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CONSTITUTIONAL LAW—FREEDOM OF SPEECH—PRIOR RESTRAINT ON MOTION PICTURE EXHIBITION

Petitioner, a motion picture distributor, refused to submit the movie "Don Juan" for "examination or censorship" required by the Municipal Code of the City of Chicago[1] and accordingly was denied a license to exhibit the film. Subsequently, the distributor sought an injunction to restrain city officials from interfering with the exhibition of the motion picture on the narrow ground that the ordinance, on its face, constituted a prior restraint on freedom of speech within the prohibition of the first and fourteenth amendments. In affirming a dismissal of the complaint by the district court,[2] the court of appeals[3] held that a justiciable controversy had not been presented. On certiorari to the Supreme Court of the United States, *held,* affirmed (5-4). The Court found that a justiciable controversy had been presented but that an ordinance requiring submission of motion pictures for examination or censorship as a prerequisite to the granting of a license for public exhibition is not invalid per se as a prior restraint on freedom of speech within the prohibition of the first and fourteenth amendments. *Times Film Corp. v. City of Chicago,* 365 U.S. 43 (1961).

Although freedom of expression has never been regarded as absolute,[4] the Supreme Court has always disapproved of prior restraints

1. Section 155-4 provides: "Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship . . . ." Times Film Corp. v. City of Chicago, 365 U.S. 43, 44 n.1 (1961).

2. Times Film Corp. v. City of Chicago, 180 F. Supp. 843 (N.D. Ill. 1959).

3. Times Film Corp. v. City of Chicago, 272 F.2d 90 (7th Cir. 1959).

4. "[T]he protection even as to prior restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 716 (1931) (Hughes, C.J.). For an analysis of the Court's concept of prior restraint in the *Near* case, see CHAFFEE, FREEDOM OF SPEECH IN THE UNITED STATES 375-81 (1941); Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROB. 648, 652-55 (1955); Note, 31 COLUM. L. REV. 1148 (1931). See also Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). The theory that construes the first amendment as an enactment of Blackstone's statement that "liberty of the press . . . consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published" has been criticized as too narrow in that obviously the threat of subsequent punishment may be so great as to amount to an effective prior restraint, and too broad if taken literally as a total prohibition on previous restraints. See CHAFFEE, FREEDOM OF SPEECH IN THE UNITED STATES 9-11 (1941). Two formidable opponents of censorship, Mr. Justice Douglas and Mr. Justice Black, make no claim to absolute privilege, but would allow suppression only when expression is so closely brigaded with illegal action as to be an inseparable part of it. See, *e.g.,* Roth v. United States, 354 U.S. 476, 514 (1957) (dissenting opinion).

upon speech[5] and the press.[6] It is equally true, however, that free expression through the motion picture medium has been viewed by a majority of the Court with a great deal of reservation. In the initial test of the states' power to pre-censor films, the Supreme Court found that movies were mere commercial spectacles which were "capable of evil," and not to be considered an organ of the press.[7] Following this decision censorship in this country has been confined almost exclusively to the motion picture.[8] Only within the past decade has the Court indicated at least a partial reversal of its attitude[9] toward movie censorship. In the now famous case of *Joseph Burstyn, Inc. v. Wilson*,[10] motion pictures were added to that category of free speech and press within the protection of the first and fourteenth amendments, but in the same opinion the Court cautiously pointed out that films might well possess some special "capacity for evil" which would warrant controls not imposed upon other media.[11] Following *Burstyn*

5. *E.g.*, Thomas v. Collins, 323 U.S. 516 (1945).

6. "[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 716 (1931) (Hughes, C. J.).

7. Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915). Although no federal rights were involved in the *Mutual* case, the Court merely ruling upon film censorship under the Ohio Constitution, nevertheless this decision remained a major obstacle to opponents of film censorship for over thirty years.

8. Since the *Near* decision there have apparently been no attempts to license or pre-censor the press. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 662 (1955). Certain forms of prior restraint, however, have been exercised upon the press in time of war and by the postal authorities. Note, 71 HARV. L. REV. 326 n.1 (1957). *But see* Grosjean v. American Press Co., 297 U.S. 233 (1936) (Louisiana license tax on newspapers and periodicals struck down as an effective prior restraint). *Compare* Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957) (injunction to restrain the sale of obscene books after publication *held* not a prior restraint on the press), *with* Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931) (statute authorizing the abatement of defamatory newspapers as a public nuisance invalidated as an effective prior restraint). On this point see Desmond, *Legal Problems Involved in Censoring Media of Mass Communications*, 40 MARQ. L. REV. 38, 44-45 (1956). For a discussion of the injunction as a form of prior restraint see Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 655-56 (1955).

9. It appears that this change of judicial attitude is due largely to an effective self-imposed censorship through the industry's Production Code Administration coupled with a growing realization of the potentiality of motion pictures in the expression of political and social ideas. For a discussion of the operation and effect of the Production Code Administration see Note, 71 HARV. L. REV. 326, 327, 354-58 (1957).

10. 343 U.S. 495 (1952). The question of state censorship of motion pictures was not considered by the Court following Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915), until after a series of decisions had determined that the first amendment prohibitions against federal abridgement of civil rights applied with equal vigor to the states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925); Stromberg v. California, 283 U.S. 359 (1931). Forecast by way of dictum in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the *Mutual* decision was formally overruled in the *Burstyn* case.

