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Recent Decisions

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These various characteristics and limitations of the bill of particulars force each case to turn upon its own individual circumstances. Ultimately, it is not a question of exercising a right, but is one "addressed to the sound discretion of the court," and as the cases have demonstrated, seldom is there a need for sustaining the motion for a bill. In recent correspondence, the acting Commissioner of Narcotics, G. W. Cunningham, has expressed the view that the infrequency with which bills are needed, or with which indictments are found insufficient, is due to a greater care in drafting indictments as developed by experience. This, we believe, is substantiated by the cases and is but another factor, a procedural one, in present-day, effective regulation of narcotics.

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RECENT DECISIONS

ADMINISTRATIVE LAW — JUDICIAL REVIEW — SELECTIVE SERVICE BOARD CLASSIFICATIONS. — *Dickinson v. United States*, ...U.S....., 74 Sup. Ct. 152 (1953). The petitioner sought reclassification after he became a duly ordained "pioneer" minister of Jehovah's Witnesses. His religious duties occupied all of his time except for five hours a week of secular employment. He claimed a ministerial exemption under § 6(g) of the UNIVERSAL MILITARY TRAINING AND SERVICE ACT, 62 STAT. 611 (1948), 50 U.S.C. APP. § 456(g) (Supp. 1952). Title changed from the SELECTIVE SERVICE ACT of 1948, 65 STAT. 75 (1951). This exemption was denied by the local draft board, and the decision was affirmed by the state and national appeal boards. The registrant was then ordered to report for induction. He reported to the induction center, but refused to submit to induction. Subsequently, he was indicted and convicted in the trial court for violating § 12(a) of the Act, *supra*. The court of appeals affirmed, 203 F.2d 336 (9th Cir. 1953), but the conviction was reversed by the Court on certiorari. In the criminal prosecution in the lower courts the defendant offered the defense of improper classification by the local board. This allegation was denied by both lower courts.

Although federal district courts were given jurisdiction to punish violators of the Act, 62 STAT. 622 (1948), 50 U.S.C. APP. § 462 (Supp. 1952), there is no specific authority given to the judiciary to review draft board decisions. On the contrary, the Act states: "The decisions of such local boards shall be final. . . ." 62 STAT. 620 (1948).

When are the classifications of selective service boards within the jurisdiction of the federal courts? The Supreme Court says in the instant case that the local board loses jurisdiction if there is insufficient affirmative evidence in the record to support its conclusion.

The problem of judicial review of draft board classifications has evolved from the "finality" clauses in the SELECTIVE DRAFT ACT OF 1917, 40 STAT. 76, 80 (1917); the SELECTIVE TRAINING AND SERVICE ACT OF 1940, 54 STAT. 885, 893 (1940), and under the present Act, *supra*. Since Congress did not specifically provide for judicial review, there has been a large amount of interpretation by the federal courts of the finality provisions with regard to draft board decisions. The courts have adhered to the theory that Congress did not intend to make "final" draft actions so opposed to granted authority as to amount to a breach of rights. Under the 1917 Act, the broad proposition developed as shown in Ex parte *Beck,* 245 Fed. 967 (D.C. Mont. 1917), the registrant could gain judicial hearing by a writ of habeas corpus after his induction if the local board's finding was contrary to the evidence or arbitrary in nature. *Accord, Arbetman v. Woodside,* 258 Fed. 441 (4th Cir. 1919).

This precedent of review established in the World War I cases was followed in cases arising under the 1940 Act with the courts generally giving a great degree of finality to local board action. In *United States* ex rel. *Trainin v. Cain,* 144 F.2d 944 (2d Cir. 1944), *cert. denied,* 323 U.S. 795 (1945), habeas corpus was granted to test the legality of the induction. It was pointed out in *Rase v. United States,* 129 F.2d 204, 207 (6th Cir. 1942), that the courts would grant relief under a writ of habeas corpus if administrative remedies had been exhausted.

With the decision of *Falbo v. United States,* 320 U.S. 549 (1944), the rule was definitely established that the selectee who failed to submit to induction is not entitled to judicial review in a criminal prosecution because he had not completed the draft process or exhausted his administrative remedies. The lower courts followed the *Falbo* rule, permitting judicial review by writ of habeas corpus only after induction. As in *United States v. Rinko,* 147 F.2d 1 (7th Cir. 1945), *cert. denied,* 325 U.S. 851 (1945); and *United States v. Flakowicz,* 146 F.2d 874 (2d Cir. 1945), appeals of Jehovah Witnesses who claimed ministerial exemptions were not reviewed as to the correctness of classification in criminal prosecutions after they had refused to be inducted.

The decision of the *Falbo* case, *supra,* was distinguished in *Estep v. United States,* 327 U.S. 114 (1946), on the basis that, unlike Falbo, the petitioner had exhausted his administrative remedies before he challenged the order of the board. He had followed the statutory procedure up to the final step in the induction ceremony where he refused to take the oath. (Note, as held in *Billings v. Truesdell,* 321 U.S. 542 (1944), a registrant refusing to take the oath does not become subject to military jurisdiction).

In *Estep v. United States, supra,* the draft registrant was permitted to attack his classification by showing either that it was not determined in conformity with statutory regulations or that there was no basis in fact for the decision of the local board. The "finality" provision of the Act was given the following definition by the Court in the *Estep* case, *supra,* at 122-23:

> It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

In the instant case the petitioner's conviction was reversed because the Court found no proof in the board files incompatible with the registrant's proof of exemption nor any affirmative evidence to support the board's classification. In the court of appeals' decision, 203 F.2d 336, 344-45 (9th Cir. 1953), it was shown that the local board might have had reason to suspect Dickinson's claims; however, the Supreme Court clearly held that suspicion was not enough, 74 Sup. Ct. at 158:

> But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

The fact that the petitioner worked five hours a week at secular employment was held not to be a factual basis for the denial of exemption, but where a minister was also a practicing lawyer, *United States* ex rel. *Trainin v. Cain, supra,* or spent more than half his time as a farmer, *Jeffries v. United States,* 169 F.2d 86 (10th Cir. 1948), the courts denied appeals for exemption.

A strong dissent in the instant case points out a seeming contradiction in the majority opinion where it was held that selective service board decisions are "final" and not subject to the "customary scope of judicial review," nevertheless, the Court condemns a board classification because the draft board did not record affimative evidence in its files to support its conclusion, mere disbelief not being sufficient.

The dissenting opinion construes the Act to mean, 74 Sup. Ct. at 159:

> We think the Act nevertheless requires that in the absence of affirmative proof by the registrant that the board has misconstrued the law or acted arbitrarily, the board's decisions are final and not subject to judicial scrutiny.

The consequent dilemma arising from this viewpoint is recognized. How can the Court determine whether or not the board has acted within its statutory regulations if there is no evidence in the record to support its classifications, merely, a "final" decision? Apparently, the ruling of the Court has answered the question.

The problem of exemptions from the draft and the challenging of draft board classifications will undoubtedly remain with us as long as the Selective Service System is in effect. It is made clear by the decision in the instant case that the courts will continue to uphold exceptions to the decree of "finality" of draft board decisions. If a draft board wishes its classifications to be upheld under judicial scrutiny, the *Dickinson* case holds that the board must build a record of affirmative evidence that will refute the registrant's claim to exemption.

J. Patrick O'Malley

CONSTITUTIONAL LAW — DUE PROCESS — ILLEGALLY OBTAINED EVIDENCE. — *Irvine v. California,* .....U.S....., 74 Sup. Ct. 381 (1954). Petitioner, Irvine, was convicted of violating California anti-gambling laws on evidence gained by police through use of a microphone installed in his private residence. Entrance to the home was gained by having a key made to the front door while the Irvines were away. The microphone was placed in a hallway and connected to a neighboring garage where officers were stationed to monitor the household conversations. Repeated entries were made by the police to move the hearing device to better locations, and finally it was placed in a closet. At no time over a period of two months did the police obtain a search warrant or any other process to enter the home. The conversations overheard by the officers provided the incriminatory information necessary to furnish leads against the petitioner and his wife. These conversations were considered a substantial factor in the finding by the jury against the petitioner.

The principal issue with which the court was confronted, *inter alia,* was the contention that the police conduct had violated the guaranty of due process of law under the Fourteenth Amendment to the Constitution. Therefore, the petitioner argued, the evidence so obtained was incompetent and should have been ruled inadmissible. The petitioner relied upon two recent cases that established separate notions of where the Supreme Court would find a lack of due process. *Rochin v. California,* 342 U.S. 165 (1952) and *Wolf v. Colorado,* 338 U.S. 25 (1949).

In *Rochin v. California, supra,* there was a conviction based on evidence obtained by the forced expulsion of narcotics which had been swallowed in the presence of the arresting officers. The police had entered the home of the petitioner without a warrant and surprised Rochin with the narcotics capsules on his bedstand. Rochin swallowed the capsules and the police immediately attempted to retrieve them by force. Being unsuccessful, they took the petitioner to a hospital where, against his will, an emetic solution was forced into his stomach, caus-

ing vomiting and the evidence thus obtained was used to convict Rochin. In reversing the conviction, the Supreme Court steadfastly refused to define due process in any concrete terms. However, the court said, 342 U.S. at 172:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of the government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.

It was stressed in the *Rochin* decision that the brutality of the police method constituted the denial of due process. The court in the instant case could not find any "coercion" of the defendant and summarily dismissed any application of the facts to a deprivation of due process of law.

The decision in *Wolf v. Colorado, supra,* was concerned primarily with the admissibility of illegally obtained evidence in criminal trials and the implication of a denial of due process of law which is cast over such a use of evidence to convict. In this case, similiarly, Wolf was convicted of conspiring to perform abortions on evidence secured by police officers who unlawfully broke into Wolf's office and seized his private papers. The conviction was affirmed by the Supreme Court, but it said, 338 U.S. at 27:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.

And at page 28:

> Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.

