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Recent Decisions

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CONSTITUTIONAL LAW — CENSORSHIP OF MOTION PICTURES FOR PUBLIC EXHIBITION — STATUTE NOT FURNISHING A REASONABLE GUIDE. — *R.K.O. v. Department of Education of Ohio*, . . . Ohio St. . . ., 122 N.E.2d 769 (1954). Plaintiff was engaged in the production and distribution of motion picture films in the State of Ohio and elsewhere. The division of film censorship of the department of education issued an order requiring the plaintiff to eliminate certain parts of a motion picture film prior to its distribution and exhibition in the state. Plaintiff instituted the present suit in the Supreme Court of Ohio, praying that the court vacate and set aside the order of the division on the grounds that the censorship act was repugnant to the first and fourteenth amendments to the Constitution as well as similar provisions of the constitution of Ohio. The Ohio censorship statute provides that only pictures which are "moral, educational, or amusing and harmless" shall be approved for public exhibition. OHIO GEN. CODE ANN. § 154-47b (1946). Thus the court was presented with the problem of determining whether or not, or to what extent, a state in its sovereign capacity could censor the public exhibition of movies without violating the due process requirements of its own and the Federal Constitution.

The plaintiff was granted the relief prayed for, the court determining that, in view of the recent decisions of the Supreme Court of the United States, the censorship statute was unconstitutional. However, the court was prevented from declaring the act unconstitutional because only five justices concurred in the opinion, whereas a rule of the court required six members to concur before the invalidity of a statute could be established. In the alternative, the court held that any censorship order made pursuant to the present statute would be per se unreasonable and unlawful and therefore could not be enforced.

Prior to 1952, the Supreme Court indicated that motion pictures were not among those forms of expression protected by the due process provisions of the Fourteenth Amendment. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915). However, the Court expressly reversed its position and, by so doing, stimulated renewed interest in this field when it declared that ". . . expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S.

495, 502 (1952). The *Burstyn* case, *supra,* perhaps better known as the court test of the moving picture "The Miracle," reached the Supreme Court as a result of a refusal by the regents of the State of New York to allow the showing of the movie on the ground that it was "sacrilegious," one of the standards provided by statute. This action by the regents was affirmed by the state court, but the Supreme Court unanimously reversed on the grounds that no moving picture could be subject to censorship by such an uncertain and indefinite standard. "Sacrilegious," as a statutory standard was too broad, tending to vest the censors with an unlimited discretion in its application. The Court qualified its position by stating that the protection afforded by the Constitution did not extend to all kinds of movies and pointed out that if it had been presented with a clearly drawn and definite statute designed to prohibit the showing of obscene films, the result might have been different.

One week later, the Supreme Court struck down an ordinance of a Texas city on the authority of the *Burstyn* case, *supra. Gelling v. Texas,* 343 U.S. 960 (1952). The ordinance empowered the city board of censors to refuse a license to exhibit a movie if such exhibition would be "prejudicial to the best interests" of the community. The appellant had been convicted of a misdemeanor under this ordinance for showing a motion picture without a license. The Supreme Court reversed the conviction in a memorandum decision and ordered the appellant discharged. In a separate opinion, Justice Frankfurter, concurring with the court, expressly stated that the ordinance under attack was violative of due process because of indefiniteness.

Notwithstanding the fact that the standard of "sacrilegious" in its censorship act had been declared invalid in the *Burstyn* case, *supra,* the New York Court of Appeals once again upheld a decision of the board of regents to refuse a license to show the movie, "La Ronde," on the grounds that it was "immoral" and "would tend to corrupt morals." *Commercial Pictures Corp. v. Board of Regents,* 305 N.Y. 336, 113 N.E.2d 502 (1953). The state court, attempting to save the statute, interjected a new aspect into its reasoning when it applied the clear and present danger test to motion pictures, that is, if a movie presents such a danger of "substantive evil to the community," then it is within the power of the legislature to protect the community from the evil, even though in doing so it may infringe upon the right of freedom of expression. The court considered any act of the legislature in this regard to be a reasonable and valid exercise of the police power of the state, and therefore, where the evil is a motion picture that threatens the morals of the community, any

protective measure taken by the legislature must necessarily include some form of censorship. Applying the requirements of due process to the statute itself, the court construed the standards applied in this case, "immoral" and "tend to corrupt morals," to refer clearly to sexual immorality, and as such they were thought neither vague nor indefinite.

At about the same time the *Commercial Pictures Corp.* case, *supra,* was being decided in New York, the Supreme Court of Ohio was confronted with a similar problem in *Superior Films, Inc. v. Department of Education,* 159 Ohio St. 315, 112 N.E.2d 311 (1953). Here the censors had refused to issue a permit to show the motion picture "M" because they believed the picture was "harmful." The court concluded that not all state censorship statutes had been outlawed by the United States Supreme Court, and that there was still a certain field within which the decency and morals of the community could be protected from offensive movies by "prior restraint under proper criteria." Confronted with the same statute as in the instant case, the court further concluded that the specified standards established by the statute could be applied without much difficulty since they had acquired a definite and precise meaning over the years. On the basis of this statutory norm, the court upheld the decision of the censors.

The Supreme Court of the United States did not accept the reasoning of the *Commercial Pictures Corp.* case, *supra,* nor the *Superior Films* case, *supra.* The Court reviewed both these cases together and, in a memorandum decision, were reversed on the authority of the *Burstyn* case, *supra. Superior Films, Inc. v. Department of Education of Ohio,* 346 U.S. 587 (1954). The New York Court of Appeals thereafter, on motion, directed the Board of Regents to issue a license to allow the showing of the same movie it had previously banned. *Commercial Pictures Corp. v. Board of Regents,* 306 N.Y. 850, 118 N.E.2d 908 (1954).

Thus the Supreme Court has extended the decision of the *Burstyn* case to strike down standards of "best interests," "immoral," "tend to corrupt morals," and "harmful." As yet the Court has not been presented with a clearly drafted statute designed to prohibit the public exhibition of obscene films, which, as it indicated in the *Burstyn* case, might require a different answer.

However, there is a possibility that this question might come before the Court as the result of current litigation in Illinois. An ordinance of the City of Chicago authorizes the police commissioner to refuse a license to exhibit any motion picture which he finds to be "immoral or obscene." Applying these norms, the commissioner refused to permit the exhibition of "The Miracle"

in Chicago. The trial court enjoined the prevention of exhibition, but the Supreme Court of Illinois reversed and held that the city did have the power to censor movies on the basis of these standards. The case was remanded to the trial court for the determination of whether or not the film in question was in fact obscene. *American Civil Liberties Union v The City of Chicago,* 3 Ill. 2d 334, 121 N.E.2d 585 (1954). Should the trial court sustain the finding of the censor that the film is "obscene," it is the opinion of this writer that the Supreme Court of the United States may be called upon to answer the question which it anticipated in the *Burstyn* case.

Relying on the decision of the Supreme Court of Ohio in *Superior Films, Inc. v. Department of Education, supra,* and disregarding the inferential effect of the United States Supreme Court's reversal of that case, a lower court in Ohio refused to enjoin the enforcement of the same censorship act which had been under attack in these prior cases. *R.K.O. Pictures v. Hissong,* 123 N.E.2d 441 (Ohio C.P. 1954). The court, disregarding the fact that this statute had been impliedly declared invalid by the Supreme Court in the *Superior Films* case, *supra,* interpreted it as prohibiting the showing of obscene films. The United States Supreme Court had apparently recognized that obscenity might be censored in the *Burstyn* case; and on this basis, the court upheld the validity of the statute.

The principal case was a direct proceeding in the Supreme Court of Ohio from the Department of Education, and, although no mention is made of *R.K.O. Pictures v. Hissong, supra,* any weight which this latter case might have had in subsequent cases has been completely destroyed by the decision in the instant case. Moreover, the present case indicates that the Supreme Court of Ohio has finally come to realize that the censorship statute of Ohio is not sufficiently clear and definite to be upheld as a constitutionally valid prior restraint on the public exhibition of motion picture films. The failure to strike down the statute once and for all is explained in the court rule that requires six judges to concur in such action.

George N. Tompkins, Jr.

CONSTITUTIONAL LAW — CIVIL RIGHTS — PROHIBITION OF FRATERNITIES AND SORORITIES. — *Webb v. State University of New York,* 125 F. Supp. 910 (N.D.N.Y.), *appeal dismissed,* 348 U.S. 867 (1954). On October 8, 1953, the board of trustees of the State University of New York adopted a resolution outlawing all social organizations that had any affiliation outside the university.

The president of the university was authorized to determine what organizations fell within this prohibition and to take steps to exclude them. The plaintiffs and intervenors are members of national fraternities and sororities, and this action is brought under 17 STAT. 13 (1871), 42 U.S.C. § 1983 (1952), to have the resolution declared unconstitutional and void as depriving them of their civil rights. This three man federal court had been granted jurisdiction under 28 U.S.C. §§ 2281, 2284 (1952), since injunctive relief was prayed against a state body. *Webb v. State University of New York,* 120 F. Supp. 554 (N.D.N.Y. 1954).

The question this court was called on to decide was whether or not a state board of education has the power to prohibit the existence in state institutions of fraternities and sororities connected with national chapters. The district court held the board did have this power by virtue of its interest in a sound educational system under N.Y. EDUC. LAW § 355, which gave the trustees, when approved by the board of regents, general supervisory power to regulate the admission of students, and to prescribe the qualifications for their continued attendance.

The concept of liberty by its very nature is incapable of being defined exactly. Attempts to define so nebulous a term have, as in *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), been expressed with reference to the privileges essential to "the orderly pursuit of happiness by free men." The Court there went on to say, 262 U.S. at 399-400:

> The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

The *Meyer* case, *supra,* involved the validity of a state law forbidding the teaching of German to grade school pupils which was held invalid since there was no reasonable cause for such a law. The requirement of a proper and necessary reason for control was reaffirmed in 1954 in *Bolling v. Sharpe,* 347 U.S. at 499-500, where the Court stated: "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except *for a proper governmental objective.*" (Emphasis added) Again a "proper objective" of the exercise of a state's police power became the standard, the application of which was the issue presented to the district court in the instant case.

Two types of cases involving interdictions against fraternities and sororities have been presented to the courts. The first type

are those which challenge the constitutionality of a state statute outlawing fraternities and sororities, and the second arise out of attempts by boards of education to do the same thing.