11. "[C]apacity for evil . . . may be relevant in determining the permissible

it was assumed by some that motion pictures were entitled to the same protection against prior restraints as afforded the press[12]—an assumption reinforced by the fact that not a single specific attempt at motion picture censorship to reach the Supreme Court has been upheld since 1952.[13] On the other hand the Court has consistently indicated by way of dicta that a narrowly drawn licensing statute might be upheld,[14] and further intimated that it was no longer willing to invalidate state legislation solely on the basis of prior restraint.[15]

scope of community control . . . it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. . . . Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression." Burstyn Inc. v. Wilson, *supra* note 10, at 502-3. Proponents of censorship contend that protection of the public, children in particular, can only be accomplished by a system of prior restraint upon motion pictures, due to their vividness and the greater rapidity with which they reach the general public. See Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 4 N.Y.2d 349, 151 N.E.2d 197, 175 N.Y.S.2d 39 (1958); 8 VAND. L. REV. 638 (1954).

12. The highest courts of three states invalidated their state censorship statutes, and the number of cities engaged in movie censorship, once estimated at ninety, fell to fewer than twenty. At present there are four states and an estimated eleven cities engaged in movie censorship. See Note, 71 HARV. L. REV. 326, 328 (1957). Some opinions indicate that the Court felt there was no longer a valid distinction between motion pictures and the press. *E.g.*, Brattle Films, Inc. v. Commissioner of Pub. Safety, 333 Mass. 58, 127 N.E.2d 891 (1955).

It would seem that at least a part of this confusion was due to the fact that the precise nature of the exceptions to the doctrine of prior restraint had never been fully examined by the Court. In the *Near* case it was pointed out that publications obstructive of the nation's war effort or inciting to crime might be suppressed (the Court cited Schenck v. United States, 249 U.S. 47 (1919)); it was added that "the primary requirements of decency may be enforced against obscene publications." Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 716 (1931) (dictum). It has been submitted that this entire portion of the opinion was not well considered and further suggested that the Chief Justice's reference to obscenity may have been merely to make the traditional point that obscene publications are subject to subsequent punishment as an exception to the first amendment. Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROB. 648, 661 (1955). It appears to have been generally understood, however, that prior restraint was indicated. See Chaplinsky v. New Hampsire, 315 U.S. 568, 571-72 (1942).

13. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957) (per curiam); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955) (per curiam); Commercial Pictures Corp. v. Regents of Univ. of New York, 346 U.S. 587 (1954) (per curiam); Superior Films, Inc. v. Dept. of Educ., 346 U.S. 587 (1954) (per curiam). Apparently all of the statutes involved in these cases failed to meet the requirements of procedural due process in that the standards involved were too vague and indefinite. See Times Film Corp. v. City of Chicago, 365 U.S. 43, 46 n.3 and accompanying text (1961). For a criticism of the per curiam practice see Note, *Supreme Court Per Curiam Practice: a Critique,* 69 HARV. L. REV. 707, 719-21 (1956). *But see* Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 121 (1960), to the effect that the Court is wise in moving slowly in the "elusive and dangerous" field of obscenity.

14. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 505-06 (1952); Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684, 689-90 (1959).

15. "The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis." Kingsley

Moreover, the decision in *Roth v. United States*,[16] that "obscenity" is not "speech" within the meaning of the first amendment, was certainly not unfavorable[17] to censorship statutes directed primarily at the restraint of obscene films.

In the instant case the only issue considered by the Court was whether the city of Chicago could constitutionally require that motion pictures be inspected or censored before the issuance of a permit for public exhibition of the film within the jurisdiction.[18] The majority holding represents the Supreme Court's first pronouncement that licensing statutes, placing a prior restraint on motion pictures, are not on their face violative of the first and fourteenth amendments. The Court reviewed its past holdings dealing with the free speech guaranties and concluded that there are certain narrow exceptions to the prohibition against prior restraint,[19] placing particular emphasis upon the obscenity exception.[20] The majority, speaking through Mr. Justice Clark, reiterated that motion pictures possess a capacity for evil which the community may thwart in the most effective manner[21] and

Books, Inc. v. Brown, 354 U.S. 436, 442 (1957). The Court quoted from Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951). A similar objection to an axiomatic approach to the problem of prior restraint was voiced against the Supreme Court's decision in the *Near* case. 16 MINN. L. REV. 97 (1931).

16. 354 U.S. 476 (1957). In the *Roth* decision the Court categorically excluded obscenity as without redeeming social importance and hence not "speech" within the constitutional meaning. Petitioner's contention that constitutional rights were being denied since proof was not required that obscenity presented a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct was expressly rejected. The petitioner's contentions were apparently based on Schenck v. United States, 249 U.S. 47 (1919), and Dennis v. United States, 341 U.S. 494 (1951). There has been a great deal of controversy as to whether obscenity has a substantial causal relation to immoral action. For discussions to the effect that the danger of obscenity has not been sufficiently demonstrated to justify the validity of obscenity regulations, see the concurring opinion of Judge Frank in United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956), and Lockhart & McClure, *Obscenity in the Courts*, 20 LAW & CONTEMP. PROB. 587, 593, 596 (1955); Note, 11 WESTERN RES. L. REV. 669 (1960). *But see* Erbe & Craig, *Freedom From Obscenity*, 10 CLEV.-MAR. L. REV. 123 (1961); Desmond, *Legal Problems Involved in Censoring the Media of Mass Communications*, 40 MARQ. L. REV. 38 (1956).