However, the Court also made it clear that as a matter of admitting the evidence, such evidence, being the fruit of an illegal search and seizure, could be included in a state trial without any deprivation of due process. This was the Court's traditional approach, even though according to the doctrine announced in *Weeks v. United States,* 232 U.S. 383 (1914), upon a similar factual situation, such evidence would be excluded from a federal court for a federal crime.

The area of due process under the Fourteenth Amendment applicable to the states, must be carefully examined. In the *Rochin* case, the "coercive methods" of the police contaminated the evidence. Also, coercion employed to obtain a confession will contaminate the confession and render it inadmissible. The breaking of a suspect's spirit by use of fear or physical force is a denial of due process of law. *Ashcraft v. Tennessee,* 322 U.S. 143 (1944). The confession is made out of despair and is therefore involuntary. In *Lisenba v. California,* 314 U.S. 219, 236 (1941), the court said, "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the *use of evidence* whether true or false." (Italics supplied.)

The coercion need not involve extreme violence as in *Brown v. Mississippi,* 297 U.S. 278 (1936), where petitioner was flogged until he confessed. Thus holding the prisoner incommunicado and questioning him for excessive periods is sufficient coercion to constitute a denial of due process. *Watts v. Indiana,* 338 U.S. 49 (1949), (prisoner held in solitary and questioned by relays of interrogators for six days). See also, *Ashcraft v. Tennessee, supra; Ward v. Texas,* 316 U.S. 547 (1942).

Coercion in violation of due process is not found when evidence is obtained merely without the consent of the suspect. In *People v. Heaussler,* 41 Cal.2d 252, 260 P.2d 8 (1953), where the petitioner's blood was taken for a sobriety test while the petitioner was unconscious. The court held the evidence admissible. This act was not considered coercive or shocking by the court. *Accord, People v. Frederick,* 109 Cal. App. 900, 241 P.2d 1039 (1952); *Kallnback v. People,* 125 Colo. 166, 242 P.2d 222 (1952). In *State v. Smith,* 91 A. 2d 188 (Del. Super. Ct. 1952), the court said such tests taken without the suspect's consent were not so "repugnant to the decencies of civilized conduct" as to be a denial of due process.

The fact that the admission of evidence illegally obtained is not per se a denial of due process under the Fourteenth Amendment does not mean that the suspect's constitutional rights have not been violated. The Court in the instant case suggested another approach for violation aside from declaring the evidence inadmissible; that is, the method adherred to in a minority of jurisdictions. See Note, 150 A.L.R. 566 (1944). The suggested alternative is to indict the officers for a federal crime. If the petitioner's constitutional rights were violated by police methods, the officers would be subject to prosecution under federal criminal law, 18 U.S.C. § 242 (1952). This section makes a federal crime of any act which is done under color of law and which deprives a citizen of any state of rights, privileges, or immunities guaranteed by the Constitution of the United States.

Such a crime, however, is difficult to prove. The act must have been under the color of law, *Williams v. United States,* 341 U.S. 70 (1951); and an element of specific intent must be shown, *Screws v. United States,* 325 U.S. 91 (1945).

The main problem then revolves around the protection of an individual's constitutional rights. A remedy is needed for the purpose of inhibiting police officers from using or condoning methods of gathering evidence that tend to violate the Fourteenth Amendment. In the *Irvine* case, the Court favors the "federal crime solution". This is, however, of dubious effectiveness. The petitioner urged that the evidence be declared inadmissible as a violation of the guarantee of due process. It is submitted that this approach is by far the more effective of the two. Justice Brandeis, in the collateral problem of wire tapping, saw the necessity

of effective sanction against doubtful police methods. Justice Brandeis proved quite prophetic in respect to the situation found in the instant case where he spoke out in favor of excluding such evidence. *Olmstead v. United States,* 277 U.S. 438, 473-4 (1928):

> Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
>
> Ways may someday be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home.

His words became the facts of the instant case some twenty-one years later.

Peter H. Lousberg

CONSTITUTIONAL LAW — FREEDOM OF EXPRESSION — STATE MOVIE CENSORSHIP — *Superior Films, Inc. v. Department of Education of Ohio,*.....U.S....., 74 Sup. Ct. 286 (1954). The Supreme Court of the United States decided two cases together in this decision, one coming from Ohio and the other from New York. In the Ohio case, *Superior Films, Inc. v. Department of Education,* 159 Ohio St. 315, 112 N.E. 2d 311 (1953), the Supreme Court of Ohio held there is a limited sphere in which public decency and morals may be protected from the impact of offending motion pictures by prior restraint or censorship. The court determined that the threat of juvenile delinquency and increased criminality were fostered by the character of the pictures shown. Under a statute, Ohio Gen. Code Ann. § 154-47 (1938), control of such public exhibits are required, *inter alia,* to be sound morally and harmless. It was the opinion of the Ohio court that such criteria was not too indefinite and sustained the board of censor's rejection of petitioner's film. The New York case, *Commercial Pictures Corp. v. Board of Regents,* 305 N. Y. 336, 113 N.E. 2d 502 (1953), presented the same conclusions, but also determined that the means of distribution of film made it necessary to apply censorship before exhibition.

Both cases concerned the test used by the respective state boards and its constitutionality as a medium of control over presentation of motion picture films. In each case the movie was censored or license to exhibit was refused on the grounds of immorality or public harm. The Supreme Court summarily reversed the state holdings on the authority of *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1951), where the court struck down the term "sacriligious" as being too vague a test for censoring movies as it appeared that the producer could not know the exact meaning of the test.

The issue is whether state censorship of movies is valid in the light of constitutional rights of freedom of expression, as enunciated in the First Amendment and secured against state infringement by the Fourteenth Amendment.

To comprehend the decisions which have recently been set forth concerning censorship, one must take cognizance of the early history of censorship. As the puritan influence spread throughout the country, the theater was regarded as a low form of entertainment. Very few courts interpreted a state constitution as protecting drama from "prior restraint." It was usually considered by the majority of jurisdictions as the legitimate use of administrative discretion. *Bainbridge v. Minneapolis,* 131 Minn. 195, 154 N.W. 964 (1915); *Thayer Amusement Corp. v. Moulton,* 63 R.I. 182, 7 A.2d 682 (1939).

Almost forty years ago the Supreme Court held that movie censorship was not unconstitutional as a violation of the First Amendment. The leading case supporting this principle of law is that of *Mutual Film Corp. v. Industrial Commission of Ohio,* 236 U.S. 230 (1915). The petitioner involved in the case was engaged in the business of selling and distributing movie films for exhibition throughout Ohio and parts of Michigan. The defendants censored one of the plaintiff's movies. The complainant based his argument on three propositions. He said that censorship of movies violated the First Amendment of the Constitution. The court held the exhibition of moving pictures is a business enterprise and it is not to be regarded as part of the press of the country or as an organ of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining but capable of evil. Therefore, the government has the power to censor them before exhibition.

However, after the Supreme Court recognized the spoken word to be as freely protected against prior restraints as that which is written, as was stated in *Thomas v. Collins,* 323 U.S. 516 (1945), the same court went further in extending the doctrine of unconstitutionality of movie censorship as a violation of the First and Fourteenth Amendment in subsequent decisions.

One of the leading cases which squarely presented the question, whether motion pictures are within the ambit of protection which the First Amendment through the Fourteenth secures to any form of speech or press, is that of *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). The appellant in the case had the exclusive agency to distribute motion pictures in the United States. He acquired the specific right to distribute the movie "The Miracle", which the appellee banned as being sacrilegious. It was held that the basic principles of freedom of speech and press applied to motion pictures, even though their production, distribution, and exhibition is a large-scale business conducted for profit.

The Court, in striking down the word "sacrilegious", said the term could not be known even through the sense and experience of men. The ideas of the various religious sects concerning the word sacrilegious, is so wide and varied it would place a heavy burden on the film industry, as they would be governed by its notions of the feeling likely to be aroused by diverse religious sects, certainly the powerful ones. From the standpoint of freedom of speech and the press, the state has no legitimate interest in protecting any or all religious groups from views distasteful to them which is sufficient to justify prior restraints upon the expressions of those views. In concluding, the Court held that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. The Court stated that the views expressed in the *Mutual Film Corp. v. Industrial Commission of Ohio,* 236 U.S. 230 (1915), are no longer valid.

This departure from the holdings in the *Mutual* case, *supra,* might be explained to some extent, by the introduction of talking movies, thus conforming to the likeness of the press. However, the general holding of *Joseph Burstyn, Inc. v. Wilson, supra,* was qualified by the Court in saying that motion pictures are not necessarily governed by any other particular method of expression, for each case presents a different problem.

The idea of "prior restraint" of the press was expressed clearly in *Near v. Minnesota,* 283 U.S. 697 (1931). The facts of the case involved an attorney who brought an action to enjoin the publication of what was described as a malicious, scandalous and defamatory newspaper, known as "The Saturday Press", published by defendants. It alleged that a gangster was in control of gambling, bootlegging and racketering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties as they should. The Court stated the press must be protected from any form of restraint because, the members of an organized society, united for their common good must have the right to impart and acquire information about their common interest.

In determining the extent of the constitutional protection, the chief purpose of the constitutional provisions is to prevent "prior restraints" upon publications. This liberty was best described by Blackstone, 4 BL. COMM. *151:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiment he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

It was the opinion of the court, in *Near v. Minnesota, supra,* that the freedom of the press and of speech is within the liberty safeguarded by

the law of the land. Recognizing this as a fundamental guaranty, the limits of the police power of the state must be determined with regard to the particular subject of its exercise.

In regard to state limitations on the First Amendment freedoms, one of the interesting cases is *Winters v. New York,* 333 U.S. 507 (1948), in which the appellant was a New York City bookdealer, convicted of a misdemeanor for having in his possession, with intent to sell, certain magazines. Upon appeal the Supreme Court of the United States reversed the state court decision. In doing so the court reiterated, a failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment violates an accused's right under procedural due process and freedom of speech or press.