In *Waugh v. Bd. of Trustees of the University of Mississippi,* 237 U.S. 589 (1915), the enforcement of a statute of Mississippi, requiring the signing of a pledge that an applicant for admission to a state school was never a member of a prohibited fraternity and that he would not join, was sought to be restrained by the plaintiff, who was denied admission to the state law school because of his membership in a prohibited fraternity. He alleged the statute was an obstruction to his pursuit of happiness and a deprivation of his property rights, as well as of his privileges and immunities under the United States Constitution. The Supreme Court met these arguments by taking the view that the right to attend a university was a conditional, not an absolute right and that the educational institutions of the State of Mississippi were under the control of the state legislature. The grounds of this control was that these institutions were maintained by public funds and any disciplinary enactment for the furtherance of educational purposes could not be curtailed. The reasoning in the *Waugh* case, *supra,* was applied in *Satan Fraternity v. Bd. of Public Educ.,* 156 Fla. 222, 22 So. 2d 892 (1945), where the constitutionality of a Florida statute banning faternities and secret organizations in primary and secondary schools was upheld as a valid disciplinary measure by the state. The Florida court grounded its decision, 22 So. 2d at 893:

> . . . on the theory that the right to attend an educational institution provided by the State is not a natural right but a public benefaction and those who seek to become beneficiaries of them must submit to such regulations and conditions as the law imposes as a prerequisite to participate.

Accord, Hughes v. Caddo Parish School Bd., 57 F. Supp. 508 (W.D. La. 1944), *aff'd per curiam,* 323 U.S. 685 (1945); *Burkitt v. School Dist. No. 1,* 195 Ore. 471, 246 P.2d 566 (1952).

Statutes prohibiting fraternities and sororities in primary and secondary schools are common today. CAL. EDUC. CODE §§ 16075-16077 (1952); ILL. ANN. STAT. §§ 122.31-1 - 122.31-5 (1946); MICH. STAT. ANN. §§ 15.741-15.744 (1953); N.J. STAT. ANN. §§ 18:14-110, 18:14-111 (1940). In addition to a question of violation of the fourteenth amendment, these statutes have been attacked on a second ground, *i.e.,* that they amount to class legislation. However, this objection is answered by the fact that the statute applies to all students, *Bradford v. Bd. of Educ.,* 18 Cal. App. 19, 121 Pac. 929 (1912); that it keeps youth from wasting its assets and is necessary to keep interest and the school curriculum

at its highest efficiency, *Lee v. Hoffman,* 182 Iowa 1216, 166 N.W. 565, 568 (1918); and that it is necessary for training and discipline, *Burkitt v. School Dist. No. 1, supra; Hughes v. Caddo Parish School Bd., supra.*

The problem of the extent to which legislation in prohibition of high school fraternities might go was brought out in the dissenting opinion in *Steele v. Sexton,* 253 Mich. 32, 234 N.W. 436, 438-440 (1931), in which *reductio ad absurdum* argument was used, wherein the judge stated that if this outlawing type of legislation continued to be upheld, the state could exceed its legitimate sphere and prevent student membership in the Knights of Columbus, Masons, Elks, etc. and withhold the earned academic credits of Methodists, Presbyterians, or Catholics. But in actual practice the line of control has been drawn at fraternities and sororities. *Satan Fraternity v. Bd. of Public Educ., supra.* Thus, there is unanimity of judicial opinion that legislation prohibiting the existence of fraternities and sororities is a reasonable exercise of the disciplinary power of the states over the educational institutions which they create and maintain.

Some states have even permitted boards of education to outlaw fraternities and sororities under general education laws such as N.C. GEN. STAT. § 115-19 (1952), which reads: "The State Board of Education shall . . . generally . . . supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto." See N.Y. EDUC. LAW § 355. Nor has the constitutionality of such procedure been questioned. *Smith v. Bd. of Educ.,* 182 Ill. App. 342 (1913) (Illinois at this time did not have an express prohibition of such societies as is presently embodied in ILL. ANN. STAT., *supra*). Generally these rules and regulations merely prohibit a student who will not renounce his affiliation from participating in any type of school activity or from receiving honors. *Wilson v. Abilene Independent School Dist.,* 190 S.W.2d 406 (Tex. App. 1945); *Wayland v. Bd. of School Directors,* 43 Wash. 441, 86 Pac. 642 (1906).

The grounds on which these rules are attacked are that the schools do not have power to regulate student activities outside of school hours and that they interfere with the right of parental discipline. This rationale was accepted in both *State ex rel. Stallard v. White,* 82 Ind. 278 (1882) and *Wright v. Bd. of Educ.,* 295 Mo. 466, 246 S.W. 43 (1922), which are the only cases so holding. Coincidentally each of these cases has a dissent extolling the majority view. In the *White* case, *supra,* Purdue University was ordered to admit anyone physically and mentally healthy provided there was room available, since it was a public institution and, therefore, could not bar an applicant who would not

sign a pledge. The court made a distinction between the requirements for admission and for control and management, possibly leaving room for a rule that a pledge might be demanded when the student was already actually in attendance. In the *Wright* case, *supra,* the Missouri court went much further and expressly ruled that control by a teacher or board of education ceases when the child reaches his home, unless the child's act there will affect the conduct of other school children. Fraternity membership was held not bad in itself, and therefore a rule prohibiting membership was invalid, since the general education statute of Missouri did not give express power to the board of education to outlaw such membership.

However, in *Wilson v. Bd. of Educ.,* 233 Ill. 464, 84 N.E. 697 (1908), under a general constitutional provision for a school system and in *Wayland v. Bd. of School Directors, supra,* under a general statute, the courts upheld school board prohibition of fraternities and sororities. These cases and others representing a strong majority base their decisions on the premise that the boards were created to operate schools and that they, not courts or juries, know the conditions of school life intimately. Therefore, with this knowledge the school boards themselves are able to determine what is necessary for the schools to function at peak efficiency, and rules to achieve this purpose are valid. *Wilson v. Board of Educ., supra,* 84 N.E. at 700; *accord, Coggins v. Bd of Educ.,* 223 N.C. 763, 28 S.E.2d 527 (1944); *Wilson v. Abilene Independent School Dist., supra.* Nor are parents' rights infringed upon, for the control of the school extends to anything which might possibly interfere with study habits, the character of the pupil, or the reputation of the school. *Antell v. Stokes,* 287 Mass. 103, 191 N.E. 407 (1934). Also it is said in *Waugh v Bd. of Trustees of the University of Mississippi, supra,* regarding the Mississippi statute, whoever passed the regulation must have been of the opinion that fraternity membership was detrimental, and, since it was, it should be outlawed. Furthermore, the courts will not interfere with such prohibition of fraternities and sororities if made as a reasonable disciplinary measure which is within the exclusive discretion of the boards. *Ingrig v. Srygley,* 210 Ark. 580, 197 S.W.2d 39 (1946); *Coggins v. Bd. of Educ., supra.*

"The right to attend school exists, but it does not exist absolutely, but is a right that is subject at all times to reasonable conditions the state may impose." *Johnson v. Town of Deerfield,* 25 F. Supp. 918, 921 (D. Mass.), *aff'd per curiam,* 306 U.S. 621 (1939). This limitation on education is not a restraint on a student's liberty for it is absolutely necessary, to guide his untrained mind, that such power be had by those possessing experience.

Thus, a limitation on a fraternity or sorority by statute is valid, and if a regulation promulgated by a board of education is in its function to operate the schools efficiently, it, too, is also valid according to the clear weight of authority. In the instant case the court conclusively held, in complete accord with the logical view, that boards of education are free to make such rules for the attainment of their purpose — to create and maintain a productive educational system.

James M. Corcoran, Jr.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CONFLICT OF STATE AND FEDERAL LEGISLATION IN RE MOTOR CARRIERS. — *Castle v. Hayes Freight Lines, Inc.*, 75 Sup. Ct. 191 (1954). The respondent, Hayes Freight Lines, was engaged in transporting goods in the State of Illinois both local and interstate commerce. It had certificates from both the Interstate Commerce Commission under the power granted by the Federal Motor Carriers Act, 54 STAT. 919 (1935), 49 U.S.C. § 301 (1952) and the State of Illinois. An Illinois statute provides that fines shall be imposed for violation of weight limits there set out, and further provides for the suspension of a carrier's right to use the highway for repeated violations. ILL. REV. STAT. § 229 (b) (1953). The motor carrier brought action for declaratory judgment as to the validity of certain sections of the Illinois statute. The Supreme Court of Illinois held that the suspension of intrastate operations was valid, but that no part of the interstate operations could be suspended. On certiorari the United States Supreme Court agreed with the view of the Illinois court, while conceding the right of the state to punish for weight violations, it held that the power to suspend all operations by the carrier is within the exclusive domain of the Interstate Commerce Commission.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), one of the earliest cases of conflict between the power of a sovereign state over transportation and the federal power under the commerce clause, U.S. CONST. art. I, § 8, Gibbon's federally granted license, to engage in interstate commerce by boat, was in direct conflict with the exclusive right to use New York waterways that had been given to one Livingston and subsequently assigned to Ogden. The issue of whether a state can regulate commerce among the states while Congress is regulating it is present in the instant case as it was in the *Gibbons* case, *supra*. The court stated that the power to nullify inconsistent state control arises from the declaration that the Constitution is the supreme law of the land. U.S. CONST. art. VI, § 2. The law of the state must yield to the act of Congress.

Five years later, state obstruction of interstate commerce by a dam over a navigable stream was held not repugnant to Congress' power to regulate commerce as no legislation had been enacted in that area. *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1819). But even when Congress has legislated, if such legislation manifests an intent not to cover the entire field, the state is not deprived of power to legislate in the remaining area. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

In the course of striking down a Missouri licensing statute that discriminated against the sale of out of state goods and burdened interstate commerce the Court stated: "There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the state begins." *Welton v. Missouri*, 91 U.S. 275, 281 (1876). In the instant case the line must be drawn between a state's right to protect its roads by acceptable legislation and the extent to which that legislation burdens interstate commerce. *Sproles v. Binford*, 286 U.S. 374 (1932).

Hendrick v. Maryland, 235 U.S. 610 (1915) was a forerunner of many similar cases in which the state and federal government clashed over the control of highway traffic passing through the state. Maryland required all persons using its highways to obtain a certificate of registration, including those just passing through the state; the certificate being in the nature of state permission to use the road. The court pointed out the necessity for good maintenance of the roads and held the tax was not an unlawful burden on interstate commerce but a legitimate exercise of police powers. A frequently cited case dealing with state transport certificates is *Buck v. Kuykendall*, 267 U.S. 307 (1925) where such certificate was refused to one Buck who wished to operate a common carrier in interstate commerce but could not because he was unable to obtain the state license. The Court, in striking down the law of Washington, stated that the primary purpose of the state law was not to encourage safety and preservation of highways, but to limit competition and hence its effect was to obstruct interstate commerce. Similarly, in the same year, the Court declared a Michigan law invalid that required all motor vehicles for hire to be registered as common carriers and as such take out certain indemnity bonds. The appellant was a private carrier and as a result of this law was forced to become a common carrier. The fault in this law was that it subjected the right to use the highway to unnecessary restrictions. *Michigan Public Utilities Comm'rs v. Duke*, 266 U.S. 570 (1925).

