provided the contestants wear five ounce gloves, fight not more than ten rounds of three minutes each and have previously been examined and pronounced fit by a physician,<sup>72</sup> all of which regulation would describe the "boxing and sparring exhibitions" of other statutes.

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<sup>70</sup> Act. of Feb. 7, 1896, c. 12, s. 1, 29 Stat. 5.

<sup>71</sup> *Id.*, s. 2.

<sup>72</sup> Act of Feb. 8, 1929, c. 153, 45 Stat. 1156.