Since the Supreme Court has struck down "sacrilegious" as a criteria for censorship in the *Burstyn* case and "immoral" in the instant case, it cannot follow from this that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and places. As was stated in *Schenck v. United States,* 249 U.S. 47, 52 (1919), even the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. This concept can well be compared to a prior restraint in censorship in the movie industry. On the other hand the state is limited in its power to censor by these various decisions of the Supreme Court. The test to be applied by state tribunals is in accordance with the mandate of the clear and definite provisions of procedural due process. Such limitations on both the state power of censorship and the freedom that the movies enjoy under the Constitution admittedly will make state legislatures proceed with more certainty and caution in drafting future boundaries for movie censorship.

David J. Eardley

CRIMINAL LAW — "CONVICTION" — JUDICIAL INTERPRETATION. — *Bubar v. Dizdar,* ....Minn....., 60 N.W.2d 77 (1953). The defendant was arrested in Texas on a criminal charge of violating the Blue Sky Law of Minnesota. Waiving extradition, he appeared and pleaded guilty to the charge. Following this, but before sentence was pronounced, he was served with a civil summons and complaint arising out of the same facts. The defendant then appeared specially, asking that the complaint in the civil action be dismissed upon jurisdictional grounds based upon MINN. STAT. § 629.24 (1949), which provides that if a person was extradited or waived extradition on a criminal charge he would not be subject to

personal process in a civil action based on the same facts until he had been convicted or until he had time to leave the state, if acquitted.

The trial court denied the motion and the defendant appealed. The issue decided was whether the term "conviction," as used in the statute, was meant to include a plea of guilty made in open court or only a final judgment of the court. The Supreme Court of Minnesota upheld the trial court's decision that "conviction" under the statute included a plea of guilty made in court, stressing that such was its ordinary meaning.

This constantly recurring problem has confronted many courts. They generally hold that where there is an accepted plea of guilty it will be a conviction for all purposes, as in *Weathers v. State,* 56 So.2d 536 (Fla. 1952), where the conviction of an accessory was based upon the "conviction" of the principal who had pleaded guilty, but had not been sentenced before his accessory's guilt was determined, and in *Cruchfield v. Commonwealth,* 187 Va. 291, 46 S.E.2d 340 (1948), where the defendant pleaded guilty to assault and was improperly sentenced. In the latter case the defendant was retried and the court held the prior plea a sufficient conviction to bar retrial.

The same rule of plea of guilty equaling conviction applies when a prior conviction is necessary for the imposition of a heavier punishment. *Jenness v. State,* 114 Me. 40, 64 A.2d 184, 186 (1949); *Commonwealth v. Simmons,* 361 Pa. 391, 65 A.2d 353, 358-359 (1949). *But cf. Meyer v. Missouri Real Estate Commission,* 238 Mo. App. 476, 183 S.W.2d 342 (1944). A New York court reasoned that when a man voluntarily pleads guilty to an offense he is admitting that he has committed it as surely as if he were so adjudged by a court at the time of judgment. *Weinrib v. Beier,* 294 N.Y. 628, 64 N.E.2d 175 (1945). An older case, *Commonwealth v. Gorham,* 99 Mass. 420 (1868), holds contra, but it seems unsupported today. *Schireson v. State Board of Medical Examiners,* 130 N.J.L. 570, 33 A.2d 911, 913 (1943). Thus a plea of guilty will suffice as a conviction in all situations.

Upon analyzing the word "conviction" when a pardon is involved a broader interpretation is usually given to the word. Although a dispute arises whether a pardon granted after a verdict of a jury, but before final judgment, is a conviction within the meaning of their constitutions or statutes, the majority of states speaking on the subject base their interpretation on Blackstone's definition, 4 BL. COMM. *362:

> But if the jury find him guilty . . . he is then said to be *convicted* of the crime whereof he stands indicted; which conviction may accrue two ways — either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country.

This was first followed in *Commonwealth v. Lockwood,* 109 Mass. 323, 326 (1872), which is considered to be the leading case in the United States, *People v. Marsh,* 125 Mich. 410, 84 N.W. 472, 473 (1900). The

majority takes the view of *Blair v. Commonwealth,* 25 Gratt. 850, 864 (Va. 1874), where the ". . . true intent, meaning and effect of said pardon . . . ." is to be given effect, *accord,* In re *Anderson,* 34 Cal. App.2d 48, 92 P.2d 1020 (1939).

The minority view, that followed only by Oklahoma and Nebraska, is based on the idea that strict limitation upon the pardoning power is required, since this legislation was the result of abuses by the King at Common Law and therefore must be limited until the formal closing of the case so the public would know a crime had been committed. Ex parte *White,* 28 Okla. Cr. 254, 230 Pac. 522, 524 (1924); *accord,* Ex parte *Campion,* 79 Neb. 364, 112 N.W. 585, 588 (1907); *Gilmore v. State,* 3 Okla. Cr. 639, 108 Pac. 416 (1910).

Generally speaking, however, a verdict of the jury, as well as a plea of guilty, will suffice as a conviction in order to give effect to the pardoning power.

The question now arises whether or not "conviction" is always construed in its ordinary sense of a plea of guilty or a verdict by a jury outside the states of Oklahoma and Nebraska. In the analysis of the proposition of any word one meaning cannot always be given. There arise situations where discretion is more important than strict etymology. This has been mentioned earlier in stating the reason for the equating of pleas of guilty and verdicts of guilty when a pardon is involved.

There are two situations upon a verdict of a jury where it can be seen immediately that conviction must be used in its technical, limited sense. These are where a heavier punishment is imposed because of a prior conviction and where a person is deprived of the right to vote or to speak in court. Included in the latter is the modern view that conviction will not deprive one of his right to be a witness, but can be used to impeach his testimony.

The holding that judgment is necessary in a prior conviction, when this prior conviction is used for heavier punishment in a subsequent offense, is based on the premise that the punishment inflicted for the prior wrong was not strong enough to deter the defendant from committing further wrongs. *Emmertson v. State Tax Commission,* 93 Utah 219, 72 P.2d 467, 470 (1937). Thus, the requirement of final judgment is easily seen. *Commonwealth v. Ashe,* 156 Pa. Super. 451, 40 A.2d 875 (1945); *Smith v. Commonwealth,* 134 Va. 589, 113 S.E. 707 (1922). *But cf. People v. Adams,* 95 Mich. 541, 55 N.W. 461 (1893).

In *People v. Fabian,* 192 N.Y. 443, 85 N.E. 672 (1908), the defendant had been convicted of burglary but the sentence was suspended. He later voted in an election and was indicted for voting when not qualified. A demurrer was sustained to the indictment which the New York Supreme Court, 126 App. Div. 89, 111 N.Y. Supp. 140 (1st Dep't 1908), overruled in reversing the trial court's judgment. It based its

decision on the ordinary use of the word "conviction" in conjunction with the Penal Code of 1901. The Court of Appeals in reinstating the demurrer indicated that its reason for taking the technical view was based on the idea that a person's rights are sacred and cannot be revoked unless done so expressly. The court stated the New York law to be that suspension postpones the consequences of the conviction. *But cf. People v. Wengorra,* 256 App. Div. 508, 10 N.Y.S.2d 632 (1st Dep't 1939) (Under N.Y. CODE OF CRIM. PRO. § 470-b, a suspension is equivalent to a conviction).

This concept is extended to the situation where the testimony may be impeached because of conviction. Here too, it is necessary for a final adjudication since there is the possibility of reversal. *People v. Andrae,* 295 Ill. 445, 129 N.E. 178, 182 (1920). This was the Common Law rule, *Faunce v. People,* 51 Ill. 311, 314 (1869), and is still applied, *Thomas v. United States,* 121 F.2d 905, 907 (D.C. Cir. 1941); *Commonwealth v. Lewandowski,* 74 Pa. Super. 512 (1920).

The court in the principal case states, 60 N.W.2d at 80: "To give effect to the intent of the legislature, we conclude that the term 'convicted,' as used in the statute, should be given its ordinary and popular legal meaning rather than its technical meaning." This case thus follows the majority rule that a plea of guilty will equal a conviction. To date eleven states have fully discussed all phases of possible interpretations, while twenty-seven more, the District of Columbia and the Supreme Court have considered various aspects of the word.

Today, therefore, it seems that the better reasoning favors a plea of guilty equaling a conviction in all cases; a verdict of the jury when a pardon is involved, and final adjudication of the court when a civil right or heavier punishment will result from the verdict of the jury.

James M. Corcoran, Jr.

DOMESTIC RELATIONS — BIGAMOUS MARRIAGE CONTRACTED IN BAD FAITH BY BOTH PARTIES. — *Olinghouse v. Olinghouse,* ....Okla....., 265 P.2d 711 (1954). Plaintiff became pregnant by the defendant, and subsequently the two went through a ceremonial marriage, both knowing that defendant's first wife had not yet obtained a divorce from him. The first wife's divorce became final February 24, 1950, and Olinghouse and his second wife lived together thereafter as husband and wife until Memorial Day of 1950. There was evidence that defendant lived with his first wife after her divorce became final and while he was still living with plaintiff. The second wife was granted a divorce in the trial court on the theory that a common-law marriage existed after the first wife's divorce

became final. In a four to three decision the Supreme Court of Oklahoma affirmed the decision, holding that the acts of the parties in living together and holding themselves out as husband and wife after a legal impediment to the marriage had been removed, constituted a common-law marriage. The court said that it made no difference that both parties had known of the impediment when they married.

The case presents the question as to whether two persons who both enter a marriage knowing of an existing legal impediment to that marriage can ever become validly married by common law after the impediment has been removed.

In those states not prohibiting common-law marriage by statute, it is well settled that the parties, by living together with intent to be man and wife and holding themselves out as man and wife, will be presumed by law to be validly married, if both parties are capable of a valid marriage. *Catlett v. Chestnut,* 107 Fla. 498, 146 So. 241 (1933); *Conkling v. Conkling,* 117 N.J. Eq. 218, 175 Atl. 132 (Ct. Err. & App. 1934). *But cf. Tedder v. Tedder,* 108 S.C. 271, 94 S.E. 19, 21 (1917).