A motor vehicle act in Texas prohibited operation on the state highway of vehicles over the stipulated weight. TEX. PEN. CODE

ANN. art. 827a (1931). The limitation on weight was held not per se repugnant to the commerce clause and there was no congressional action, hence the limitation was upheld. It was stated that the state is not powerless to protect its highways from being subjected to excessive burdens. *Sproles v. Binford, supra.* A more comprehensive prohibition was upheld in *Bradley v. Public Utilities Commission,* 289 U.S. 92 (1933), where the State of Ohio refused a certificate to use a highway because it was already too congested and the carrier refused to take another route. Once again, by reason of the right of the state to regulate traffic to promote safety, the enactment was upheld. The effect on interstate commerce was said to be merely incidental, even though the prohibited vehicles were used exclusively in interstate commerce.

Maurer v. Hamilton, 309 U.S. 598 (1940) and *South Carolina State Highway Dep't v. Barnwell,* 303 U.S. 177 (1938), both of which were decided after the passage of the Federal Motor Carriers Act, *supra,* are two of the frequently cited cases on the point in issue. In the *Maurer* case, *supra,* Pennsylvania prohibited the use of highways by vehicles carrying other vehicles over the head of the operator of such carrier vehicles. In holding that this limitation was not in conflict with the commerce clause, the Court explained that the regulation was to insure the safe and convenient use of the highways. This was accomplished through control of the size and weight of motor vehicles, a right reserved to the states by federal law. 54 STAT. 929 (1935), 49 U.S.C. §325 (1952). The Court must pass on the question of whether such state restrictions are reasonable means to protect the roads in the light of possible effect on interstate commerce, *South Carolina v. Barnwell, supra.* If these restrictions are found to be necessary to preserve state roads such limitations will apply with equal force to both interstate commerce and intrastate commerce. Both of the above cases were deemed controlling in *Whitney v. Johnson,* 37 F. Supp. 65 (E.D. Ky. 1941), *aff'd,* 314 U.S. 574 (1941). Here the court, in upholding a Kentucky limitation of weight to 18,000 lbs. per truck said, in effect, that to permit tonnage to pass over roads unable to bear the weight would result in the complete breakdown and disruption of highway systems. 37 F. Supp. at page 68.

Licensing and taxing go hand in hand and the power of a state to tax commercial motor vehicles, particularly trucks, has been challenged many times. Especially applicable to this discussion are the cases where the tax is based on the weight of the trucks. In *Clark v. Poor,* 274 U.S. 554 (1927), an Ohio statute required payment of a graduated tax according to the number and capacity of vehicles used on the roads. As the tax did not

discriminate, nor obstruct interstate commerce and was used to maintain the roads involved, it was held valid. Thus common carriers who use the highways as a place of business may be expected to be assessed for their upkeep. In *Hicklin v. Coney,* 290 U.S. 169 (1933), the Court again upheld a "carrying capacity" tax in South Carolina, since it was reasonable and was applied to keeping the roads in repair; while being neither discriminatory, nor burdening interstate commerce. Capacity taxes were also upheld in Idaho, *Consolidated Freight Lines v. Pfost,* 7 F. Supp. 629 (S.D. Idaho 1934), and Indiana, *Eavey v. Treasury Department,* 216 Ind. 255, 24 N.E.2d 268, *appeal dismissed,* 310 U.S. 611 (1939).

More recently taxes were upheld where a trucker was arrested for carrying liquor through a state without paying the license tax, *Duckworth v. Arkansas,* 314 U.S. 390 (1941); and where the tax was primarily on city trucks, but they also carried interstate commerce, *City of Chicago v. Willett Co.,* 344 U.S. 547 (1953); and where the plaintiff failed to show that a weight tax deprived him of rights under the commerce clause. *Bode v. Barrett,* 344 U.S. 583 (1953).

It is apparent from the above cases that the control of Congress over interstate commerce through the Federal Motor Carriers Act, *supra,* does not completely restrain the state's power to promote the welfare of the state by highway safety and conservation methods. *See,* George, *Alleged Conflict between The Federal Motor Carriers Act and other Statutes,* 22 ROCKY MT. L. REV. 13 (1949). Congress has also authorized the Commission to investigate and report as to the size and weight of vehicles, impliedly leaving regulation in the hands of the states. *See,* Swerer, *State Regulation of Interstate Transportation by Motor Carriers,* 16 ROCKY MT. L. REV. 53 (1943).

If a state's system of enforcement of its weight regulations by fines is ineffective the state can work through the machinery of the Commission to have the violators banned from the highways. Every motor vehicle must obey the laws of the state in which it operates unless it is at variance with a Commission order. 49 CODE FED. REGS. § 192.3 (Cum. Supp. 1954). Therefore, the Commission can protect the state's interest, after an investigation of the facts, by ordering compliance with state law and, if there is wilful failure to comply, revoke the federal certificate. 49 STAT. 555, 49 U.S.C. § 312 (1952).

An analysis of the above cases illustrates that the federal government has left some regulation of carriers to the states. However, when the federal government has specifically acted, as in the instant case where it granted the Hayes Freight Co. a

certificate of convenience and necessity through the Interstate Commerce Commission any state law that attempts to revoke the federally protected right or privilege is void.

John L. Rosshirt

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — PROFESSIONAL BOXING UNDER THE SHERMAN ANTI-TRUST ACT.— *United States v. International Boxing Club of New York, Inc.*, 75 Sup. Ct. 259 (1955). This is a civil anti-trust action brought by the government against the defendants, three corporations and two individuals, who are engaged in the business of promoting professional championship boxing contests. The government charged that the defendants, in the course of their business, have violated the Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U.S.C. §§ 1, 2 (1952). The government's complaint alleged that the defendants made a substantial utilization of the channels of interstate trade and commerce and had restrained and monopolized this trade and commerce in the "promotion, exhibition, broadcasting, telecasting and motion picture production and distribution of professional championship boxing contests in the United States," through a conspiracy to exclude competition. The district court granted defendant's motion to dismiss the complaint. (The district court's opinion was oral and not transcribed.) The case came to the Supreme Court on direct appeal under the Expediting Act, 62 STAT. 989 (1948), 15 U.S.C. § 29 (1952).

The question presented to the Supreme Court was whether or not the defendant's business, of promoting professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission constituted "trade" and "commerce" within the meaning of the Sherman Act, thus making the defendants liable for violations thereof.

Assuming the facts to be true, it was held that the fact that a boxing match was a local affair did not bar application of the Sherman Act to a business based on the promotion of such matches if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. The Court was of the opinion that it would be sufficient to rest the allegation that boxing activities are interstate commerce upon the ground that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights. The Court deemed it necessary first to distinguish the holdings in *Federal*

Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), and *Toolson v. New York Yankees, Inc.,* 346 U.S. 356 (1953), to the effect that professional baseball was not subject to the Sherman Anti-Trust Act since the defendants in the instant case contended that these cases immunized any business involving exhibitions of an athletic nature.

The Supreme Court adhered to the *Federal Baseball* ruling in deciding the *Toolson* case, *supra,* only insofar as that decision determined that Congress had no intention of including the business of baseball within the scope of the anti-trust laws, 346 U.S. 356, 357. The *Toolson* case, *supra,* neither overruled the *Federal Baseball* case, *supra,* nor necessarily reaffirmed all that was said in that case. Thus, the *Toolson* case did not extend anti-trust exemptions to all business based on local exhibitions. The intention of the *Toolson* case is clear — to exempt baseball — and no other sport.

The defendants relied on the opinion in *Federal Baseball, supra,* in which the Court said, 259 U.S. at 209:

> . . . Personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because that transportation (across state lines) that we have mentioned takes place.

In the landmark case of *Gibbons v. Ogden,* 19 U.S. (9 Wheat.) 448 (1823), the Court said that: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It described the commercial intercourse between nations, and parts of nations, in all its branches. . . ." Thus commerce is interstate when it involves more than one State. In *International Textbook Co. v. Pigg,* 217 U.S. 91 (1910), the Court held commerce to include the mere transmission of information or intelligence. Commercial intercourse is an element of commerce and the mere transmission of the intangible, *e.g.,* ideas and intelligence, is interstate commerce when carried on between the states. The telegraph, as a carrier of messages, is an instrumentality of commerce since its business is commerce itself. *Western Union Telegraph Co. v. Pendleton,* 122 U.S. 347, 356 (1887); *Pensacola Telegraph Co. v. Western Union Telegraph Co.,* 96 U.S. 9 (1877). The gathering of news by a press association and its transmission to member newspapers is termed interstate commerce, *Associated Press v. United States,* 326 U.S. 1 (1945). The business of insurance in different States is interstate commerce, *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944).

Congress can interfere with the completely internal concerns

of a State for the purpose of executing its general powers, one of which is its power over foreign and interstate commerce. It is generally agreed that "no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). Thus the power to regulate commerce is the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitation imposed upon Congress' power, or by the due process clause of the fifth amendment, are observed; *United States v. Caroline Products Co.*, 304 U.S. 144, 147 (1938). Thus, in *Houston E. & W.T. Ry. v. United States*, 234 U.S. 342 (1914), it was held that Congress could take all necessary measures appropriate to the end of fostering and protecting interstate commerce, even though intrastate transactions of interstate carriers may, as a result, be controlled.

Since the decision in the *Federal Baseball* case, *supra*, it has become apparent that when "personal effort" is connected with something else, such as restricting the competing telecasts of league games in a team's area when that team is playing an "away game," there may very well be an unreasonable and illegal restraint of trade which comes within the provisions of the Sherman Act. *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953). In the latter case, the defendants contended that the action against them should have been dismissed because professional football is not commerce or interstate commerce. This contention was rejected and it was held that the restrictions by professional football on the sale of radio and television rights imposed substantial restraints on the television and radio industry. Since the effect of the League by-laws was to restrict substantially that which was interstate commerce, it was immaterial whether professional football standing by itself, was commerce or interstate commerce. Radio, television, and motion picture activities are clearly interstate commerce. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (radio); *United States v. Paramount Pictures*, 334 U.S. 131 (1948) (motion pictures); *DuMont Laboratories Inc. v. Carroll*, 184 F.2d 153, 154 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951) (television).

However, as the Court has pointed out, not all restraints are illegal, only unreasonable restraints are prohibited. By the terms of the Sherman Act, every contract in restraint of trade is unlawful. But long ago, a vague "rule of reason" supplanted the strict letter of the statute. *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1916). Since every regulation of trade tends to restrain, the true test of legality is whether or not the restraint

promotes or destroys competition. The approach of the Supreme Court to the problem is well expressed in *Chicago Bd. of Trade v. United States,* 246 U.S. 231 (1918), where the Court said, 246 U.S. at 238:

> . . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint . . . the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

In *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940), it was held that the Sherman Act does not condemn all combinations which interrupt interstate commerce, but only those which divide marketing territories, apportion customers, and basically injure the consumer. The Act's main purpose is to preserve normal competition in the market and to center the restraint of trade limitations on only those agreements affecting prices for an unlawful purpose by unlawful means. In *United States v. American Medical Ass'n,* 110 F.2d 703 (D.C. Cir.), *cert. denied,* 310 U.S. 644 (1940), it was stated that the purpose of the Act was to prohibit those restraints which would prevent the public from freely receiving goods and services. To be illegal, the restraint must also be unreasonable, which depends, not upon a scientific formula applicable to all cases, but upon a consideration of the intent of the parties and the effect on the public. At the very foundation lies a consideration of the nature and condition of the business to be effected. *Westway Theater, Inc. v. Twentieth Century-Fox Film Corp.,* 30 F. Supp. 830 (D. Md. 1940), *aff'd,* 113 F.2d 932 (4th Cir. 1940).