17. Although the *Roth* case, *supra* note 16, dealt with subsequent restraint, it would seem highly unlikely that a court holding obscenity as not within constitutionally protected speech would deny the state all authority to deal with obscene films. Schwartz, *The Supreme Court—October 1958 Term*, 58 MICH. L. REV. 165, 203-05 (1959).

18. The content of the film was not involved or examined nor were the standards of the ordinance considered by the Court.

19. See notes 4 and 12 *supra*.

20. Although much of the opinion dealt with the obscenity exception the Court did not expressly exclude incitement to riot or forceful overthrow of the government as proper subjects for pre-censorship.

21. The dissenting opinion of Mr. Justice Warren, joined by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan, did not agree that licensing or censorship were considered within the "exceptional cases" discussed in the *Near* decision. The Chief Justice emphasized the adverse practical

in conclusion pointed out that the instant holding was limited specifically to movies, since each method of expression tends to present its own peculiar problems.

It is clear from the majority opinion that pre-censorship of motion pictures[22] on the basis of obscenity[23] constitutes a valid exception to the general prohibition against prior restraints. Theoretically the decision does not authorize rampant censorship,[24] and earlier cases indicate that the Court would put narrow limits upon the censor's discretion.[25] Presumably the determination that a film is obscene must be based upon a finding that the picture, *viewed as a whole,* has a dominant appeal to a prurient interest.[26] Assuming that administra-

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effect of an administrative licensing system upon free speech and pointed to the fact that Chicago had resorted to pre-censorship without any apparent attempt to devise other less objectionable methods of control. Further, the dissenters objected to the majority's failure to distinguish motion pictures from other media and indicated that a possible showing that motion pictures do in fact produce a greater impact upon the public would not justify censorship of the entire industry. In a separate and concurring dissent, Mr. Justice Douglas characterized censorship as repugnant to a free and democratic society, reiterating the traditional distrust of the censor's power.

22. As to whether licensing and pre-censorship on the basis of obscenity would be upheld in *other* areas of communications, the Court made no commitments. The opinion seems to imply that pre-censorship would not be valid in *all* areas. It is suggested that it is doubtful that the rule of the instant case would be extended to the press or individual speech. See Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931); Thomas v. Collins, 323 U.S. 516 (1945). Logically, however, it would seem that the categorical exclusion of obscenity from protected speech would allow prior restraint on this basis in any area of expression. On the propriety of making broad distinctions between protected and unprotected speech, James Madison asserted that it would subvert the first amendment to make "a distinction between the freedom and the licentiousness of the press." PADOVER, THE COMPLETE MADISON 267, 268-69 (1953), quoted in Roth v. United States, 237 F.2d 796, 801 (2d Cir. 1956).

23. Censorship of movies which create an imminent danger to the government or incite to riot would probably also be sustained. See note 20 *supra.* "The Respectful Tramp," a movie dealing with the racial problem in the South, was reportedly banned by a Virginia board of censors on the ground that it "would tend to incite violence." The Board's determination was upheld by the Richmond Circuit Court on the authority of the instant case. Washington Post, Feb. 26, 1961, p. A-10, col. 1.

24. "[C]ensorship of obscenity has almost always been both irrational and indiscriminate." Lockhart & McClure, *Literature, The Law of Obscenity and the Constitution,* 38 MINN. L. REV. 295, 371 (1954). See notes 27, 28 and 32 *infra.*

25. See note 13 *supra.*

26. The *Roth* case placed the determination of obscenity on the basis of "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 354 U.S. 476, 489 (1957). It has been suggested that very few movies are so devoid of content as to be censorable under the *Roth* test. 13 VAND. L. REV. 541, 546 n.26 (1960). Professors Lockhart and McClure submit that the concept of obscenity held by most members of the Court is probably "hard-core pornography." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 MINN. L. REV. 5, 58-68 (1960). It would seem that practically the only films constitutionally censorable on the grounds of obscenity would be so called "stag movies" which for obvious reasons would never be submitted to a censorship board.

tive censorship boards are capable[27] and desirous[28] of following strict statutory standards,[29] the decision of the Court appears acceptable. It is at least arguable that the protection of the general public from obscene films is paramount to the individual's interest in free speech.[30] The problem of dealing with the obscene, however, will always be more tangible to the community than seemingly abstract constitutional principles of free speech. The Court, in reviewing the means which the community has chosen for its protection, must necessarily approach the problem from a broader perspective. It would seem that the basic issue involved, where the *method*[31] of

"'[G]enuine pornography is almost always underworld, it doesn't come into the open.'" Kingsley Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684, 692 (1959) (Frankfurter, J., concurring opinion) (quoting D. H. LAURENCE, PORNOGRAPHY AND OBSCENITY 12, 13). A statute requiring that *all* movies be submitted for inspection because they *might* be obscene appears hardly justified when a comparatively negligible number may be *validly* censored.