A somewhat different problem arises in the case in which a marriage ceremony has taken place between the two parties, but where an impediment existed to the marriage in the legal inability of one or both of the parties to marry. If the parties entered into the marriage in good faith and continued to cohabit after the impediment has been removed, most courts recognize the relationship as a valid marriage. *Mudd v. Perry,* 108 Okla. 168, 235 Pac. 479 (1925). A large number of these cases arise in those states that require a waiting period after divorce before either party can remarry and where the waiting period was unobserved. *E.g., Schuchart v. Schuchart,* 61 Kan. 597, 60 Pac. 311 (1900). Yet, some courts hold such marriages in the prohibited period as absolutely void, no marriage being presumed from the continuing relationship after the period had expired. *Hall v. Baylous,* 109 W. Va. 1, 153 S.E. 293 (1930). Even where there was no recorded ceremony, however, and the parties began living together as husband and wife during a period of statutory inability of one of the parties, an Iowa court presumed the marriage to be valid when the relationship continued after the impediment had passed. *Smith v. Fuller,* 138 Iowa 91, 115 N.W. 912 (1908).

The law tends to smile on innocent parties, so that where only one spouse has entered the relationship in good faith, the other party having known of the impediment, the law generally will protect the innocent one and presume a valid marriage after the impediment has been removed and the relationship continues. This is true especially where children have been born of the union. *Smith v. Reed,* 145 Ga. 724, 89 S.E. 815 (1916).

But in the instant case both parties entered the marriage in bad faith. The law is reluctant in a strong majority of these cases of bad faith to extend its protective arm in aid of a wrongdoer. In an early Indiana case, *Nossaman v. Nossaman,* 4 Ind. 648 (1853), the court refused to recognize as a marriage the cohabitation of the parties for thirty-three years. There had never been a ceremony because both parties knew that the man was not divorced from his first wife. She died only one year before the second wife, who had borne two children. Despite these children and the long relationship, the court strictly observed the common law and decided that there was no marriage.

The Indiana case, *supra,* should set some kind of record for a lengthy, illicit affair. Several other cases holding that there was no legal marriage established are similarily impressive though concerning relationships of a shorter duration. In *Spencer v. Pollock,* 83 Wis. 215, 53 N.W. 490 (1892), the couple lived together nineteen years as husband and wife until he died. Both had known of the wife's first husband whom she never divorced, and there was no evidence of his death. The court stated the general rule of law that a marriage illicit at its inception with full knowledge of both parties remained illicit throughout. This same rule led an Iowa court to decide that a woman who married another man without divorcing her first husband could not have her relationship validated by law many years later. *Barnes v. Barnes,* 90 Iowa 282, 57 N.W. 851 (1894). There the second husband had been seemingly unaware of the woman's previous marriage and lived with her eleven years, seven of which were after the death of the first husband. After a twenty-year separation the second husband died, but the woman found that the court cared not how long she had been the man's wife in name as it held that she had never been his wife at law.

In Arkansas both parties knew of the man's previous marriage, but they lived together fourteen years before he obtained a divorce. After the divorce the relationship continued five months, at which time he died. The court held that there was no marriage. *O'Neill v. Davis,* 88 Ark. 196, 113 S.W. 1027 (1908). A later Mississippi case reached a similar determination under similar facts. The couple married, although they knew the man's spouse still lived, and cohabited together fourteen years, when he died, two and a half years after the death of his first wife. Although there was one child of the relationship, the court held that there was no marriage. *Thompson v. Clay,* 120 Miss. 190, 82 So. 1 (1919). It is submitted, therefore, that in the eyes of most courts neither time nor the removing of the legal impediment while the relationship continues can overcome the bad faith in which the parties entered the marriage and thus make it valid. In re *Franchi's Estate,* 119 N.J. Eq. 457, 182 Atl. 887 (Preg.), *aff'd,* 121 N.J. Eq. 47, 187 Atl. 371 (Ct. Err. & App. 1936).

Thus, it is evident that the Oklahoma case under discussion is illustrative of the minority view. This view is exemplified in *University of Mich-*

igan v. McGuckin, 62 Neb. 489, 87 N.W. 180 (1901), *aff'd,* 64 Neb. 300, 89 N.W. 778 (1902), in which a divorced woman began living with the man while his divorce was pending, and the relationship continued thirteen years after his divorce was granted. There was never a ceremony, though five children were born to the couple. The court was of the opinion that there was sufficient evidence of a valid marriage.

Other than an Idaho case discussed *infra,* and which was cited in the instant case's opinion, only one other case was found in other jurisdictions favorable to this *Olinghouse* case. This was a strange case in Nevada, *Parker v. DeBernardi,* 40 Nev. 361, 164 Pac. 645 (1917). The parties lived together before the woman got her divorce and at least eight years thereafter. The woman ran a house of prostitution most of the time, and the relationship was discontinued at one time for two years, but later renewed. Both had known of the legal impediment, but the court decided that the parties intended marriage and held for the defendant as a husband in a suit for restitution of real property by the wife.

It should be noted that the instant case expressly overruled an earlier case in Oklahoma, *Clark v. Barney,* 24 Okla. 455, 103 Pac. 598 (1909). In that case Barney and Clark married and divorced. The former validly married another and then remarried Clark, though both knew that his second wife still lived. The second wife died two months later, and the renewed relationship continued six years more, until Barney died. There was no marriage in the eyes of the court, it stating, 103 Pac. at 600:

> Common-law marriage grows out of good faith, honest intentions, and proper purposes, and if willful bigamous relations, after the death of the party who has been wronged by the other spouse, are to ripen per se by the continuance of such cohabitation . . . into a common-law marriage . . . it would tend to put a premium upon the disregard of marital relations, rather than the ukase of the law against it.

The court in the present case states that the Oklahoma attitude has become progressively broader toward such situations since the *Barney* decision. Three of the cases cited by the court, though, involved good faith on the part of the parties involved. *Mantz v. Gill,* 147 Okla. 199, 296 Pac. 441 (1931); *Andrews v. Hooper,* 138 Okla. 103, 280 Pac. 424 (1929); *Mudd v. Perry, supra.* However, that the Oklahoma court has some precedent for its decision cannot be denied. There are two earlier cases in which the bad faith of the parties did not prevent the court from finding that a valid marriage existed. *Hess v. Hess,* 198 Okla. 130, 176 P.2d 804 (1947); *Branson v. Branson,* 190 Okla. 347, 123 P.2d 643 (1942).

The *Hess* case, *supra,* does not mention the *Barney* case, *supra,* but the two decisions can be reconciled only with difficulty. In the *Hess* case, the parties married with knowledge that the statutory period of inability of the man, because of his recent divorce, had not yet expired. They lived together only seven months after the ceremony, only one of which

was after the statutory impediment had expired. The court held that knowledge of the impediment at the time of marriage did not prevent a common-law marriage after the impediment had been removed. But in this case the husband had at least got a divorce, whereas in the *Barney* case, *supra,* the husband was content to let the first wife's death dissolve the marriage. Thus, the two cases can be distinguished. The same is true of the earlier *Branson* case, *supra,* which mentions the point though not called upon to decide it.

The court in the *Olinghouse* case also cites *Thomey v. Thomey,* 67 Idaho 393, 181 P.2d 777 (1947), which supports the Oklahoma decision. In this case a woman who had not divorced her first husband informed the second of this when she began living with him. After four years in this relationship, she obtained a divorce from the first husband and continued to live nine more years with the second one. The length of the relationship, therefore, distinguishes this case from the *Olinghouse* case.

Thus, with only slight precedent in its own state and a few others, the Oklahoma Court in the *Olinghouse* case has gone far in recognizing a valid marriage where there is little evidence of one, and at least equal evidence to the contrary. It has overruled a case, *Barney v. Clark, supra,* that had stood for forty-four years in Oklahoma, in order to virtually stand alone in its readiness to recognize such a cohabitation as common-law marriage. It is difficult to acknowledge that the relationship in the instant case — a forced, invalid marriage in bad faith, and of short length — should bloom into a legal marriage with its corresponding rights, without some further evidence of matrimonial intent in the parties than here appeared before the court.

Joseph B. Joyce

EVIDENCE — WITNESSES — ADMISSABILITY OF ILLEGALLY OBTAINED EVIDENCE TO IMPEACH CREDIBILITY OF A WITNESS. — *Walder v. United States,* ....U.S....., 74 Sup. Ct. 354 (1954). In May, 1950, the petitioner was indicted for the purchase and possession of one grain of heroin. Claiming that the heroin had been obtained through an unlawful search and seizure, the petitioner moved to suppress the evidence. The motion was granted and shortly thereafter, the indictment was dropped. In January of 1952, Walder was again indicted, this time for four other sales of narcotics, in violation of 53 STAT. 272 (1939), 26 U.S.C. § 2554 (a) 1948. The only witness for the defense was the defendant, who upon direct examination vigorously denied having ever had any dealings in narcotics during his entire lifetime. In rebuttal, the Government introduced the officer who had participated in the 1950 seizure and a chemist who had analyzed the seized capsule. The defendant was convicted, the court of

appeals affirmed, 201 F.2d 715 (8th Cir. 1953), and certiorari was granted by the United States Supreme Court, 345 U.S. 992 (1953).

The issue presented in this case is whether evidence, excluded in one action because illegally obtained, is admissible in a subsequent action in a federal court to attack the credibility of a defendant's testimony. The answer of the Court is in the affirmative.