The only real distinction between the baseball and boxing cases indicated by the Court in the instant case is that when the government's complaint against boxing was filed, "no court had ever held that the boxing business is not subject to the anti-trust laws," 75 Sup. Ct. at 262. The *Toolson* case, *supra,* 346 U.S. at 357, points out that the business of baseball had "been left for thirty years to develop, on the understanding that it was not subject to existing anti-trust legislation." Thus the Court said that if an exemption under the Sherman Act should be denied baseball,

or granted to boxing, then it is an issue for Congress alone to determine. It is clear, from the interpretation given to it by the Court in the instant case and the *Toolson* case, that the *Federal Baseball* case did not hold that all business based on professional sports is outside the scope of the anti-trust laws.

The case of *United States v. Shubert,* 75 Sup. Ct. 277 (1955), decided the same day as the instant case, held that the business of producing, booking, and presenting legitimate stage attractions on a multistate basis constitutes "trade or commerce" that is "among the several states" within the meaning of those terms in the Sherman Act. In this case involving the legitimate theater, the Court was on somewhat firmer ground by reason of the decision in *Hart v. Keith Vaudeville Exchange,* 262 U.S. 271 (1923), that the theatrical business could fall within the scope of the federal anti-trust laws, since part of the defendants' business was making contracts that call on performers to travel between the states and abroad and, in the connection therewith, require the transportation of large quantities of scenery, costumes, etc., which resulted in a constant stream of commerce from state to state.

"Trade or commerce" has been held to include the production, distribution, and exhibition of motion pictures, *United States v. Paramount Pictures,* 334 U.S. 131 (1948), and a liberal construction has been given the requirement of §§ 1 and 2 of the Sherman Act that the "trade or commerce" be "among the several States." In the motion picture cases, the requirement was satisfied by the interstate transportation of films, *Binderup v. Pathe Exchange, Inc.,* 263 U.S. 291 (1923), even though the actual "showing of motion pictures is of course a local affair," *United States v. Crescent Amusement Co.,* 323 U.S. 173, 183 (1944). Moreover, once interstate commerce is established, it has been held that the Sherman Act may be applied even to "local" restraints on that commerce. *United States v. Employing Plasterers Ass'n,* 347 U.S. 186 (1954); *accord, United States v. Women's Sportswear Mfg. Ass'n,* 336 U.S. 460 (1949); *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948).

Thus we have seen that only baseball is exempt from the Sherman Act. Other activities, such as professional football, boxing, legitimate theatre, radio, television, and motion pictures are all subject to the Sherman Act when they involve transportation across state lines. Obviously, the argument of Mr. Justice Holmes in the *Federal Baseball* case, *supra,* that "Personal effort, not related to production, is not a subject of commerce," is no longer valid, or, at best, has been limited by subsequent decisions of the Supreme Court.

What possible effect could these decisions have upon collegiate

athletics? Many college athletic activities are comparable to organized professional football and baseball in that teams cross state lines, carry paraphernalia with them, and charge admissions, with resulting profit for the sponsoring universities. Furthermore, the games are broadcast and televised through interstate media. Who can anticipate the ramifications of the National Collegiate Athletic Association's policy of restricted television and of only allowing the "game of the week" to be televised? It was a restriction similar to this that was struck down in the *National Football League* case, *supra*. Concededly, radio, television, and motion pictures are within "interstate commerce" as applied in the Sherman Act. Could the NCAA policy on restricted television be brought within §§ 1 and 2 of the Sherman Act? Under the present decisions of the Supreme Court, it would seem that such a policy comes dangerously close to being a "restraint of trade among the several states."

Ronald P. Mealey

CONSTITUTIONAL LAW—RIGHT TO COUNSEL—WAIVER IN FELONY ACTION NOT OPERATING AS WAIVER IN SUBSEQUENT HABITUAL CRIMINAL CHARGE. — *Chandler v. Fretag*, 75 Sup. Ct. 1 (1954). Petitioner Chandler seeks his release from prison by writ of habeas corpus on the grounds that he was denied counsel at his trial on a habitual criminal charge following his conviction for housebreaking and larceny. Intending to plead guilty to the latter offense only, he advised the court that he did not need a lawyer. At the trial he was told, for the first time, that he would also be tried as a habitual criminal under the Tennessee Habitual Criminal Act, TENN. CODE ANN. § 11863.1 (Williams Supp. 1951), which imposes a mandatory life sentence with no possibility of parole. Petitioner's immediate request for a continuance to enable him to retain counsel was denied. He pleaded guilty to the housebreaking and larceny charge, and the jury accepted his plea, sentencing him to three years imprisonment. The jury then found Chandler to be a habitual criminal, this being his fourth offense. The entire proceeding from the impaneling of the jury to the passing of sentence, required less than ten minutes time. Three years later, after having completed his sentence on the minor charge, Chandler petitioned the circuit court for a writ of habeas corpus, seeking relief from the life imprisonment under the habitual criminal conviction. The Tennessee Supreme Court affirmed the circuit court's denial of the writ, ruling that petitioner had waived his right to counsel on the habitual criminal charge by waiving counsel on the prior charge. The Supreme Court reversed, holding that the action of the trial court amounted

to a deprivation of petitioner's right to counsel under the due process provisions of the fourteenth amendment to the Constitution.

The issue for the determination of the Court was whether failure to allow Chandler to retain counsel after he had previously declined legal assistance on the minor charge violated due process.

Due process requirements with regard to the right to counsel originated not with the English courts but with the practices in the American colonies at the time of the drafting of the Constitution. In England, an accused's right to counsel in a felony case was not recognized until 1836 by statute, 6 & 7 WILL. 4, c. 114. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 700 (8th ed. 1927). This English rule was rejected by the colonies in America, which afforded the right to counsel in nearly all criminal prosecutions. *Powell v. Alabama,* 287 U.S. 45, 61 (1932).

Conflict over the right to counsel in criminal cases has caused considerable litigation in the past two decades. That every defendant has the right, if he so desires, to have an attorney appear in his behalf in court is unquestioned. *Powell v. Alabama, supra,* at 71; BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS 89 (1955). *Powell v. Alabama, supra,* specifically determined that in all capital cases, the defendant is entitled to counsel. However, in noncapital cases no such unequivocal rule has been defined to guide the trial court. *Betts v. Brady,* 316 U.S. 455 (1942). Of course, in all federal criminal cases, capital or noncapital, an accused must have assistance of counsel under the sixth amendment to the Constitution, unless he understandingly waives that right. *Johnson v. Zerbst,* 304 U.S. 458 (1938). *Betts v. Brady, supra,* flatly rejected the incorporation of the sixth amendment in the fourteenth. The court held that in deciding whether due process was denied the accused, the totality of facts in a given case must be appraised. If a "fair trial" resulted despite the absence of counsel, it can not be said that the rights of the defendant have been infringed.

It is interesting to study the application of this "fair trial" doctrine in the cases involving alleged denials of due process. In the instant case and several others to be discussed below, the Supreme Court has had to decide whether such unusual circumstances existed as to make inadequate any defense without benefit of counsel.

Palmer v. Ashe, 342 U.S. 134 (1951) is a relatively recent decision concerning the abuse of the right to counsel in a noncapital case. The petitioner there appeared without benefit of counsel, and after being told by the arraigning magistrate that

he would be indicted for breaking and entering, he pleaded guilty. Not until he arrived at the state penitentiary was he informed of his conviction of the more serious offense of robbery. The Supreme Court, considering these facts as well as evidence that the accused had spent the greater part of his life in reform schools, concluded that he exhibited no qualities of mind or character that would enable him to protect himself in the give-and-take of a courtroom trial. In other words, special circumstances may demand that counsel be afforded even in a noncapital case.

The obvious inability of the accused to defend himself was again the court's reason for reversing a conviction of an eighteen year old boy in *Wade v. Mayo,* 334 U.S. 672 (1948). Defendant asked the court to furnish him a lawyer, but the Florida court refused, relying upon the broad rule of *Betts v. Brady, supra.* The Supreme Court, in a five to four decision, said, 334 U.S., at 684:

> There are some individuals who, because of age, ignorance, or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. . . . Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law. . . .

Betts v. Brady, supra, was strictly applied in *Canizio v. New York,* 327 U.S. 82 (1946). The defendant, being without counsel and not having been advised of his rights at the arraignment, pleaded guilty to the charge of robbery. On the day before and the day of sentencing, however, he was represented by an attorney. The Court upheld his conviction and sentence, on the grounds that the record showed that he had the aid of counsel in ample time to use every defense originally available to him. To little avail the dissenting justices urged that an accused is entitled to counsel at every step in the proceedings and even assuming that the attorney had struck out the prior plea of guilty, it would have been too difficult to overcome the incriminating effect of the plea. In *Bute v. Illinois,* 333 U.S. 640 (1948), where denial of counsel was held not a violation of due process under the circumstances of the case, the Supreme Court explained that it was not its province to establish a minimum procedural standard for state courts with regard to defendants' right to counsel, in view of the historic power of the states to maintain their own local court procedure. The Court's function is to insure that whatever procedure the state establishes does not violate due process.

An opposite decision was reached in *Uveges v. Pennsylvania,* 335 U.S. 437, 442 (1948), in which the Court decided that the petitioner being "young and inexperienced in the intricacies of criminal procedure" required the presence of counsel. The de-

fendant, seventeen years old, had pleaded guilty to four offenses of burglary, requiring a twenty to forty year sentence. In addition, there was no attempt by the court to instruct the boy as to the consequences of his plea. On similar facts in a one-day murder proceeding in Michigan, where capital punishment does not exist, the conviction was struck down. *DeMeerler v. Michigan,* 329 U.S. 663 (1947).

Understandably, the lower federal courts also have experienced difficulty in determining when denial of counsel violates due process. In *Hanson v. Warden, Maryland Penitentiary,* 198 F.2d 470 (4th Cir. 1952), petitioner maintained that his confession was improperly obtained, but he nevertheless pleaded guilty at the trial, without benefit of counsel. A motion for writ of habeas corpus on the grounds that petitioner had been deprived of a fair trial was denied, the court holding that failure to provide counsel where the offense is not punishable by death is not of itself a denial of due process. However, in *Anderson v. Eidson,* 191 F.2d 989 (8th Cir. 1951), the court reversed a conviction obtained when defendant pleaded guilty to four crimes, one being a capital offense, without assistance of counsel. The court determined that after pleading guilty to the capital offense, the defendant had "put his life at the mercy of the court" with respect to the other felonies, and thus should have had the advice of a lawyer from the outset.