27. One of the basic objections to censorship has been that as a general rule the censor is totally unqualified to pass upon literary merits. A number of censorship boards are composed of policemen, housewives and "leading citizens." Chicago's censors are generally policemen's widows; the chief censor there is a police sergeant who reportedly declared, "if a picture is objectionable for a child, it's objectionable, period." A Memphis housewife and part-time censor recently commented, "I have heard twice in pictures a word I have never heard used before. S-L-U-T." Newsweek, Feb. 13, 1961, p. 90. For a discussion of the make-up and operation of censorship boards, see Note, 71 HARV. L. REV. 326, 328-31 (1957). See GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 72-74 (1956).

28. "During the trial of the *Times Film* case . . . the censor was presented with a definition of obscenity which was the same as that given by the state supreme court. Despite the fact that she was supposed to follow this definition, the censor stated that she did not consider it adequate . . . ." Note, 71 HARV. L. REV. 326 n.88, (1957). A persuasive argument is based upon the premise that the requirements of due process cannot be met by censorship statutes since in the final analysis the censor's determinations are based upon his own concept of decency and obscenity which in turn depend upon different religious, social and educational backgrounds. See Note, 23 ALBANY L. REV. 152, 158-59 (1959).

29. The Courts have struggled for years to resolve an adequate standard for the determination of obscene material. See generally Lockhart & McClure, *Obscenity in the Courts,* 20 LAW & CONTEMP. PROB. 587 (1955). Many consider the present *Roth* test as inadequate and contend that it adds nothing of value in the determination of the obscene. See 36 TEXAS L. REV. 226, 228 (1957); Note, 11 WESTERN RES. L. REV. 669, 672-74 (1960). If the courts have been unable to agree upon what constitutes obscenity it is equally clear that the censor is in no better position.

30. See note 16 *supra.*

31. Opponents of censorship have contended that subsequent restraints are entirely adequate for the control of obscene films, pointing not only to criminal punishment as a deterrent, but also to the informal control by audiences in view of their power by voluntary boycotts to ruin both the producer and the theatre if really objectionable pictures were forced upon them. See CHAFFEE, FREEDOM OF SPEECH IN THE UNITED STATES 542 (1941). Petitioner's contention in the instant case, that the state's sole remedy against the showing of an obscene film was under the Illinois pornography statute and then only after a transgression, was expressly rejected. 365 U. S. at 49. For a discussion and differentiation of the practical results flowing from the use of prior and subsequent restraints upon speech, see Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROB. 648, 655-60 (1955).

restraint is challenged, is whether such method has an adverse effect upon the unassailable public interest in free access to *protected* speech. From this point of view, past experience with administrative pre-censorship offers little assurance that free speech will not be suppressed at the arbitrary discretion[32] of the censor. Procedural disadvantages[33] together with the discouraging aspect of costly and time consuming litigation weigh heavily against the prospect that the censor's mistakes will be corrected by appeal to the courts.[34] Furthermore, when faced with the possibility that costly productions may be cut or banned by numerous censorship boards with their various codes, it is not likely that the motion picture industry will reflect important controversial issues of immediate interest to the public. The majority opinion in the instant case is apparently based upon the unexplained presumption that motion pictures are somehow different[35] from other media and therefore particularly susceptible to pre-censorship, an argument which, it is submitted, is altogether unconvincing.[36] Per-

32. An examination of motion pictures which have been cut or banned completely, reveals innumerable unwarranted supressions. *E.g.*, "Anatomy of a Murder," "Curley," "Joan of Arc," "Idiot's Delight," "The Great Dictator," "Potemkin," and Walt Disney's "Vanishing Prairie." 365 U.S. at 69-72 (Warren, C.J., dissenting). For a more complete list of the censors' absurdities see 60 YALE L.J. 696, 699-700 nn.7 & 8 (1951). An Atlanta censor who last year banned eleven movies including "Room at the Top" and "Birth of a Nation," indicated that she was reassured by the Court's decision in the instant case and stated, "I'm having a big hassle right now trying to cut two 'bastards' and a 'by God' from a British movie." Newsweek, Feb. 13, 1961, P. 89.

33. Once the censors determine that a motion picture is obscene the burden of proving the contrary will be placed upon the exhibitor, should he pursue a judical remedy. See note 31 *supra*.

34. Litigation in the instant case consumed approximately three years. "The Miracle," which was the subject of dispute in the *Burstyn* case, was five years in the courts; even then, after the censors' determination was reversed, the movie was never shown in Chicago. 365 U.S. at 73. "Of the forty-three films which were altered or banned by the Maryland State Board of Motion Picture Censors during a recent two year period, litigation followed in only two cases." 71 HARV. L. REV. 326, 339 n.93 (1957).

35. The Court did not attempt to distinguish between movies and other media, nor did the opinion indicate that any different rule would apply to newsreels or documentary films. It has been suggested that motion picture censorship may be vulnerable to attack under the equal protection and commerce clause of the Constitution. Note, 71 HARV. L. REV. 326, 334-35 (1957). The majority offered no explanation to substantiate the proposition that motion pictures possess some special "capacity for evil." *Cf.* note 11 *supra*. It is interesting to note that "capacity for evil" was one of the bases for the now overruled holding in Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915). See Note, 60 YALE L.J. 696, 702-03 (1951). "[I]t is arguable that much of our film censorship is a left-over from the era of Prohibition." CHAFFEE, FREEDOM OF SPEECH IN THE UNITED STATES 544 (1941).