Under common law, the courts did not inquire into the means by which evidence was obtained. *Legatt v. Tollervey,* 14 East. 302, 104 Eng. Rep. 617 (K.B. 1811). This rule was almost universally accepted in the United States. *Commonwealth v. Dana,* 2 Metc. 329 (Mass. 1841). The first contrary ruling appeared in *Boyd v. United States,* 116 U.S. 616 (1886), in which the Court held that both the Fourth and Fifth Amendments prohibited the use of illegally obtained evidence against the accused. Eighteen years later, however, the Court apparently returned to the more liberal common law rule, though federal officials had not been involved in the particular illegal search in question. *Adams v. New York,* 192 U.S. 585 (1904). Then, in the landmark case, *Weeks v. United States,* 232 U.S. 383 (1914), the Court emphatically denied the use of illegally obtained evidence in federal courts by permitting the defendant to demand its return. The constitutional philosophy of the Court in regard to the admission of evidence obtained by unlawful methods is expressed in 232 U.S., at 393:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Subsequent rulings by the Court have but ramified the basic theory expressed in the *Weeks* case, *supra.* The furthest extension of this doctrine is seen in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920), where the court ruled that the Fourth Amendment not only prohibited the use of illegally obtained evidence by the Government before the courts, but its use in any manner whatsoever.

Also in accord with the *Weeks* case, was *Agnello v. United States,* 269 U.S. 20 (1925), where the Government had attempted to make use of illegally obtained evidence by referring to its existence on the cross-examination. This case is distinguishable from the instant case in that the defendant had made no reference to the evidence upon direct examination. It was held that the Government could not use indirectly that which it was denied from using directly.

The credibility of the defendant becomes vitally important in respect to his denial of the crime charged. The chief weapon employed by the prosecution in rebutting this credibility is an attack upon the character of the defendant. *United States v. Holmes,* 26 Fed. Cas. 452, No. 15, 382 (D. Me. 1858). Evidence as to the character of the accused is never

admissible until the accused has first put his character at issue. *Gordon v. United States,* 254 Fed. 53 (5th Cir. 1918). If the defendant does not choose to take the stand in his own behalf, the prosecution cannot attack his character or credibility, but if the defendant does take the stand, he occupies a double position; and evidence which was formerly inadmissible against him in his status as a defendant may be entirely admissible in contradicting his testimony as a witness. *Raffel v. United States,* 271 U.S. 494 (1926); 1 WIGMORE, EVIDENCE § 61 (3d ed. 1940). Thus, once the accused has made an affirmative step to prove his good character, he lets loose the flood gates of rebuttal by the prosecution.

Various theories have been presented by the courts, either in justification or denial of the constitutional foundation of the right of the prosecution to attack the character and credibility of the accused. One view upheld by many courts is that the defendant's voluntary testimony is a waiver of his constitutional privilege against self-incrimination as to all facts whatever, including those which merely affect credibility. *Connors v. People,* 50 N.Y. 240 (1872). Therefore, it was decided in *Michelson v. United States,* 335 U.S. 469, 479 (1948):

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.

According to this theory, the defendant is protected solely against compulsory testimony against himself. However, if he voluntarily takes the stand this protection is cast aside and it is by his own affirmative act that he has placed himself in danger. This is the position taken by the Court in the instant case.

A narrower view taken by some courts holds that the constitutional waiver extends only to those matters which are relevant to the issue, thus excluding collateral matters, such as facts merely impeaching credibility. *Brown v. Walker,* 161 U.S. 591, 598 (1896) (dicta); *Lohman v. People,* 1 N.Y. 379, 385 (1848). A small minority has taken the extreme view that the defendant does not waive his Constitutional rights by testifying in his own behalf, and that he may claim his privilege at any time. *State v. Ober,* 52 N.H. 459 (1873).

Earlier decisions held that evidence of good character introduced by the defendant was relevant only in cases involving capital crimes. *Commonwealth v. Dana, supra.* Gradually, it has been accepted that such evidence is admissible as a defense to charges of all grades, even misdemeanors. *Ware v. State,* 91 Ark. 555, 121 S.W. 927 (1909). Once the issue of character has been brought into the trial, the question then arises as to what type of evidence the prosecution may utilize in rebutting the defendant's testimony. As a general rule, great latitude is allowed on the cross-examination of a witness on matters affecting his credibility, the extent of which is determined by the sound discretion of the trial court. *Johnstone v. Jones,* 1 Black 209 (U.S. 1861).

In the instant case, it is apparent that the petitioner had resorted to obviously perjurious testimony in order to take advantage of the Government's disability dictated by the *Weeks* case. The only evidence which would have proved Walder's testimony undoubtedly false was apparently barred by the Court's scrupulous adherance to this sacred federal rule of evidence. The Court was presented with two directly conflicting legal interests. The fundamental right which the accused enjoys as a citizen under the Constitution had to be protected. In opposition was the right of the prosecution to introduce evidence which would expose perjured testimony. The Court decided that the Constitution was neither intended, nor could it be used, as a "shield against contradiction of untruth."

Though the principal case is not directly contradictory to the well-established *Weeks* ruling, it is a highly significant exception when compared with earlier, all-excluding views, as seen in *Silverthorne Lumber Co. v. United States, supra.* In this case the Government has not only made use of evidence gained through methods banned by the Constitution, but it has also used this evidence to very good advantage.

Though reaffirming the significanse of the constitutional safeguards which were intended to protect the citizenry from an unlimited police tyranny, the Court was primarily influenced by the obvious injustice which would result from a strict adherance to the doctrine of the *Weeks* case. Here, the accused had asserted his constitutional right to suppress illegally obtained evidence which would undoubtedly have brought about his conviction of a criminal offense. Yet later he perverted that evidence to insure himself against any contradiction or impeachment of credibility — clearly a distortion of any individual protection from police oppression as intended by the Constitution.

Despite the Court's firm denial of a lessening of respect for the theory expressed in the *Weeks* case, the instant case would seem to indicate a tendancy of the Court away from its strict interpretation, which had characterized earlier decisions.

James E. Murray

RADIO AND TELEVISION LAW — AGREEMENT RESTRICTING BROADCASTING — RESTRAINT OF TRADE UNDER THE SHERMAN ANTI-TRUST ACT. — *United States v. National Football League,* 116 F. Supp. 319 (E.D. Penn. 1953). The government brought this action against the National Football League to enjoin the enforcement of the League by-laws restricting the televising and radio broadcasting of its professional football games. Under scrutiny was Article X of the by-laws which prohibited a member club from allowing the telecast or broadcast of its

home and away games by a station within seventy-five miles of another League city. The Football Commissioner was to have the power of granting permission to broadcast and telecast within the allocated territories, depending upon the concurrence of the home team. The government sought an injunction to restrain the enforcement by claiming illegality under the SHERMAN ANTI-TRUST ACT, 26 STAT. 209 (1890), as amended, 50 STAT. 593 (1937), 15 U.S.C. § 1 *et seq.* (1946), section one of which provides *inter alia* that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

The district court held the broadcasting and televising to be interstate commerce, and hence, within the applicability of the Sherman Act. The League was deemed a monopoly, restricting interstate commerce with its by-laws. A modified injunction was granted enjoining the Commissioner's power and the enforcement of the restrictive limitations of the by-laws, with the exception of the restriction on the telecast of outside games in a home territory when the club was playing at home.

The basic question considered by the court is whether the "restraint of trade" prohibition of the Sherman Anti-Trust Act is applicable to the restrictions imposed by the by-laws of the National Football League upon the telecasting and broadcasting of professional football games? To determine this question, it must first be determined whether these restrictions are actually in "restraint of trade"?

The term "restraint of trade" was conceived in the English common law and has been developed to a much greater extent in this country. Originally in England all contracts in restraint of trade were held illegal. The term has gradually come to mean in this country only the unreasonable restriction on competition, thus recognizing that freedom to contract is the essence of freedom from undue restraint of the right to contract. *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 51-62 (1910).

The true test of what is in restraint of trade depends upon the difference between interstate commerce or an instrumentality thereof, and the incidents which may aid in carrying on such commerce. In the *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore,* 269 Fed. 681 (C.C.D.C. 1920), the court, in attempting to clarify the term "restraint of trade," cited *May v. Sloan,* 101 U.S. 231, 237 (1879) to the effect that the mere business of buying and selling for money was deemed to be "trade" in its broadest significance. The entire transaction is the underlying test, with the law looking not upon specific acts but to the intent and objective of the parties. The transaction includes ". . . all the initiatory and intervening acts, instrumentalities and dealings . . ." which would make up its entirety. *Swift and Company v. United States,* 122 Fed. 529, 531 (C.C.N.D. Ill. 1903).

In *International Textbook Co. v. Pigg,* 217 U.S. 91, 106 (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 intangibles, *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. *Accord, Western Union Telegraph Co. v. Pendleton,* 122 U.S. 347, 356 (1887); *Pensacola Telegraph Co. v. Western Union Telegraph Co.,* 96 U.S. 1, 9 (1877).

When the Sherman Act was passed the term "restraint of trade" had a fairly definite meaning. It was necessary to differentiate between a restraint of competition and a restraint of trade which may be illegal. A restraint of trade is necessarily a restraint of competition while the reverse is not necessarily true since it then depends on the facts and the circumstances of each individual case. *United States v. E. I. Du Pont De Nemours & Co.,* 188 Fed. 127 (3d Cir. 1911). Since every regulation of trade restrains, the true test of legality is whether the restraint promotes competition or destroys it. Justice Brandeis, in delivering the opinion of the court in *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918), reiterated the approach of the courts:

> 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 evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

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 affected. *Westway Theatre, Inc. v. Twentieth Century-Fox Films Corporation,* 30 F. Supp. 830 (D. Md.), *aff'd,* 113 F.2d 932 (4th Cir. 1940).

A clear exposition of the direction of the common law in applying the restraint of trade limitation is evidenced in *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940). Here 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 court in applying the Sherman Act had focused the restraint of trade limitation on only those agreements affecting prices for an unlawful purpose by unlawful means. The purpose of the Act, then, is to preserve normal competition in the market. The Association in *United States v. National Retail Lumber Dealers Ass'n,* 40 F. Supp. 448, 453 (D. Colo. 1941), was held to have violated the purpose by affecting retail prices with their policy of distribution. The

essentials of a violation were evidenced in "(1), the existence of concerted action to accomplish; (2), an unreasonable restraint; (3), of trade or commerce; (4), among several states." The general purpose is to prohibit those restraints which would prevent the public from freely receiving goods and services. *United States v. American Medical Ass'n,* 110 F.2d 703 (D.C. Cir.), *cert. denied,* 310 U.S. 644 (1940).