The Supreme Court in the instant case distinguished the facts from those of *Betts v. Brady* on the grounds that Chandler was not asking for the appointment of counsel, but wanted a continuance to retain his own counsel. The lower court held that Chandler had waived his right to counsel by not hiring one to represent him on the housebreaking charge.

The general test regarding the validity of a waiver of counsel is expressed in *Johnson v. Zerbst, supra,* 304 U.S. at 464:

> The determination [in habeas corpus proceedings] of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Following this general guide, the Supreme Court in the instant case decided that Chandler, in refusing counsel on the felony charge, while not being aware of the possibility of being charged as a habitual criminal, did not intend his waiver to extend to that part of the indictment. Not being fully appraised of the facts he was not capable of a competent and intelligent waiver.

A dictum in *Sanders v. United States,* 205 F.2d 399 (5th Cir. 1953), which involved a plea of guilty by an alleged insane per-

son, indicates that in order for one to competently waive the right to counsel he must know the nature of the charge, all the statutory offenses included under it, and the range of allowable punishments.

It has been held that where an accused is not told of the term of the sentence which would probably have to be served, until after a plea of guilty to murder, his refusal of an attorney is not a competent waiver. *Voigt v. Webb,* 47 F. Supp. 743 (D.C. Cir. 1942). A similar denial of due process occurred in *Smith v. O'Grady,* 312 U.S. 329 (1941), where the defendant agreed with the prosecuting attorney to plead guilty to simple burglary for which he would be sentenced to a three year term. However, after pleading guilty at the arraignment, he was told that the indictment charged him with committing burglary with explosives, and he was sentenced to twenty years. He immediately demanded an opportunity to hire an attorney, but the court rejected his plea on the ground that he had already waived his right. Ultimately, the Supreme Court reversed, saying this was a clear deprivation of due process.

Thus, an effective waiver of the right to appear and be assisted by an attorney in a criminal case necessarily includes a sufficient understanding of the nature of the crime and the possible punishment. Where no effective waiver of counsel was made, and the circumstances indicate that the accused was denied a fair trial as in the instant case, due process is violated and the conviction will not stand. The Supreme Court has not yet defined exactly what the "special circumstances" are which require presence of counsel in a noncapital case, and it definitely has not repudiated the test established by *Betts v. Brady, supra.* However, the decisions clearly show a tendency to discover these extenuating circumstances more frequently, especially in the recent cases.

Patrick J. Foley

DOMESTIC RELATIONS — ADOPTION — WEIGHT TO BE GIVEN TO CHILD'S RELIGION IN PLACEMENT IN FOSTER HOME. — *Petition of Goldman,* . . . . Mass. . . . ., 121 N.E.2d 843 (1954), *cert. denied,* 75 Sup. Ct. 363 (1955). The petitioners, husband and wife, who are of the Jewish faith, sought to adopt twin children, parents of whom are members of the Roman Catholic church. A Massachusetts statute provides in part that the judge, when practicable, must give custody only to persons of the same faith as that of the child. In those instances where the court, with due regard for the religion of the child, does permit adoption by persons of a different faith, the statute requires that the minutes of the proceedings state the impelling facts for granting the

petition. MASS. ANN. LAWS c. 210, § 5B (Cum. Supp. 1953). Two weeks after birth, the children were transferred from the hospital to the home of the petitioners and the testimony regarding the manner of the transfer was said to be conflicting and unreliable. The natural mother consented both orally and in writing to the twins being raised in the Jewish faith. When the Jewish couple filed for legal adoption papers, the probate court denied the petition on the basis of the Massachusetts statute. The probate court had found that it was "practicable" to give custody to persons of the Catholic faith since there were Catholic parents available in the area, and further that it was in the best interests of the twins that they be adopted by members of the faith of their birth. The supreme judicial court affirmed over the objection that it would be prejudicial to the children's interests to remove them from their present foster home.

The question to be discussed is what should be the controlling consideration when the courts are faced with the apparent conflict between the material well-being and the spiritual welfare of the child. Must the courts ignore the religious origin of a child when it has found worldly security in a family of a different religion? The court in the instant case determined that the statute attested to an already well-settled principle that children should generally be adopted within the faith of their natural parents.

Adoption, while practiced by the ancients of Greece and Rome, was unknown to the English common law and exists in the United States only by virtue of statutes enacted in many, if not all of our states. *Brosnan, The Law of Adoption,* 22 COLUM. L. REV. 332 (1922). The courts in our country hold that adoption statutes should be liberally construed to carry out the beneficial purposes of adoption. *Bradley v. Tweedy,* 185 Wis. 393, 201 N.W. 973, 974 (1925).

Prior to the determination of the instant case, the controlling view in Massachusetts was exemplified in *In re Gally,* 107 N.E.2d 21 (Mass. 1952) where the supreme court permitted a Catholic child to be adopted by Protestant parents. The court held that since there was no showing of anyone of the faith of the mother available to adopt the child, it would not be "practicable" to limit custody only to persons of that faith. In the present case the court heard testimony to the effect that there were suitable Catholic parents in the area, ready and willing to adopt Catholic children. The court ruled that there was a sufficient showing to satisfy the statute and, on the strength thereof, refused the petition for adoption. This ruling is a manifestation of the so-called "parental right" theory, *i.e.,* that the wishes of the natural

parents shall control. *Hernandez v. Thomas,* 50 Fla. 522, 39 So. 641 (1905); *In re McConnon,* 60 Misc. 22, 122 N.Y. Supp. 590 (Surr. Ct. 1908); *Palm v. Smith,* 183 Ore. 617, 195 P.2d 708 (1948). This theory is followed in *In re Santos,* 279 App. Div. 373, 105 N.Y.S2d 716, (1st Dep't 1951),*appeal dismissed for want of jurisdiction,* 304 N.Y. 483, 109 N.E.2d 71 (1952), where two children were placed with a Jewish woman by their Catholic mother; after the children had been moved to a Jewish children's institution, their natural mother, two years later, sought to have the children transferred to a Catholic adoption agency. The New York court, relying largely upon the parental right theory, granted the petition.

All of the states have legislation covering the general field of guardianship, custody and adoption. The majority of the states have statutes similar to the Massachusetts statute with reference to guardianship and custody. See Note, 54 COLUM. L. REV. 396 (1954). The District of Columbia statute is representative. D.C. CODE § 918 (1951) It reads in part that a child when being placed for guardianship or custody shall, when practicable, be placed with a person, or an institution or agency governed by persons of like religious faith. It states further that if there be a difference in the religious faith of the parents, then the religious faith of the child shall control, or if the religious faith of the child is not ascertained, then that of either of the parents. The states that do have adoption statutes, mention religion merely as one of several considerations. See generally CONN. GEN. STAT. § 6863 (Supp. 1953); GA. CODE ANN. § 74-411 (Supp. 1951); OHIO REV. CODE ANN. § 31.0705(15) (1953). Delaware and Rhode Island, however, have statutes comparable to the Massachusetts statute, but leave no question to be resolved. The Delaware statute, DEL. CODE ANN. Tit. 13, § 911 (1953), specifically adheres to the parental right theory.

> Religious Affiliations: No child born out of wedlock shall be placed for adoption unless at least one of the prospective adopting parents shall be of the same religion as the natural mother, or of the religion in which she has reared the child or allowed it to be reared. . . .

See also R.I. PUB LAWS c. 1772, § 1 (1946).

There have been various interpretations of these statutes, but in the final analysis the majority of the courts look to the best interests of the child. *In re Clark's Adoption,* 38 Ariz. 481, 1 P.2d 112 (1931); *In re Barkholder's Adoption,* 211 Iowa 1222, 237 N.W. 702 (1930); *In re MacFarland,* 223 Mo. App. 826, 12 S.W.2d 523 (1928). The courts have given different estimates to the "best interests" standard. A widely reached conclusion is

that the child shall be awarded on the condition that it be raised in the faith of its natural parents regardless of the religion of the adopting parents. *In re Bynum's Estate,* 72 Cal. App. 2d 120, 164 P.2d 25 (1945); Accord, *Lemke v. Gultiman,* 105 Neb. 251, 181 N.W. 132 (1920). But see *In re Flynn,* 87 N.J. Eq. 413, 100 Atl. 861, 865 (Ch. 1917). Another conclusion is that the religion of the child is subordinated, the result being that the award is made to the petitioner who offers the best opportunity of material well being. *Estate of Walsh,* 114 Cal. App. 2d 82, 249 P.2d 578 (1952); *Oelberman Adoption Case,* 167 Pa. Super. 407, 74 A.2d 790 (1950). The courts are free to arrive at these varying decisions through their interpretation of the statutes and in particular the use of the words "shall" and "will" as merely advisory rather than mandatory. In some cases the courts have done this to assure the constitutionality of their statutes in face of objections that such a statutory mandate seeks to establish a religion. *In re Walsh's Estate,* 100 Cal. App.2d 194, 223 P.2d 322 (1950); *State ex rel Lutheran Society v. White,* 123 Minn. 508, 144 N.W. 119 (1913).

Petitioners in the instant case sought to attack the validity of the Massachusetts statute as a violation of the first amendment to the Constitution, relying generally upon *Zorach v. Clauson,* 343 U.S. 306 (1952). In support of this contention would be the ruling in *Perez v. Sharp,* 32 Cal. 2d 711, 198 P.2d 17 (1948), where a statute forbidding marriages between the races was termed a violation of the fourteenth amendment and its equal protection clause. The court in the instant case ruled that the statute was not unconstitutional as an aid to the establishment of religion.

Religious authorities differ on their views in regards to this problem. The Catholic church, Canon 2319 § 4, takes the position that members of the Catholic faith have an obligation to see that their children are raised in the Catholic church. Generally, the Protestant viewpoint holds that if the child has reached the age of reason, he should remain with the religion that has been taught to him. If he has not reached the age of reason, they believe that the child may be awarded to whomever offers him security, the faith of the natural mother not controlling. See Note, 28 IND. L. J. 401, 405 (1953).

It is submitted that when children are removed from their mother, the prospective adopting parents are aware of, or should be aware of the existing law. When the law clearly states that children shall be awarded to persons, whenever practicable, of a like faith of that of the natural mother, the plea of hardship on the child is of little merit if it was deliberately created by the moving party. A contrary rule would sanction persons who

would take a child for the *express purpose* of raising it in a faith different from that of its natural parents and with the intent to file for adoption papers after enough time had passed so that the hardship of the child claim could be made. The statute was passed in recognition of a parental right. The courts should recognize the wisdom of the legislature and not the "created" exception to the law.