36. As pointed out in the dissenting opinion of Mr. Justice Warren, the proposition that motion pictures have a greater impact upon the public and therefore should be censored was basically the same argument advanced against newspapers at the time of the invention of the printing press. 365 U.S. at 77. (dissenting opinion). In support of the proposition that motion pictures should be *less* censorable because of their greater impact upon the public, see CHAFFEE, FREEDOM OF SPEECH IN THE UNITED STATES 543-48 (1941); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 669 (1955).

haps more difficult to accept is the paternalistic[37] implication of the Court's decision, in its underlying denial of the individual's ability to choose between good and evil.[38] Considering the dangers to free speech inherent in pre-censorship, it is suggested that the state has failed to bear the heavy burden[39] of proof which would warrant prior restraint in an area designated by the Supreme Court as "a significant medium for the communication of ideas."[40]

CRIMINAL LAW—MURDER—YEAR AND A DAY RULE REJECTED IN PENNSYLVANIA

Defendant was indicted for murder and manslaughter. Both indictments alleged that the deceased was assaulted by defendant on September 21, 1958, from which death ensued on November 1, 1959. The defendant moved to quash the indictments claiming that the common law of Pennsylvania prohibited prosecution for murder when death occurs more than a year and a day after the assault. The

37. The assumption that the general public is unable to recognize and reject pornography without the help of a censor is hardly compatible with democratic ideals. "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech . . . ." Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684, 689 (1959) (quoting from the concurring opinion of Mr. Justice Brandeis in Whitney v. California, 274 U.S. 357, 378 (1927)). See Note, 71 HARV. L. REV. 326, 353, 367 (1957); Note, 11 WESTERN RES. L. REV. 679 (1959). An argument for pre-censorship based solely upon the protection of youth from obscene films is more plausible; however, there appear less onerous methods of restraint which would afford adequate protection for minors. For a discussion of age classification as a more meaningful basis for a constitutional distinction between prior restraints as applied to adults and children, see Note, *For Adults Only: The Constitutionality of Governmental Film Censorship by Age Classification*, 69 YALE L.J. 141 (1960).

38. There is a great deal of truth in the "old adage that every man should have the right to go to hell in his own way." Note, 34 ORE. L. REV. 250, 251 n.2 (1955).

39. See Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 503-04 (1952). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).

40. *Id.* at 501. The decision in the instant case has received an adverse reaction by numerous members of the press. See Publishers Weekly, Feb. 6, 1961, vol. 179, No. 6, p. 68; The Commonweal, Feb. 10, 1961, vol. 63, No. 20, pp. 495-96; The Christian Century, Feb. 8, 1961, pp. 163-64; New York Times, Feb. 25, 1961, p. 12C. An appeal for rehearing of the instant case was filed on Feb. 27, 1961. Simultaneously, seven organizations in the field of communication filed *amicus curiae* briefs in support of the petitioner: The American Society of Newspaper Editors, The National Association of Broadcasters, Society of Magazine Writers, The American Society of Magazine Photographers, The Authors League, American Book Publishers Council, and Motion Picture Association of America. N.Y. Times, Feb. 28, 1961, p. 37 col. 1. The petition for rehearing was subsequently denied. 29 U.S.L. WEEK 3277 (U.S. Mar. 21, 1961).

trial court overruled the motion. On appeal, *held,* affirmed. The common law rule which precluded an indictment for murder where death did not occur until more than a year and a day after the assault is a rule of evidence only and can be changed by judicial decision.[1] *Commonwealth v. Ladd,* 166 A.2d 501 (Pa. 1960).

At the common law, in order to constitute punishable homicide, it was necessary that death ensue within a year and a day from the infliction of a mortal wound by the defendant.[2] Unless death took place within this period, the common law drew the conclusion that death had not resulted from this injury and/or that the cause of death could not be discovered. Neither the court nor the jury was allowed to reach a different result.[3] It is usually thought that this rule grew out of the limitations and uncertainties of the medical knowledge of ancient times.[4] Today some jurisdictions treat the rule as one of evidence that has the effect of a conclusive presumption that death resulted from other causes.[5] Still other jurisdictions regard death within a year as part of the substantive definition of murder.[6] Whichever way the rule is considered, the effect on successful prosecution of murder is the same. In at least one jurisdiction the necessity that death result within a year and a day has been abrogated by statute.[7] The common law rule, however, still prevails in an overwhelming majority of state jurisdictions and is apparently applicable in federal court prosecutions.[8]

In the instant case the majority opinion carefully reviewed the authorities on this rule and recognized that the majority of jurisdictions still follow the year and a day limitation. Since Pennsylvania

1. In the case of Commonwealth v. Evaul, 5 Pa. D. & C. 105 (1922), the court held that the common law rule was not applicable in prosecutions for involuntary manslaughter.