Baseball, as a business, is a monopoly dealing not with the players themselves but with their services. *American League Baseball Club of Chicago v. Chase,* 86 Misc. Rep. 441, 149 N.Y. Supp 6 (1914). Although a business monopoly, its main purpose is the rendition of services which prevents it from being a combination in restraint of trade as that term is applied at common law and in state statutes. *American League Baseball Club v. Pasquel,* 63 N.Y.S.2d 537, 540 (1946). In reference to the Sherman Act, baseball was held to be a sport and thus not embraced within its terms in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs,* 259 U.S. 200, 209 (1922). In this leading case, Justice Holmes held the transportation of baseball players and their equipment across state lines to be merely incidental to the business of baseball, which was the giving of exhibitions, since, "That which in its consummation is not commerce, does not become commerce . . . because the transportation . . ." is across state lines. 259 U.S. at 209.

However, recently there has been no doubt as to the steadily expanding content of the phrase "restraint of trade." In reversing the district court in *William Goldman Theatres, Inc. v. Loew's, Inc.,* 150 F.2d 738 (3d Cir. 1945), *aff'd after remand,* 164 F.2d 1021 (3d Cir.), *cert. denied,* 334 U.S. 811 (1948), the circuit court held that there is a violation of the Sherman Act by a mere suppression of competition. If any part of interstate trade is affected by a monopoly, the act is applicable.

In a later baseball case, *Gardella v. Chandler,* 79 F. Supp. 260 (S.D.N.Y. 1948), the district court held that the *Federal Baseball Club* case, *supra,* was still controlling, but stated that the trend was toward a broader conception of what constituted interstate commerce. On appeal, 172 F.2d 402 (2d Cir. 1949), the court in reversing held that television and broadcasting were not incidental but parts of the business of baseball itself. However, there was considerable disagreement among the judges as to the applicability of the Supreme Court decision in the *Federal Baseball Club* case. The court stated that the modern trend was away from the *Baseball* case, while the dissent thought is still controlling.

The same question appeared in *Toolson v. New York Yankees, Inc.,* 101 F. Supp. 93 (S. D. Cal.), *aff'd,* 200 F.2d 198 (9th Cir. 1951) (where the court mentioned that the *Gardella* case was the only decision challenging the *Baseball* case), and in *Kowalski v. Chandler,* 202 F.2d 413 (6th Cir. 1953). In both these cases the *Baseball* case was cited as controlling and baseball was still held to be a sport and not engaged in inter-

state commerce by virtue of its television and radio connections. The Supreme Court having joined the *Kowalski* and *Toolson* cases, *supra,* in granting certorari, 345 U.S. 963 (1953), affirmed these decisions, likewise holding the *Baseball* case as controlling authority. 74 Sup. Ct. 78 (1953).

The court in the present case held football to be within the applicability of the Sherman Act. Football and baseball on the professional level are similar sports; the economic organization of organized baseball has been adopted to a considerable extent by professional football. Even the by-laws of the National Football League are analagous to the provisions imposed by baseball. Note, 21 GEO. WASH. L. REV. 466, 477 (1953). Although this is the first case of this sort involving professional football, it is reasonable to suppose that, from the close similarity between the sports, football will follow the rulings on baseball.

The non-applicability of the Sherman Act to organized baseball has been well settled since the *Baseball* case, with the only dissent occurring in the *Gardella* case, *supra.* Even in that case, in which each of the three judges rendered a separate opinion, the *Baseball* case was at most distinguished in the attending circumstances.

The present case, however, is distinguished on its facts from all the prior cases, in that here the televising and broadcasting of professional football games and their regulation by the Commissioner is actually in issue for the first time. Previously the connection of the sport with interstate communications was wholly collateral to the controversy, but was alleged in an attempt to bring the case within federal jurisdiction and the Sherman Act, but here it is in clear focus. With the advent of million dollar gate receipts, coast-to-coast programs and fabulous salaries, the decision of the *Baseball* case, seems to be founded on the game of baseball of another age. The present decision recognizes the exceedingly important role that radio and television has come to play in professional baseball and football.

Edmund L. White

TORTS — PRENATAL INJURIES — RIGHT TO RECOVER. — *Howell v. Rushing,* ....Okla....., 261 P.2d 217 (1953). Parents of a stillborn child brought this action to recover as next of kin for its wrongful death, which was allegedly a result of negligently caused prenatal injuries. The trial court sustained a demurrer to the petition; which judgment was affirmed by the Supreme Court of Oklahoma on the grounds that (1) the wrongful death statute under which the suit was brought by personal representatives, 12 OKLA. STAT. § 1053 (1951), requires the deceased to

have been able to recover for the injuries had he survived, and (2) that a child cannot recover for injuries sustained while *en ventre sa mere.*

With this holding the court accepted the majority view in this country on the latter point, *i.e.,* that the majority of all wrongful death and survival statutes restrict recovery to instances where the deceased could have recovered if death had not ensued. *Ryan v. Poole,* 182 Wash. 532, 47 P.2d 981 (1935). The basic issue in the instant case is whether a child can maintain an action for personal injuries suffered while *in utero,* thus allowing its beneficiaries or representatives to sue under wrongful death or survival acts. Although most of the jurisdictions in the United States answer in the negative, there has been a pronounced trend by certain jurisdictions in allowing recovery.

There is a surprising paucity of cases in point on the matter. The earliest case on record in either England or America was *Dietrich v. Northampton,* 138 Mass. 14, 52 Am. Rep. 242 (1884), which denied recovery for a miscarriage produced when a four to five month pregnant mother fell due to a highway defect. Judge Oliver Wendell Holmes based the holding on the lack of precedent at common law for a contrary decision and on the belief that "the unborn child was part of the mother at the time of the injury," not having an independent juridical existence. Following the view that an unborn foetus is *pars vicerum matris* was *Allaire v. St. Luke's Hospital,* 184 Ill. 359, 56 N.E. 638 (1900). There the court, subsequently overruled by *Amann v. Faidy,* 415 Ill. 422, 114 N.E.2d 412, 418 (1953), refused damages to an infant, living at the time of the suit, for prenatal injuries sustained when its mother, in confinement was hurt in a negligently constructed and operated elevator. Lack of precedent at common law was again controlling in *Buel v. United Rys. Co.,* 248 Mo. 126, 154 S.W. 71 (1913).

In two prenatal injury actions, *Stemmer v. Kline,* 128 N.J.L. 455, 26 A.2d 489 (1942); *Berlin v. J. C. Penney Co.,* 339 Pa. 547, 16 A.2d 28 (1940), and in an action for wrongful death resulting from injuries to a foetus twenty-two days prior to its birth, *Newman v. Detroit,* 281 Mich. 60, 274 N.W. 710 (1937), the courts rejected recovery in the absence of a specific statute establishing a cause of action which they felt did not exist at common law.

The difficulty of proving a causal connection between an alleged injury and the consequent condition or death of the foetus, along with the possibility of fraudulent claims, was the principal factor influencing the holding against the child in *Stanford v. St. Louis-San Francisco Ry.,* 214 Ala. 611, 108 So. 566 (1926). *Lipps v. Milwaukee Elec. Ry. & Light Co.,* 164 Wis. 272, 159 N.W. 916 (1916), confined its refusal of recovery to non-viable foeti, which the court deemed to have no independent existence at law. [A viable foetus is "one sufficiently developed for extra uterine survival, normally a foetus of seven months or older." *Amann v.*

Faidy, supra, 114 N.E.2d at 417, citing Stedman's Medical Dictionary (16th ed. Taylor 1946).]

One of the pioneer cases granting recovery was *Montreal Tramways v. Leville,* [1933] 4 D.L.R. 337 (Can. Sup. Ct.), which although decided on the basis of a provision in Quebec's civil law, discussed common law authorities as well. See 4 U. OF TORONTO L. J. 288. Likewise in *Scott v. McPheeters,* 33 Cal. App.2d 629, 92 P.2d 678 (1939), an infant girl who suffered injuries *en ventre sa mere* when the physician attending at delivery was negligent in the use of metal clamps and forceps was permitted to sue on the basis of a statute declaring an unborn child to be an existing person as far as is necessary for its interests should it subsequently be born.

Kine v. Zuckerman, 4 Pa. D. & C. 227 (1924), was the first case in this country to grant recovery for prenatal injuries without benefit of statute, but was overruled by *Berlin v. J. C. Penney Co., supra.* The first enduring case was *Bonbrest v. Kotz,* 65 F. Supp. 138, 142 (D.D.C. 1946). There the court attacked one of the early buttresses for refusing recovery, the lack of precedent at common law:

> The absence of precedent should afford no refuge to those who by their wrongful act, if such be proved, have invaded the rights of an individual. . . .

The dissenting opinion in *Stemmer v. Kline,* supra, 26 A.2d at 686, had succinctly set forth this position previously:

> It is no answer to say that there is no remedy because a cause of action is not written down in the common law in precise formula. We cannot expect to find it charted in so many words. Rather it is implicit in the common law — else we admit that the law has no remedy for a grievous wrong.

Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550, 553 (1951), in allowing a cause of action for prenatal injuries to a viable foetus, criticised the theory that the unborn child is part of the mother by citing the oft-quoted dissenting opinion in *Allaire v. St. Luke's Hospital, supra:*

> A foetus in the womb of the mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in the womb, it reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also . . . it is but to deny a palpable fact to argue there is but one life, and that of the mother.