Lawrence J. Dolan

EVIDENCE — SEARCH AND SEIZURE — AUTOMOBILES. — *Idol v. State*, . . . Ind. . . . , 119 N.E.2d 428 (1954). This was an appeal before the Supreme Court of Indiana from a conviction for reckless homicide and for leaving the scene of an accident. The appellant, while driving, had struck a pedestrian crossing in the middle of the block and failed to stop. He drove directly from the scene of the accident to the fraternity house where he was living and put his car in the garage connected therewith. The following day two police officers, while seeking the hit-and-run vehicle, looked into the garage, and there seeing appellant's automobile, broke into the garage to make a closer examination. Not having made an arrest or obtained a search warrant, but being satisfied that they had located the automobile sought, the officers then went to the fraternity house and obtained permission from the house manager to enter the garage. During this second entry the officers gathered evidence which was later used at the trial to identify the hit-and-run vehicle as appellant's. On this appeal the trial court's admission of this evidence was held to be error on the ground that it was obtained in violation of the state constitution. IND. CONST. Art. 1, § 11:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

The court refused the application of a general exception where automobiles are involved, in which cases the above constitutional requirement of a search warrant is frequently dispensed. The court thus pointed up the question as to when the elusive nature of automobiles justifies an exception to the more general rule that a search warrant must be obtained.

The search and seizure provisions of all the state constitutions are the same or substantially the same as those of the fourth amendment to the Federal Constitution. However, among the states there are two widely divergent views on the application

of these provisions where the admissibility of evidence is questioned. One view admits evidence in a criminal prosecution regardless of how obtained, *Banks v. State,* 207 Ala. 179, 93 So. 293 (1921), *cert. denied,* 260 U.S. 736 (1922); *People v. Mayen,* 188 Cal. 237, 205 Pac. 435 (1922), while the other refuses to admit evidence which is illegally obtained. The latter view is the one adhered to by the federal courts, in turn, followed closely by Indiana and other states. *Carroll v. United States,* 267 U.S. 132 (1925); *Callender v. State,* 193 Ind. 91, 138 N.E. 817 (1923); *Tucker v. State,* 128 Miss. 211, 90 So. 845 (1922); *State v. Wills,* 91 W.Va. 659, 114, S.E. 261 (1922).

In the federal courts the leading case on search and seizure is *Carroll v. United States, supra.* The court there outlined the general rule: 267 U.S. at 153,

> The guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

In the *Carroll* case, *supra,* federal prohibition agents without a warrant had stopped and searched a car and found it to be carrying illegal liquor. In holding there was no violation of the search and seizure provisions of the fourth amendment to the Constitution, the court required only that the seizing officer shall have "reasonable or probable cause" for search. "Probable cause" has been described as that which would cause a prudent and careful person, having a due regard for the rights of others, to believe that an unlawful act has been or is being committed. *People v. Younger,* 327 Mich. 410, 42 N.W.2d 120, 122 (1950). It has come to mean more than mere suspicion. *Brinegar v. United States,* 338 U.S. 160, 175 (1949); and where the facts are uncontroverted, the existence of probable cause is a judicial question. *Jenkins v. State,* 116 Tex. App. 374, 32 S.W.2d 848 (1930).

In the principal case the court found no evidence to support probable cause for search, and emphasized the fact that the circumstances failed to justify a belief that delay to obtain a warrant would make the search impracticable or impossible. This test of practicability is the older view which was adopted in the federal courts by the decision in the *Carroll* case, *supra.*

In the case of *Boyd v. State,* 206 Miss. 573, 40 So. 2d 303 (1949), the principle of practicability laid down by the federal courts

was followed in a situation where illegal whiskey was discovered in a car parked in a garage on defendant's premises. The search warrant relied upon by the officers was later found to be defective, so the prosecution attempted to justify the search by a statute which authorized the search of an automobile without a warrant. The court determined there was probable cause, but nevertheless held that it was still possible to obtain a warrant because seclusion of the automobile was not imminent; the statute was never intended to permit an officer to invade the "private premises of a defendant without a search warrant and search an automobile in his garage after the same has come to rest. . . ." 40 So. 2d at 306. This case rests at least partially upon the fact that the vehicle was no longer in motion, and in that regard can be distinguished from the *Carroll* case, *supra.* That factor also initiates a new consideration in the judgment on the admissibility of evidence obtained by search and seizure.

The test of the practicability of obtaining a warrant was emphasized in the case of *United States v. Nichols,* 78 F. Supp. 483 (W.D. Ark. 1948), *aff'd,* 176 F.2d 431 (8th Cir. 1948), where it was said that in every case where it is reasonably practicable to obtain a search warrant, the same must be procured, but the court added that it was a rare case indeed where it would be reasonably practicable to obtain a warrant to search an automobile.

The decisions in the *Boyd* and *Nichols* cases, *supra,* are either expressly or impliedly based upon the practicability test, but the federal courts since the *Nichols* case, *supra,* have come to construe the proper basis for a search as its reasonableness under all the circumstances, as opposed to the practicability of obtaining a warrant. *United States v. Rabinowitz,* 339 U.S. 56 (1950). The *Rabinowitz* case expressly overruled the earlier case of *Trupiano v. United States,* 334 U.S. 699 (1949), in so far as it required a search warrant solely upon the basis of the practicability of procuring it. This holding was extended in the case of *Johnson v. United States,* 199 F.2d 231 (4th Cir. 1952), *cert. denied,* 345 U.S. 905 (1953), where the district court said: 199 F.2d at 233,

> But to the extent that such cases [*Carroll* and *Trupiano* cases, *supra*] stress the practicability of obtaining a search warrant prior to the search, they have been supplanted by the recent decision of the Supreme Court of the United States in United States v. Rabinowitz [citation omitted] which held that the test was the reasonableness of the particular search, viewed in the light of all the facts and circumstances of the case.

The theory of the *Rabinowitz* case, *supra,* concerning the principles applicable to the admission of evidence in search and

seizure cases is being accepted by the state courts, *Boyd v. State, supra,* and the federal courts, *Rent v. United States,* 209 F.2d 893, 897 (5th Cir. 1954). Here again in the latter case, where there was likelihood that an automobile would not be disturbed, the court found this factor significant in deciding whether or not a warrant was necessary. This consideration is ultimately one of reasonableness, and the courts, both state and federal, are approaching it as the basis for their test of the admissibility of evidence.

The court in the instant case placed importance on the practical effects of delay to secure a warrant. Actually, any inquiry into the sufficiency of time can be resolved only by determining whether the auto is likely to be moved. In this regard the instant case is consistent with the recent trend of the decisions in so far as it emphasizes the practicability of delay. Unfortunately, however, the court gives no concrete expression of a rule of law.

It is difficult to derive from the cases any definite principle on which the many jurisdictions can resolve their conflicting views. However, this writer believes that the trend is in the direction of the most recent federal cases, *i.e.,* placing the emphasis on reasonableness as the proper basis.

The problem as to when an automobile may be searched without a warrant is an acute and everpresent one for law enforcement officers since they determine at their own risk the reasonableness of a search without a warrant. *United States v. Kaplan,* 286 F. 963, 973 (S.D. Ga. 1923); and in all states they are liable to civil suit for an illegal search. *State v. Lindway,* 131 Ohio St. 166, 2 N.E.2d 490, 493 (1936). Thus it is essential that they be given a solid basic principle as a guide. The federal courts, in applying the standard of reasonableness, have employed the most workable test, both from the standpoint of the citizen's protection and the enforcement officer's freedom, and it is suggested that this standard be uniformly applied by all the states, even those not adopting the probable cause doctrine. But the standard, whatever it is resolved to be, must be definite and certain in order to insure satisfactory enforcement of the law.

Edward J. Griffin

INSURANCE—CONTRIBUTION—INSURERS OF JOINT TORT-FEASORS CONCURRENTLY NEGLIGENT. — *American Employers' Insurance Company v. Maryland Casualty Company,* 218 F. 2d 335 (4th Cir. 1954). This action arose out of a collision of vehicles in Virginia. One Arrington drove a tractor-trailer owned by his employer, Frye, and insured by the plaintiff; while one Fountain

drove an automobile insured by the defendant. These drivers were among several involved in the collision and judgments were obtained against them as joint tort-feasors by or on behalf of certain persons who were killed or injured. Plaintiff-insurer made full payment in satisfaction of these judgments and thereafter sought contribution by bringing suit in the federal district court.

The statutory basis of this suit was VA. CODE § 8-627 (1950) which modifies the common law and provides for contribution among wrongdoers where the wrong is a mere act of negligence involving no moral turpitude. The issue before trial court was whether the insurer of one joint tort-feasor may, by this statute, have contribution from the other joint tort-feasor's insurer.

The court held that such action was proper according to local law and entered judgment awarding contribution. On appeal the court of appeals affirmed for the reasons that: (1) Virginia statutory law allows contribution among joint wrongdoers in *pari delicto;* (2) the Supreme Court of Virginia has allowed, in an analogous case involving this same statute, an insured joint tort-feasor, having satisfied judgment, to sue the other alleged joint tort-feasor for contribution for the insurer's benefit. *McKay v. Citizens Rapid Transit Co.,* 190 Va. 851, 59 S.E. 2d 121 (1950); and (3) Virginia has also a liberal policy in allowing subrogation. The court held that even though Virginia had not heretofore passed on this specific issue, it was in harmony with the law of Virginia to allow the insurer-subrogee of the joint tort-feasor, who has paid the full judgment, to sue in his own name for contribution. Therefore the court also permitted the insurer of the non-contributing joint tort-feasor to be subrogated and be sued for contribution in its own name.

This liberality is in accord with the modern trend, as expressed by the court in *American Fidelity & Cas. Co. v. All Am. Bus Line,* 179 F.2d 7, 9 (10th Cir. 1949):

> Ordinarily when a public liability insurance company fully reimburses its insured for losses . . . it becomes subrogated to the rights of the insured against third parties whose tortious conduct caused the loss. . . . Where such total subrogation occurred at common law, the action to enforce the insurer's rights had to be brought in the name of the insured. . . . On the other hand, in suits in equity or admiralty, the fully subrogated insurer sued in his own name. . . . Under modern statutes abolishing the distinction between law and equity . . . it is generally held that an insured who had been paid in full by his insurer is not the real party in interest, and is not entitled to bring an action in his own name against the third party tort-feasor . . . the action must be brought by the insurer . . . .

Subrogation is a normal incident of indemnity insurance, but

the rights of the insurer can be defeated by some act of the insured. *New York Ins. Co. v. Tice,* 159 Kan. 176, 152 P.2d 837 (1944). Since the rights of the indemnitor are no greater than those of the insured joint tort-feasor, *Royal Indemnity Co., v. Becker,* 122 Ohio St. 582, 173 N.E. 194 (1930); Note, 75 A.L.R. 1486 (1930); 13 AM. JUR., *Contribution* § 58 (1938), and since the right of contribution is a substantive right, the law of the state where the injury occurred is determinative of the right to contribution and indemnity. *Spaulding v. Parry Navigation Co.,* 90 F. Supp. 567 (S.D.N.Y. 1950).