2. 4 BLACKSTONE, COMMENTARIES 197; 9 HALSBURY, LAWS OF ENGLAND § 734, at 428 (2d ed. 1931); 1 WHARTON, CRIMINAL LAW & PROCEDURE § 191 (1957); PERKINS, CRIMINAL LAW 605 (1957); 1 WARREN, HOMICIDE § 60 (1938).

3. State v. Dailey, 191 Ind. 678, 134 N.E. 481 (1922); Rose v. Commonwealth, 156 Ky. 817, 162 S.W. 107 (1914); State v. Orrell, 12 N.C. 139 (1826); Percer v. State, 118 Tenn. 765, 103 S.W. 780 (1907).

4. *Cf.* People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); People v. Legeri, 239 App. Div. 47, 266 N.Y.S. 86 (1933).

5. People v. Murphy, 39 Cal. 52 (1870); Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943); State v. Huff, 11 Nev. 17 (1876).

6. Glover v. State, 166 Ark. 588, 172 S.W. 876 (1915); Clark v. Commonwealth, 90 Va. 360, 18 S.E. 440 (1893); State v. Champoux, 33 Wash. 339, 74 Pac. 557 (1903).

7. See People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934), where the court held that since the Penal Code made no reference to the rule, the legislature must have intended that the rule no longer be a necessary requirement in prosecution for murder. Some states have expressly enacted the common law rule into their statutes. *E.g.,* REV. CODE OF MONT. § 10961 (1921).

8. See Louisville, E. & St. L.R.R. v. Clarke, 152 U.S. 230 (1894); Ball v. United States, 140 U.S. 118 (1891).

has no statutory definition of the crime of murder,[9] the majority adopted the Blackstonian definition as embodying the correct law on the year and a day rule in Pennsylvania. Because Blackstone made no reference to the rule when giving the definition of murder, the rule is not a part of the substantive definition of murder, the majority reasoned, but only a rule of evidence. Relying on the latin phrase *cessante ratione legis cessat lex*[10] the court concluded that the archaic rule is no longer supported by reason[11] and has no relevance in determining the question of causation. As a rule of evidence only, the year and a day requirement could be eliminated without making the court guilty of judicial legislation.[12]

Although the soundness of the rationale[13] of the instant case is questionable, the result reached seems desirable.[14] The many criti-

9. The Pennsylvania General Assembly, however, by its Act of January 28, 1777, 46 P.S. § 152 proclaimed that the common law and the statutes of England that had been in force in Pennsylvania would be "in force and binding on the citizens of Pennsylvania."

10. The correct phrase is *cessante ratione legis, cessat et ipsa lex*, meaning "the reason of the law ceasing, the law itself also ceases." BLACK, LAW DICTIONARY (4th ed. 1951); Nice's Appeal, 54 Pa. 200 (1867).

11. The court took judicial notice of the advances in scientific crime detection and scientific medicine. See also People v. Legeri, 239 App. Div. 47, 266 N.Y.S. 86, 88 (1933), where the court said: "Great advances have been made in medicine and surgery, and the doubt that the blow was the cause of death, when the latter ensued a year and a day after the former, has, in a large measure, been removed. Frequently there is now light where once there was darkness."

12. While the majority struggles to avoid judicial legislation and attempts to justify its decision by labeling the rule one of procedure, it is well settled that there is an established exception to the adoption, in an American state, of the English common law which allows the judiciary to throw off those doctrines which are not suited to conditions in the state, and which would have no reasonable application there. See the case of Gordon v. State, 93 Ga. 531, 21 S.E. 54 (1893) where the court refused to apply the common law presumption that a boy under the age of fourteen is incapable of committing rape, and the case of Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), where the court changed the M'Naghten test for insanity. See also State *ex rel.* Rodd v. Verage, 177 Wis. 295, 322, 187 N.W. 830, 841 (1922) where the court said that it was not wholly powerless to remold and reapply the ancient rules so as to fit them to modern conditions. But *cf.* Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952), which held that if the common law adopted by the state is clear, the court has no power to change it.

13. In the instant case Justice Musmanno in a rather emotional dissent proceeded to show the logical errors committed by the majority in reaching its decision. As he pointed out, the majority opinion cites a plethora of cases supporting the opposite result; it even cites a Supreme Court case to strengthen its position while the case actually recognizes that the majority of states support the common law rule. Musmanno also queried the majority's adoption of Blackstone as embodying the correct rule of law while disregarding the common law cases that Blackstone cites in favor of the rule. It is submitted that, while Musmanno does point out the errors in the majority's opinion, his attack fails to recognize that the majority still require the commonwealth to prove causation, and the mere removal of a technicality in prosecutions for murder does not subject the defendant to any less safeguards that he had before the rule was struck down.

14. See People v. Legeri, 239 App. Div. 47, 266 N.Y.S. 86 (1933).

cisms of the rule[15] seem well founded in view of the great advances in medicine as an aid in tracing causation. Of course the abolition of the rule does not mean that the defendant is now certain of conviction since the prosecution must still prove that the defendant's act was the proximate cause of the death. Moreover, the decision announced in the instant case will probably not be followed. Until its complete abrogation by statute, the year and a day rule will remain, in most jurisdictions, a bar to murder prosecutions.