The court in the *Damasiewicz* case, *supra,* 79 A.2d at 559, decried also the argument that difficulty of proof is sufficient grounds for denying a right of action: ". . . the right to bring an action is clearly distinguishable from the ability to prove the facts. The first cannot be denied because the second may not exist." In *Williams v. Marion Rapid Transit, Inc.,* 152 Ohio St. 114, 87 N.E.2d 334, 339 (1949), the court said, citing PROSSER, TORTS 189 (1941), that safeguards of proof could be easily

established to prevent fraudulent claims; moreover, that the difficulty "would seem to be no greater than in the case of many other matters of medical proof."

In *Woods v. Lancet,* 303 N.Y. 349, 102 N.E.2d 691 (1951), where a right of action was given for prenatal injuries to an infant when the mother in her ninth month of pregnancy fell down a staircase, the court overruling *Drobner v. Peters,* 232 N.Y. 220, 133 N.E. 567 (1921), denounced the view that granting recovery should come from the legislature:

> Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.

Other recent cases granting a cause of action are: *Amann v. Faidy, supra,* (child died after its birth from prenatal injuries); *Tucker v. Carmichael,* 208 Ga. 201, 65 S.E.2d 909 (1951), prenatal injuries; *Verkennes v. Corniea,* 229 Minn. 365, 38 N.W.2d 838 (1949), (child born dead). *Contra: Drabbels v. Skelly Oil Co.,* 155 Nebr. 17, 50 N.W.2d 229 (1951), in which the infant was stillborn and which the instant case expressly follows; *Bliss v. Passanesi,* 326 Mass. 461, 95 N.E.2d 206, 207 (1950), *affirming, Dietrich v. Northampton, supra,* although admitting at 207: "We do not intimate what our decision would be if the question were presented for the first time. . . ."

So it is seen that since 1946 seven out of ten courts in different jurisdictions have recognized a cause of action for prenatal injuries, some of which resulted in death. Courts thus seem to be presently inclining toward a view favoring recovery long held by writers on the subject. PROSSER, TORTS, *supra*; Albertsworth, *Recognition of New Interests in the Law of Torts,* 10 CALIF. L. REV. 461 (1922). Cases allowing recovery have been almost unanimous in restricting it to instances where the foetus is viable. But at least it can be said that the law in this country has made a decided invasion of a situation that was formerly considered *damnum absque injuria.* The instant case is not in accord with this trend.

Berry L. Reece, Jr.

TORTS — NEGLIGENCE — BASIS FOR AFFIRMATIVE DUTY OF OWNERS AND OCCUPIERS OF LAND TOWARD THOSE ENTERING UPON THE LAND. — *Barrett v. Faltico,* 117 F. Supp. 95 (E.D. Wash. 1953). Defendants, as promoters and operators, staged automobile races on an inclosed, circular track. The plaintiff entered the premises through an unattended gate without paying any admission fee and proceeded to seat himself on top of a chute otherwise used for rodeo purposes. These chutes were located below the level of the grandstand and between it and the track;

there was no protective barrier between the chutes and the track. While the plaintiff was watching the race, a tire on one of the racing cars blew out, causing the vehicle to skid off the track and strike the chute on which he was sitting. The force of the impact caused him to fall to the ground, fracturing his left leg.

The plaintiff charged the defendant with negligence in failing to protect and to warn spectators of the hazards involved in attending auto races. Defendants moved for summary judgment claiming that the plaintiff, as a matter of law, was either a trespasser or a licensee to whom was owed only the duty to refrain from wilful and wanton injury.

The district court, finding that express invitation and mutuality of interest were lacking, determined that the plaintiff was a mere licensee and granted the motion. On the undisputed facts, the court also held that even if the plaintiff were considered an invitee, he had, knowingly, assumed the risk and danger in which he placed himself.

This case is an example of the application of the doctrine of affirmative duty of care owed by owners and occupiers of land toward those entering on the land. More interesting, however, is the conflict which exists among commentators on the Law of Torts, courts of various jurisdictions and the *Restatement of the Law of Torts,* as to the true basis of this affirmative duty. The two different views, one resting on invitation and allurement, the other based on pecuniary gain and mutual interest, and the rationale behind each are the subject of this writing.

Indermaur v. Dames, L.R. 1 C.P. 274 (1866), is the leading case establishing an affirmative duty of care upon the landowner. In the *Indermaur* case it was held that invitees are those who "go upon business which concerns the occupier, and upon invitation, express or implied." Since the *Indermaur* case, the business advantage test has been followed almost universally in England. See, Paton, *Invitees,* 27 MINN. L. REV. 75 (1942). In the United States, the lack of a business advantage was followed in refusing to hold the landowner liable for failing to exercise affirmative care. *Stewart v. Texas Co.,* 67 So.2d 653 (Fla. 1953); *Ockerman v. Faulkner's Garage, Inc.,* 261 S.W.2d 296 (Ky. 1953); *Baird v. Goldberg,* 283 Ky. 558, 142 S.W.2d 120 (1940).

Pecuniary gain and mutual advantage are not controlling in several jurisdictions as necessary to establish an affirmative duty of care on the part of the landowner or occupier. These courts, *Campbell v. Weathers,* 153 Kan. 316, 111 P.2d 72 (1941), and *American National Bank v. Wolf,* 22 Tenn. App. 642, 125 S.W.2d 193 (1938), premise the duty of affirmative care on invitation and allurement.

Additional jurisdictions accepting the invitational theory are found in *Hodges v. United States,* 98 F. Supp. 281 (S.D. Iowa 1948) (government locks used for swimming purposes); *Bunnell v. Waterbury Hos-*

pital, 103 Conn. 520, 131 Atl. 501 (1925) (Salvation Army meeting); *Howe v. Ohmart,* 7 Ind. App. 32, 33 N.E. 466 (1893) (literary society). However, in *Firfer v. United States,* 208 F.2d 524 (D.C. Cir. 1953) and in *Comstock v. United States,* 114 F. Supp. 632 (D. Md. 1953), the benefit theory is applied. In the former case the court, searching for a duty owed by the United States to the plaintiff said, 208 F.2d at 527:

> The District of Columbia follows the mutual benefit theory with regard to invitees. In other words, only a person who goes upon the land of another for the purpose of there carrying on some transaction for the benefit of both parties (or for the benefit of the landowner alone) can attain the status of an invitee

Under the common law, the duty of a landowner toward one entering upon his premises is arrived at in a circuitous manner. Such persons are usually divided into three classes: trespassers, licensees and invitees, with a separate duty attaching to each class. The initial step is to decide into which category the entrant falls, then follows the duty owed according to the category decided on. Our concern is with the invitee class. To be included in this class, the purpose of the person entering upon the land, according to the benefit theory, must be one of interest or advantage to the owner or occupier. This is the theory adopted by RESTATEMENT, TORTS §§ 332, 343 (1934). To the invitee there is the duty to warn against all known dangers, and to exercise ordinary care and prudence to keep the premises in a reasonably safe condition. *Cudahy Packing Co. v. McBride,* 92 F.2d 737 (1937), *cert. denied,* 303 U.S. 639 (1938).

A step further in determining the true bases of affirmative duty of the landowner toward persons entering upon the premises leads to a controversial class of entrants — that of children and friends accompanying customers into shops with no intention of buying anything themselves. Earlier decisions sustain the proposition that landowners do not owe an affirmative duty of care toward these children. *Sugar Creek Creamery Co. v. Eads,* 87 Ind. App. 381, 158 N.E. 520 (1927); *Fleckenstein v. Great Atlantic & Pacific Tea Co.,* 91 N.J.L. 145, 102 Atl. 700 (Ct. Err. & App. 1917). But where the store provides facilities for children the rule is otherwise. See *Miller v. Geo. B. Peck Dry Goods Co.,* 104 Mo. App. 609, 78 S.W. 682 (1904). The modern theory is based upon the premise that the owner or possessor of a store to which the public is invited is charged with an affirmative duty of care because of the actual or potential pecuniary gain to be received from those entering the store. This duty is then extended to include the children or friends of the customer. *Crane v. Smith,* 23 Cal.2d 288, 144 P.2d 356 (1943), which follows RESTATEMENT, TORTS § 332, comment *d* (1934); *Walec v. Jersey State Electrical Co.,* 125 N.J.L. 90, 13 A.2d 301 (Sup. Ct. 1940). *But cf. Connelly v. Carrig,* 244 N.Y. 81, 154 N.E. 829 (1926). Both the old and new views are based on business advantage. The earlier cases

deny recovery because of the lack of pecuniary gain. More recent cases find a business advantage in the child, independent of the customer, as in the *Crane* case *supra,* while others permit recovery on the basis of a "transferred" duty from the customer who purchases or intends to purchase to the one who accompanies the customer who has no intention of buying anything. See *Walec* case, *supra.*

In a 1928 Georgia case is applied the codification of the common law duties owed by the landowner to the entrants upon his land. *Lawrence v. Atlanta Baseball Co.,* 38 Ga. App. 497, 144 S.E. 351 (1928) (invitee assaulted by baseball player) — See GA. CODE ANN. § 105-401 (1935). In a 1936 case, the plaintiff had a contract with defendant to park his car on the defendant's lot. On the evening of the accident, the decedent accompanied plaintiff to park the car and, on alighting from the car, fell into a pit and was killed. The court denied recovery, applying § 105-402 of the Georgia code, stating that while the decedent was not a trespasser, she was neither a customer nor a servant because "mutuality of interest" between her and the owner were lacking. As she was only concerned with her convenience and gratification the owner would only be liable for wilful or wanton injury. *Morse v. Sinclair Automobile Service Corp.,* 86 F.2d 298 (5th Cir. 1936).

The CAL. CIV. CODE § 1714 (1949), does not adopt the common law rule of categorizing the visitor into a specified class and then attaching the duty owed stating:

> Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself.

Some cases apparently disregard this section of the code. *Crane v. Smith, supra.* See discussion in *Fernandez v. Consolidated Fisheries,* 98 Cal. App.2d 91, 219 P.2d 73 (1950), which, however, applies the general doctrine of negligence embodied in this section which states a civil law principle.