In other words, most jurisdictions have taken the position that the insurer of the joint tort-feasor has no better position than the insured, where contribution has been denied the tort-feasors themselves, *Adams v. White Bus Line,* 184 Cal. 710, 195 Pac. 389 (1921), or where allowed, *Underwriters at Lloyds v. Smith,* 166 Minn. 388, 208 N.W. 13 (1926). Despite the progressively liberal allowance of contribution among wrongdoers, allowance in favor of a liability insurer or indemnitor of one joint tort-feasor in *pari delicto* has been consistently denied by the weight of authority. *Adams v. White Bus Line, supra; Lumbermen's Mut. Cas. Co. v. United States Fidelity & Guaranty Co.,* 211 N.C. 13, 188 S.E. 634 (1936); *United States Cas. Co. v. Indemnity Ins. Co.,* 129 Ohio St. 391, 195 N.E. 850 (1935). But in the case of joint tort-feasors of unequal fault, such as principal and agent, each insured by individual insurers, where the agent is the active tort-feasor, indemnity has been allowed between insurers. *Central Surety & Ins. Corp. v. London and Lancashire Indemnity Co.,* 181 Wash. 353, 43 P.2d 12 (1935). However, one who is a mere stranger or volunteer in payment, being under no legal obligation to pay and having no interest menaced by the continued existence of the debt, cannot receive a decree of subrogation. *Schmid v. First Camden Nat. Bank & Trust Co.,* 130 N.J. Eq. 254, 22 A.2d 246 (1941).

Connecticut, Dist. of Columbia, Kentucky, Louisiana, Minnesota and Wisconsin allow in an action for contribution as plaintiff an insurer-subrogee where the joint tort-feasors are concurrently negligent. *Maryland Cas. Co. v. Employers Mutual Liability Co.,* 208 F.2d 731 (2d Cir. 1953); *American Fidelity & Cas. Co. v. Owenboro Milling Co.,* 15 F.R.D. 352 (W.D. Ky. 1954); *Silver Fleet Motor Express v. Zody,* 43 F. Supp. 459 (D.D.C. 1952); *Quatray v. Wicker,* 178 La. 289, 151 So. 2d 208 (1933); *Underwriters at Lloyds v. Smith, supra; Western Cas. & Surety Co. v. Milwaukee Gen. Constr. Co.,* 213 Wis. 302, 251 N.W. 491 (1933). Pursuant to the *Western Casualty* case, *supra,* Wisconsin allows one insurer-subrogee to sue the other joint tort-feasor's insurer.

But a strict view of statutes allowing contribution among joint tort-feasors has been held not to include their respective insurers because such parties are not specifically enumerated. *Lumberman's Mutual Cas. Co. v. United States Fidelity & Guaranty Co.*, 211 N.C. 13, 188 S.E. 634 (1936). *Contra: Silver Fleet Motor Express v. Zody, supra.* Other states formally allow the insurer his right to subrogation, but hold that the insurer-subrogee stands in the shoes of the joint tort-feasor in *pari delicto* and cannot recover contribution. See *Jackman v. Jones,* 198 Ore. 564, 258 P.2d 133 (1953).

The general rule at common law is that there is no contribution between joint tort-feasors. *Merryweather v. Nixan,* 8 T.R. 186, 101 Eng. Rep. 1337 (1799). In England, the rule which prohibited contribution was confined to those cases wherein a joint wrong was confessedly intentional. See Reath, *Contribution Between Persons Jointly Charged For Negligence,* 12 HARV. L. REV. 176 (1898). This rule was followed in the United States, *Hunt v. Lane,* 9 Ind. 248 (1857), but, as in England, it was held inapplicable where the tort previously committed by the claimant was a matter of negligence or mistake, *Thweatt's Adm'r v. Jones' Adm'r,* 1 Rand. 328, 22 Va. 122, (1823). However the rule thereafter expanded to include unintentional torts. See PROSSER, TORTS 1113 (1941).

State courts generally agree that there can be no contribution between joint wrongdoers where they, by concert of action, have been guilty of a wilful tort, an immoral act, or were consciously violating the law. *Davis v. Broad Street Garage,* 191 Tenn. 320, 232 S.W.2d 355 (1950).

Often courts have stated in broad sweeping language that the general rule is that there is no contribution among joint tort-feasors. *Spaulding v. Parry Navigation Co., supra;* PROSSER, TORTS 1111 (1941). This rule has become subject to so many exceptions that the general rule now is that there is no right to contribution among joint tort-feasors who are *in pari delicto* and concurrently negligent. *Brown Hotel Co. v. Pittsburgh Fuel Co.,* 311 Ky. 396, 224 S.W.2d 165 (1949).

For example, the broad rule of no contribution among joint tort-feasors has been held not to apply in cases of vicarious liability, *United States v. Savage Truck Line,* 209 F.2d 442 (4th Cir. 1953); nor where an independent contractor was negligent, *Washington Gas Light Co. v. District of Columbia,* 161 U.S. 316 (1896); nor where the fault of one tort-feasor was termed passive and the other active, *Gish Realty Co. v. Central City,* 260 S.W.2d 946 (Ky. App. 1953); nor under workmen's compensation statutes, *United States Cas. Co. v. Hercules Powder Co.,* 4 N.J.

157, 72 A.2d 190 (1950). These exceptions are more properly classed as indemnity cases, shifting the loss, rather than contribution cases, sharing the loss. See Note, 37 IOWA L. REV. 517 (1952). Thus, the greater number of states apply this exclusionary no contribution rule where there was, on the part of the joint tort-feasors, personal knowledge, personal participation, and personal culpability.

Courts refer to indemnity in two principal ways: first, as an exception to the contribution rule, and secondly, as a contract between joint tort-feasors. *Waylander-Peterson Co. v. Great Northern Ry.*, 201 F.2d 408 (8th Cir. 1953). This discussion is concerned with the former, non-consensual indemnity. The courts in referring to non-consensual indemnity, say that indemnity is recovering full value of what was paid out, whereas contribution is recovering one-half of what was paid out. *Brown & Root v. United States*, 92 F. Supp. 257, 261 (S.D. Tex. 1950). The doctrine of contribution has been held more closely akin to contracts than to torts, however, and the contract statute of limitations has been held applicable. *McKay v. Citizens Rapid Transit Co.*, 190 Va. 851, 59 S.E.2d 121 (1950). See Note, 20 A.L.R.2d 918 (1950).

The strict doctrine of the common law that there is no right to contribution between joint tort-feasors in *pari delicto* where there is actual, concurring negligence has deep roots in American jurisprudence despite the numerous exceptions mentioned heretofore. See *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389 (1921); *Gulf, M. & O. R.R. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 125, 98 N.E.2d 783 (1951); *Davis v. Lanesky*, 91 Ohio App. 125, 107 N.E.2d 919 (1951). To the contrary there are some few jurisdictions which allow contribution among joint tort-feasors in *pari delicto* despite the general rule. See *Employers Mutual Cas. Co. v. Chicago, St. P., M. & O. Ry.*, 235 Minn. 304, 50 N.W.2d 689 (1951); *State Farm Mut. Auto Ins. Co. v. Continental Cas. Co.*, 264 Wis. 493, 59 N.W.2d 425 (1953). (Wisconsin rule now codified). Because Maine defines *in pari delicto* as an intentional or wilful concert of action, it allows contribution if the wrongdoers are merely negligent preferring not to posit wilfulness where the only means of doing so would be by means of legal inference or intendment. *Hobbs v. Hurley*, 117 Me. 449, 104 Atl. 815 (1918). Some require a joint judgment as a condition precedent to bringing the suit for contribution. *Ankery v. Moffett*, 37 Minn. 109, 33 N.W. 320 (1887); *Royer v. Rasmussen*, 34 N.D. 428, 158 N.W. 988 (1916); *Cf., Western Cas. & Surety Co. v. Milwaukee Gen. Constr. Co., supra*, where a settlement by one of the parties is sufficient. In New York the right of contribution is con-

ditioned on a judgment against the tort-feasors in the original action, there being no provision for impleading. Thus the plaintiff or injured party has sole control of the distribution of loss by electing to bring suit against the most likely prospect. See 3 MOORE, FEDERAL PRACTICE ¶ 14.23 (2) (1st ed. 1948). New Jersey has acknowledged the unjust result of such a procedure and now allows contribution where only one joint tort-feasor has been made a judgment-debtor. *Bray v. Gross,* 16 N.J.L. 382, 108 A.2d 850 (1954); *accord, Royer v. Rasmussen, supra;* see also 9 UNIFORM LAWS ANN. 153 (Cum. Supp. 50 1954). Wisconsin likewise merely requires common liability. This means that even though the joint tort-feasors are not joined in a suit by an injured party, the fact that the injured party could successfully sue any of the joint tort-feasors, joined or not, gives rise to a common obligation to contribute an equitable share of the common liability. *Western Cas. Co. v. Milwaukee Constr. Co., supra; Mutual Auto Ins. Co. v. State Farm Mutual Auto Ins. Co.,* 268 Wis. 6, 66 N.W.2d 697 (1954) (allowing insurers to sue for contribution). Accord: *American Auto Ins. Co. v. Mollery,* 239 Minn. 74, 57 N.W.2d 847 (1953).

Certain states have provided legislation which allows contribution among concurrently negligent joint tort-feasors in *pari delicto. E.g.,* N.J. STAT. ANN. § 2A:53a-1 (1952); N.Y. CIV. PRAC. ACT § 211-a; LA. CIV. CODE art. 2103 (West 1950). Some do not allow contribution where there is concurrent negligence. See GA. CODE ANN. § 105-2012 (1933).

Curious twists have developed in interpreting a few statutes. Louisiana, allowing contribution, applies that doctrine to judgments *in solido ex delicto* and *ex contractu. May v. Cooperative Cab. Co.,* 52 So. 2d 74, (La. App. 1951). New Jersey courts are wrestling with their contribution statute and court rules on third-party practice in an attempt to cure apparent injustices. See *Bray v. Gross, supra.* In the *Bray* case, *supra,* the court suggests that the court rules be changed so that, under a motion to dismiss at the end of the plaintiff's case, the court may have the authority to hold the ruling in abeyance until all of the evidence is in. In this way, the tort liability of the defendants can be adjudged in one suit. Other courts have realized the injustice of the no contribution rule. See *Southern Ry. v. Allen,* 88 Ga. App. 435, 77 S.E.2d 277, 284 and Footnote in *Arizona v. United States,* 214 F.2d 389, 391 (9th Cir. 1954), where the court suggested that federal courts should lay aside otherwise controlling state law when considering indemnity and contribution, and develop an internal policy in their own body of law.

The court in the instant case relies on the decisions of

Louisiana, New York and Wisconsin. These decisions were considered as having reached the desired result, that is, they each allowed contribution to the insurers of joint tort-feasors. However, in the New York case, *Commercial Cas. Ins. Co. v. Capital City Surety Co.*, 224 App. Div. 500, 231 N.Y. Supp. 169 (1st Dep't 1928), the joint tort-feasors were landlord and tenant, the plaintiff and defendant being their respective insurers. The factual situation admits of active negligence and liability on the part of the tenant, and constructive liability on the part of the landlord. Actually, it was a suit for indemnity, not for contribution. The plaintiff sued for the entire amount of loss, not for his equitable share based upon the principle of contribution that one compelled to pay more than his share of the common obligation is entitled to contribution from other obligors who have not been compelled to pay. The holding in this case decided the proper parties in suits between joint tort-feasors of unequal fault as far as indemnity is concerned.