REAL PROPERTY—RESTRAINTS ON ALIENATION—CONVEYANCE GIVING HOUSING COOPERATIVE FIRST OPTION TO BUY AND RIGHT TO REDEEM IS NOT AN INVALID RESTRAINT ON ALIENATION

Homeowners organized a co-operative housing association to which each conveyed his realty in exchange for a membership which carried the privilege of using the property conveyed. The membership contract stipulated that the association had a first option to buy a membership, or, if it were sold on the open market, the right to redeem the membership within ninety days. The agreement also provided that the association would temporarily convey the property to its members for their mortgage financing. The association sued seven of its members to compel reconveyance of property conveyed to them for mortgage financing. The members raised the defense that the contract was invalid because the option to buy and the power to redeem were invalid restraints on alienation. The lower court ruled for the association. On appeal, *held,* affirmed. An agreement that a housing co-operative has a first option to buy a membership and the right to redeem any membership sold on the open market is not a violation of the rule against restraints on alienation of property. *Gale v. York Center Community Cooperative,* 171 N.E.2d 30 (Ill. 1960).

Dissatisfied with the rigidities of feudal society,[1] the common law developed a policy against restrictions on alienation of real and

15. See PERKINS, CRIMINAL LAW 605 (1957); People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); and the concurring opinion in the instant case by Mr. Justice Bell who said: *"The safety, the protection, and the welfare of Society are paramount,* and require that there be no rule of evidence or of limitations for murder or for the prosecution of the murderer." 106 A.2d at 510. (Emphasis supplied by the court.)

1. For early examples of the policy against restraints on alienation see GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY § 4 (2d ed. 1895); 21 R.C.L. *Perpetuities* § 59 (1918).

personal property.[2] This policy is based on the belief that restraints remove property from commerce,[3] concentrate wealth,[4] prejudice creditors, and discourage property improvements.[5] The restraining clauses which the courts disapprove can be phrased in a variety of ways. They can prevent alienation in absolute terms for any time or to any group; or using limited terms, restrict alienation for a certain time or to a certain group.[6] Restrictions may also be classified as forfeiture restraints, which create a reversion or gift over to a third party when alienation is attempted; promissory restraints, which are contracts between grantor and grantee prohibiting alienation; or disabling restraints, which simply nullify the transfer of ownership to a party other than the grantee.[7] The majority of courts do not allow forfeiture restraints, either limited or absolute, on fee simple estates.[8] Limited or absolute forfeiture restraints on life or leasehold estates, however, are generally valid.[9] Promissory restraints are usually treated the same as forfeiture restraints.[10] Disabling restraints on fee simple estates are invalid, but a small minority of courts allow them on life estates.[11] The few cases which have been found dealing with restrictions in cooperative housing agreements have involved apartment houses. The limited promissory restrictions challenged in these

2. For cases on restraint of personalty see cases mentioned in SIMES & SMITH, FUTURE INTERESTS §§ 360, 390 (2d ed. 1956). For restraints on alienation of stock see Annot., 61 A.L.R.2d 1318 (1958).

3. "[A]nd the tendency of our time is to greater freedom of sale and transfer of property, unfettered by conditions or limitations of the right of alienation." Haeusler v. Missouri Iron Co., 110 Mo. 188, 19 S.W. 75, 77 (1892). "It is contrary to public policy because it fetters and places unreasonable restrictions upon property, which purport to remove it from the channels of trade and commerce . . . ." Friswold v. United States Nat. Bank, 122 Ore. 246, 257 Pac. 818, 820 (1927).

4. Rundell, *Concentration Versus Distribution of the Power of Alienation*, 2 WIS. L. REV. 449 (1924).

5. See Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 YALE L.J. 961, 964 (1935).

6. *Id.* at 972.

7. *Id.* at 963; SIMES & SMITH, *op. cit. supra* note 2, at 337; RESTATEMENT, PROPERTY § 404 (1944).

8. See Schnelby, *supra* note 5, at 961, 972, 973 for cases following the majority rule. In Peters v. Northwestern Mut. Life Ins. Co., 119 Neb. 161, 227 N.W. 917 (1929), the court held valid a restriction created in a will probated in 1915, preventing alienation of a fee simple estate until 1925. In Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S.W. 247 (1916), a restriction preventing grantee from alienating while the grantor was living was upheld. See also O'Conner v. Thetford, 174 S.W. 680 (Tex. Ct. App. 1905). In connection with this, see material cited in note 10 *infra*.

9. See cases in SIMES & SMITH, *op. cit. supra* note 2, at 352, 353; Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 YALE L.J. 1186, 1207, 1211 (1935). Restraints on life and leasehold estates have been justified by the fact that they protect the reversioner and remainderman, and also by the fact that these estates are not readily marketable.

10. Promissory restraints are primarily a part of contract law. SIMES & SMITH, *op. cit. supra* note 2, at 353.

11. See cases mentioned in Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 YALE L.J. 1186, 1208 (1935).

cases have been upheld.[12] The courts usually stress the leaseholding rather than the stockholding aspects of the agreement[13] since restrictions on the alienation of stock also are invalid.[14]

The court in the instant case decided that the utility of the restraints outweighed the possible injurious consequences. Since a statute provided that nonprofit housing co-operatives are legal,[15] the court assumed that their encouragement is socially desirable, and it thought that restraints are necessary for their existence. It said, without much elaboration, that co-operative housing agreements do not seriously involve the traditional dangers accompanying restraints.