To turn to the commentators — according to Bohlen, the affirmative duty we speak of is founded on consideration. Bohlen, *Affirmative Obligations in the Law of Torts,* 53 U. of PA. L. REV. 209, 235 (1905):

> . . . The burden of affirmative care is imposed only as the price of a benefit. No man need bear such a burden, but if he desire the benefit he must assume it. To sum up, the primary conception of the obligation in torts is to refrain from injurious action, unless the doing of the act, even with its attendant risk, is so beneficial to the public generally, the object of it so valuable to the general welfare, that even private injury must be borne to encourage it, the obligation and attendant liability extend to all who may be foreseen as within the radius of its effects. But the conception of a duty of protection owed to another against the consequences of his own actions is foreign to the law of torts. Such duties rest upon an assumption of them

> either by express consent or as inevitable legal incidents to certain actions, businesses, or uses of property. Such assumption can only rest on consideration. . . .

An opposite view is taken by Prosser, another commentator on the Law of Torts, whose thesis is that the basis of the affirmative duty of the owner or occupier of land is invitation and not business interest and that the latter is only occasionally mentioned in a few cases while the majority of the cases turn on the fact of invitation. See Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573, 574 (1942). Among the conclusions reached by Prosser are the following:

1. That decisions which have turned on the presence or absence of business interest are few in comparison with the large number which cannot be accounted for on that basis.

2. When premises are thrown open to the public, the occupier assumes the responsibility for their safe condition toward any member of the public who may enter for the purpose for which they are open, regardless of whether he brings with him the hope of profit or "benefit."

3. That the RESTATEMENT OF THE LAW OF TORTS is wrong.

What is the true basis of establishing an affirmative duty on the part of a landowner or occupier toward those entering upon his land? Is the "business advantage" theory to be used or are we to accept the opposite view based on invitation and allurement?

It is this writer's opinion that the position expressed by Bohlen and the RESTATEMENT ON THE LAW OF TORTS is more acceptable. In this position we have a standard setting forth legal liabilities; a standard that is fixed and is capable of being known. Following the invitation theory would only increase an already complex problem and lead to increased litigation. Such an approach is unrealistic, arbitrary and inelastic.

A. J. Deutsch

WORKMEN'S COMPENSATION — INJURY "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT" — CURIOSITY DOCTRINE. — *Roberston v. Express Container Corp.,* 13 N.J. 342, 99 A.2d 649 (1953). The petitioner was employed as a cleaning woman in an office building. Her working hours were from 4:30 P.M. to approximately 11 o'clock, with little or no supervision with regard to her work. She kept her cleaning mops on the roof outside the second floor and was accustomed to eating her lunch near where she kept these mops. Her employer neither approved nor disapproved of this practice. On the day of the accident, the petitioner was on the roof to eat her lunch when she decided to see if a fire, which had occurred a few days earlier a short distance away, was

still smoldering. She climbed a ladder to a higher level, and in attempting to reach another ladder which would take her to a still higher level, she stepped on a small platform and while walking across this platform, fell through a skylight. She testified that there was nothing in her work which would require her to walk on the roof. There was no evidence that it was her custom to do so.

The Bureau denied the petitioner's claim for compensation and this denial was subsequently affirmed by both the trial and appellate courts. However, due to a dissent, the case came before the state supreme court on appeal. In affirming the judgment of the appellate court dismissing the petitioner's claim, the court said that the accident neither arose out of nor in the course of the petitioner's employment.

This case raises the issue of whether an injury arising out of an act done by an employee during working hours, merely to satisfy his own curiosity, is an injury "arising out of and in the course of his employment."

Although the New Jersey courts had hitherto rejected the "curiosity doctrine," the petitioner insisted that it should now be adopted. This doctrine has been applied in a limited number of jurisdictions and allows compensation awards for injuries caused solely as a result of the employee's curiosity. The court, however, stating that there was no causal connection between the injury and the nature of petitioner's duties, refused to adopt the doctrine, citing as authority *Webb's Case,* 318 Mass. 357, 61 N.E.2d 340 (1945). A young boy was employed as a messenger. He had completed his morning chores and was loitering around the office in the afternoon with nothing to do, when he apparently decided to do some exploring. He made his way to the roof of the building by way of a fire escape and somehow fell to the street below, suffering fatal injuries. The court, in denying an award, said that the act of the deceased in using the fire escape and walking on the roof was not an act contemplated by his particular employment.

A lengthy discussion of the "curiosity doctrine" was presented in *Bethlehem Steel Co. v. Parker,* 64 F. Supp. 615 (D. Md. 1946). Claimant was returning to her place of work on a ship, after getting a drink of water, when she noticed a large hole in the wall in the galley; she put her head in the opening to see what it was and was severely injured when a dumb waiter descended on her head. An award was granted under the LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 44 STAT. 1424 (1927), 33 U.S.C. § 901 *et seq.* (1946), the provision of which requiring that a compensable injury be the result of an act done in the course of and arising out of the employment, is identical with many of the Workmen's Compensation acts. The court said, 64 F. Supp. at 618:

> But it is also clear on the facts that her action was not in any sense a striking or intentional departure from her duties but at most a slight and

> casual one occasioned apparently by not unnatural curiosity on her part to see something which attracted her in her unusual environment arising in the course of her general duty to return to her work on the upper deck.

The court concluded, 64 F. Supp. at 619:

> Although apparently prompted by curiosity, I think it may be properly classified as an action which was occasioned by and incidental to her environment.

The "curiosity doctrine" was rejected in *Simon v. Standard Oil Co.*, 150 Neb. 799, 36 N.W.2d 102 (1949). The plaintiff's duties were to check and measure the capacity of storage tanks mounted on trucks, and also to clean up his part of the shop before leaving at night. An exhaust fan was situated in a corner of a room adjacent to the room in which the plaintiff was required to work. The fan was not operating while he was cleaning up his section of the shop, but another employee turned it on when the sweeping was all finished. The plaintiff went into the next room and placed his hand in front of the fan just to see how much air it pulled through. His hand was drawn into the fan by the suction and was badly mutilated. The court in refusing to grant an award stated that the act which resulted in the injury ". . . had no connection with his employment or any matter reasonably necessary or incident to the work of his employment. . . ." 36 N.W.2d at 106.

In *Sullivan's Case,* 128 Me. 353, 147 Atl. 431 (1929), the claimant was employed to carry cloth from one place to another in a woolen mill; he was also required to assist any of the machine operators who might need his help. At the time of the accident, he had just finished carrying some cloth when he went over to where one of the machines was situated. Prior to asking the operator if he was needed, claimant placed his hand on some cloth which was running through the machine to see what it felt like. His hand was carried into the machine and four fingers and part of the thumb were severed by the knives in the machine. The court, in denying compensation, said that the act of the claimant which resulted in his injury was a voluntary act, ". . . done only out of curiosity, entirely independent of any duty required to be performed or incidental thereto. . . ." 147 Atl. at 432.

In a case practically on all fours with the *Sullivan* case, *supra,* an award was granted to the injured employee, the court basing its decision on the determination that the injury suffered by the employee was a natural incident of his employment. *Bernier v. Greenville Mills,* 93 N.H. 165, 37 A.2d 5 (1944), *remanded on other grounds,* 93 N.H. 299, 41 A.2d 221 (1945).

The plaintiff was awarded compensation in *Reynolds v. Oswego Falls Corp.,* 264 App. Div. 965, 37 N.Y.S.2d 167 (3d Dep't 1942), because the court felt that the act which gave rise to the plaintiff's injury was a ". . . casual and reasonable incident of her employment. . . ." 37 N.Y.S.2d

at 168. While the plaintiff was returning to her place of work, after having lunch on the employer's premises, she weighed herself upon two sets of scales in the shipping room. She fell on the last set and thereby injured herself.

Another "curiosity" situation was presented in *Guenther v. Industrial Commission,* 231 Wis. 603, 286 N.W. 1 (1939). There, the claimant was employed to deliver package freight. He had just completed a delivery and was returning to his truck when he noticed a boat on blocks in a nearby lane. Being interested in boats, he went over and looked at it. While there he noticed a dog coming toward him and he started to run. He tripped over one of the beams supporting the boat and broke a leg. The supreme court reversed a lower court and sustained the commission's finding of fact that when the injury was suffered by the claimant he was not performing an act incidental to his employment.

The reasoning of the court in the *Bethlehem* case, *supra,* was followed in *Jordan v. Dixie Chevrolet,* 218 S.C. 73, 61 S.E.2d 654 (1950). The petitioner was an employee in a paint and body shop. At the time of the accident he was enjoying a lull in the work and was seated in a police car which had been left in the garage to be repaired. He opened the glove compartment and removed what later proved to be a tear gas bomb. The petitioner did not know what it was and he pulled the cotter pin releasing the contents of the bomb; he then threw it to the floor where it exploded, seriously injuring his eyes. This was the first "curiosity" case in South Carolina and the court based its decision on the authority of the *Bethlehem* case, *supra.* The court, in granting an award, decided that, but for the employment, the petitioner would not have been injured, since the injury was caused by a dangerous condition which was part of the working environment. A somewhat analogous situation was presented in *Finck v. Galloway,* 139 Kan. 173, 29 P.2d 1091 (1934). Deceased was employed in a car washing garage. At the time of the injury he, with the other employees, was examining a gun from which the shells had been removed by deceased. Somehow the shells got back in the gun and when it was handed back to the employee who had first introduced it, the gun was accidentally discharged killing the deceased. The court denied compensation stating that the injury was in no way traceable to deceased's employment as a car washer, and further stated that the injury to be compensable must be due to the injured person's employment.

The line between employment-connected or employment-expected curiosity on the one hand, and the personal not-to-be expected curiosity of an employee on the other, is admittedly hazy. The danger of making employers absolute insurers of the safety of their employees is evident. It is doubtful whether any legislature could effectively categorize and describe "compensable curiosity." The courts would still be called upon to interpret such a provision in the light of a given factual situation.