In the Wisconsin case of *Western Cas. & Surety Co. v. Milwaukee Gen. Constr. Co., supra,* the joint tort-feasors were concurrently negligent. The insurer of one negligent tort-feasor settled with the injured party, made a demand for contribution from the other (alleged) joint tort-feasor and was refused. The paying insurer sued the other joint tort-feasor and his insurer for contribution. Wisconsin allows contribution between joint tort-feasors *in pari delicto,* if they are merely negligent and there is no moral turpitude involved regardless of the release by the plaintiff. The construction company was vicariously liable since the employee had committed the actual negligence. In reality the servant of the insured employer and the plaintiff's insured were the ones in actual fault, *in pari delicto.* The court, for the purpose of a contribution suit, described the employer (having mere vicarious liability) as the joint tort-feasor so that the insurer would meet the requirements of subrogation to the rights of his insured joint tort-feasor. Actually the court relied upon a *dictum* in *Consolidated Coach Corp. v. Burge,* 245 Ky. 631, 54 S.W.2d 16, 17 (1932) for this point.

The instant decision represents a result reached by the court based on justice, unfettered by the confused and strained reasoning used by other courts that still grapple with the common law restrictions on contribution between joint tort-feasors concurrently negligent. Though their force may well be doubted, Lefar, *Contribution and Indemnity Between Tort-feasors,* 81 U. PA. L. REV. 130, 139 & n40 (1933), the reasons given as lying behind the rule of no contribution between joint tort-feasors are its supposed deterrent effect on the commission of joint torts and

the traditional common law hostility toward allowing wrongdoers access to the courts, *Avery v. Central Bank of Kansas City*, 221 Mo. 71, 119 S.W. 1106 (1909), similar to the policy underlying the doctrines of contributory negligence and illegal contract.

No court has explained, and no statistics have been taken demonstrating how the no contribution rule has deterred concurrently negligent joint tort-feasors. Furthermore, in those states allowing such contribution, no court has explained, and no statistics have been taken demonstrating how the no contribution rule applied between casualty companies will deter any prospective joint tort-feasors from their misconduct. State legislatures have the burden of changing the substantive law to allow contribution among concurrently negligent tort-feasors. Court rules should be revised so as not to impede the progress of the substantive law in attaining the desired result, that is, equal or proportionate distribution of a common burden among those upon whom it rests. In the instant case the court liberally applied the principles of contribution and subrogation to achieve justice.

John W. Thornton

SALES — CONDITIONAL VENDOR AND PURCHASER — SUIT FOR PRICE NOT CONSTITUTING AN ELECTION OF REMEDY. — *Soter v. Snyder*, . . . Utah . . . , 277 P.2d 966 (1954). Subsequent to the purchase of a business under a conditional sales contract, the vendee sued to rescind the contract for alleged fraud, whereupon the vendor denied such fraud and counterclaimed for the full purchase price. The counterclaim was based on the vendee's default in two payments, followed by the vendor's exercise of an acceleration clause in the agreement. The jury found that there was no substance to the allegation of fraud, and the court granted judgment for the vendor on the counterclaim for the price, allowing him to retain his title until the judgment was satisfied in full. The vendee appealed claiming error on the trial court's permitting the vendor to keep title, on the grounds that implicit in such a judgment was the right to repossess in event of failure to pay, and that this theory was inconsistent with the election to sue for the price. The supreme court held that the vendor's remedy by suing for the price did not prejudice his title, and that he had not elected a remedy inconsistent with the retention of title in the goods.

The question before the court was whether or not a vendor in a conditional sales contract waives his right to reclaim the property by bringing suit for the purchase price *i.e.*, are these rights to be considered concurrent, or alternative and inconsistent? If

they are concurrent, there is no waiver and a subsequent suit may be brought; whereas, if they are inconsistent, the right to reclaim is lost by the institution of an action on the contract. The court in the instant case held these remedies concurrent, and in so doing, it acknowledged the minority view.

There is a decided split of authority in those jurisdictions that have considered this problem. The decisions that have been reached have ultimately turned on the court's comprehension and interpretation of the so-called doctrine of "election of remedies."

While the states are about equally divided on this question, the numerical weight of authority favors those decisions which hold the remedies to be inconsistent, and, therefore, the election of one precludes the future exercise of the other. The majority view is expressed in *Bailey v. Hervey,* 135 Mass. 172 (1883), where the vendor brought an action for the purchase price of certain goods after the vendee defaulted on the payments. When the judgment proved fruitless, the vendor entered the vendee's premises and took possession of the goods. The latter then brought an action for conversion against the vendor, and the court found for the vendee, reasoning that the vendor could not treat the transaction both valid and invalid at the same time. If the vendor attempts to reclaim the property, it must be on the ground that he has elected to repudiate the transaction. On the other hand, if he decides to sue for the purchase price, he is deemed to have treated the transaction as an absolute sale. The theory was that where there are two courses of action available, the vendor must choose which he will pursue, and having elected one, he is barred from the other. *S. F. Bowser and Co. v. Harris,* 241 Ala. 113, 1 So. 2d 14 (1941); *Utah Implement Vehicle Co. v. Kesler,* 36 Idaho 476, 211 Pac. 1079 (1922); *Galion Iron Works and Mfg. Co. v. Service Coal Co.,* 264 Mich. 298, 249 N.W. 852 (1933); and *Kauffman v. International Harvester Co.,* 153 Fla. 188, 14 So. 2d 387 (1943).

Some courts make the manifested intention of the vendor the test of whether or not a particular action of the vendor constitutes a waiver. For example in *Martin Music Co. v. Robb,* 115 Cal. App. 414, 1 P.2d 1000 (1931), we are told "a waiver can be inferred whenever the conduct of the seller is inconsistent with the idea that he still intends to enforce a return of the goods. . . ." Inasmuch as this is a question of fact, a more definite rule cannot be laid down. *Martin Music Co. v. Robb, supra.* Where the vendor manifests an intention to treat and rely upon the purchase price as an absolute debt from the purchaser, this will be deemed an election to waive the condition of the sale. Title will, there-

fore, pass to the vendee, and the vendor will be precluded from thereafter retaking the property. *Yost v. May,* 110 Cal. App. 2d 41, 242, P.2d 73 (1952). This theory has been followed in Massachusetts, *Goublious v. Chipman,* 255 Mass. 623, 152 N.E. 55 (1926), and Connecticut, *Walcott v. Fallon,* 118 Conn. 220, 171 Atl. 658 (1934).

A distinction sometimes made by courts adopting the majority view, is the extent to which the plaintiff has pursued his remedy as being a controlling factor as to whether or not there has been an election of remedies. Some courts hold that the mere commencement of litigation constitutes an unequivocal act of election, *Davidson v. McKown,* 157 Kan. 217, 139 P.2d 421 (1943). Others hold that the mere bringing of an action which is dismissed before final judgement, and in which no element of estoppel has arisen, is not an election of remedies. *Lester v. Fields,* 171 Okla. 442, 43 P.2d 87 (1935); *Gridley v. Ross,* 37 Idaho 693, 217 Pac. 989 (1923). As a general rule, in the absence of actual advantage to the one party or disadvantage to the other, no binding election occurs before a decision on the merits. *Williams v. Robineau,* 124 Fla. 422, 168 So. 644 (1936).

It should be emphasized that even in jurisdictions which take the position that the remedies are inconsistent, the election must be effectual, and, therefore, the bringing of a mistaken action, or one against the wrong defendant, will not constitute a waiver. *Sabovrin v. Woish,* 117 Vt. 94, 85 A.2d 493 (1952). A prerequisite to election is knowledge on the part of the plaintiff of the facts material to his rights. *Harrison v. Miller,* 124 W.Va. 550, 21 S.E.2d 674 (1942). Where a buyer of a chattel brought an action against the seller for the purchase price on the grounds that the seller did not have title, and later being convinced that he had sued the wrong party, dismissed the action and sued the original owner for possession, it was held that there was no election of remedies. *Harris v. Northwest Motor Co.,* 116 Wash. 412, 199 Pac. 992 (1921).

The minority viewpoint is well exemplified in *Midland Loan Finance Co. v. Osterberg,* 210 Minn. 681, 275 N.W. 681 (1937). The court said the courses of action were not inconsistent, but rather concurrent remedies, and, therefore, a suit for the purchase price was not such an election of remedies as to bar a subsequent right of repossession. The court maintained that to hold these remedies inconsistent is to defeat the very intention of the parties as manifested in their contract, and added, 275 N.W. at 682:

> The contract is, not that the seller shall keep the title until he sues for the price or gets a judgment, but that it shall remain in

> him until he gets his money. Is it not then to defeat rather than effectuate plainly expressed contractural intention to decide that the seller's suit for the price or a piece of it transfers title to the buyer?

Justice Cardozo, speaking for the New York court in *Ratchford v. Cayuga County Cold Storage and Warehouse Co.*, 217, N.Y. 565, 112 N.E. 447 (1916), also presented the minority view very effectively. In this case, all the payments under a conditional sales contract had been paid except the last. The vendor sued the vendee for the last installment, but being unable to collect the judgement, he then instituted replevin to recover the goods. The New York court ruled for the vendor, holding that the remedies were consistent and stating, 112 N.E. at 448:

> The vendor had the right to receive the price, and brought an action to get it. The judgment preserves the obligation of the vendee's promise to make payment, but puts it in another form. There is no inconsistency between an attempt to get the money, and a reservation of title if the attempt is not successful.

In *Murray v. McDonald,* 203 Iowa 418, 212 N.W. 711 (1927), the court relied strongly upon the above theory, in holding that it was proper for a conditional vendor to bring an action of replevin to recover his automobile even where a previous judgement was rendered but was not collected. The Iowa court emphasized the fact that conditional sales contracts are not illegal or contrary to public policy, and so they should be given their intended effect.

Eleven jurisdictions have unequivocally accepted the view of the minority by adopting the UNIFORM CONDITIONAL SALES ACT, 2 U.L.A. 6 (Cum.Supp. 1954). This act permits the vendor to bring an action of replevin where a prior suit for the purchase price has proven fruitless. Section 24 of the Act states: ". . . Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgement in such action, nor the collection of a portion of the price, shall be deemed inconsistent with the latter retaking the goods. . . ."

Professor Vold (VOLD, SALES 293 (1931)) favors the minority view, reasoning that these remedies are consistent. He criticizes the opposing majority view as unrealistic, in that it assumes the conditional sales agreement to be: ". . . merely an executory contract and to that is apparently added a further assumption that by bringing this action for the price the conditional seller waives his reserved title, thereby making the buyer the owner, as it is said that on no other basis can he be entitled to recover