The court was correct in its conclusion that restrictions are necessary incidents of co-operative housing agreements. The desire to live among neighbors with similar social and economic backgrounds is the main incentive for these agreements.[16] This desire cannot be satisfied without the power to prevent sale of membership to individuals of different backgrounds. Assuming that co-operatives are socially desirable, upholding the restrictions was the only logical alternative. It is doubtful that agreements of this type seriously involve the dangers traditionally associated with restraints on alienation. The class to which the property can be alienated will usually be sufficiently broad to keep the property within the flow of commerce and prevent a concentration of wealth. As for the discouragement of improvements, since the members live on the property they will usually maintain it in good order. Under the agreement in the instant case, creditors are not seriously endangered since members are allowed to mortgage the property. In any agreement creditors will be unjustly hurt only if they are led to believe that members have legal title to the property.

12. In Greene County Rural Elec. Co-op. v. Nelson, 234 Iowa 362, 12 N.W.2d 886 (1944), the court mentioned a state statute which permitted restrictions on alienation of membership stock. In 68 Beacon St. Inc. v. Sohier, 289 Mass. 354, 194 N.E. 303 (1935), a co-operative apartment agreement which prevented mortgaging or pledging the lease and provided that the stockholders must consent to any transfer of lease and stock was upheld. In Penthouse Properties Inc. v. 1158 Fifth Ave. Inc., 256 App. Div. 685, 11 N.Y.S.2d 417 (1939), a co-operative apartment agreement which required that the lessor must consent to a transfer of stock with its accompanying lease was upheld. This rule was later modified by a case in which the court ruled that the lessor's refusal could not be arbitrary. Weisner v. 791 Park Ave. Corp., 7 App. Div.2d 75, 180 N.Y.S.2d 734 (1958).

13. "The primary interest of every stockholder was in the long term proprietary lease alienation of which the corporation had the power to restrain. . . . The stock was incidental to that purpose and afforded the practical means of combining an ownership interest with a method for sharing proportionately the assessments for maintenance and taxes." Penthouse Properties Inc. v. 1158 Fifth Ave. Inc., 256 App. Div. 685, 11 N.Y.S.2d 417, 423 (1939).

14. See Annot., 61 A.L.R.2d 1318, 1322 (1958).

15. 171 N.E.2d at 33.

16. See Anderson, *Cooperative Apartments in Florida: A Legal Analysis*, 12 U. MIAMI L. REV. 13 (1957) and 13 U. FLA. L. REV. 123 (1960).

The creditor is hurt no more by agreements of this type than he is when the debtor is a leaseholder. Members of co-operative associations have been described as hybrids between stockholders and lessees.[17] It is submitted that this court's decision refusing to apply the traditional policy against restraints on alienation to a new form of land ownership is correct.

TAXATION—INCOME TAX—UNCOMPENSATED CASUALTY LOSS DUE TO DROUGHT ALLOWED AS SECTION 165 DEDUCTION

A severe drought in 1954 killed taxpayer's residential trees and shrubbery. The loss was not compensated for by insurance, and the taxpayer took an ordinary loss deduction under section 165(c)3 of the Internal Revenue Code of 1954. The Commissioner denied the deduction and assessed a deficiency, claiming this was a capital loss under section 1231 and Treasury Regulation 1.1231-1(e). On the question of whether the loss was a casualty loss, the jury found for the taxpayer. The district court held, however, for the Commissioner.[1] On appeal, *held,* reversed. Section 1231 applies only to involuntary conversions—compensated losses—leaving section 165 alone applicable to uncompensated losses. *Maurer v. United States,* 284 F.2d 122 (10th Cir. 1960).

The problem in this case is whether an uncompensated casualty loss to residential shrubbery is an involuntary conversion within the meaning of section 1231. Section 1231 provides:

> If during the taxable year . . . the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part . . .) of . . . capital assets held for more than six months into property or money, exceed the recognized losses from such sales, exchanges and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than six months.[2]

The Treasury Regulations provide that capital assets subject to section 1231 treatment include only capital assets involuntarily converted,[3] and that receiving compensation for the destroyed property

17. See Anderson, *supra* note 16; Hershman, *How and Why of Real Estate Syndications,* 5 PRAC. LAW 49 (1959).

1. Maurer v. United States, 178 F. Supp. 223 (D. Kan. 1959).
2. INT. REV. CODE OF 1954, § 1231.
3. Treas. Reg. § 1.1231-1(a) (1960).

is not a necessary element of a section 1231 involuntary conversion.[4] The statute does not specifically require any *quid pro quo* for an involuntary conversion. The term involuntary conversion as it is used in some sections of the code clearly implies the receipt of money or other property in exchange for the converted property.[5] In another section, the words involuntary conversion do not seem to imply anything akin to an exchange.[6] The commentators are in conflict on this point. Mertens states: "In the case of an involuntary conversion at a loss in circumstances which do not involve a 'sale or exchange,' as in the case of an uncompensated casualty loss, the loss normally would be deductible as an ordinary and not a capital loss because of the absence of a sale or exchange."[7] On the other hand, Alfred J. McDowell has stated that "casualty losses of both business property and capital assets held for more than six months had to be netted against all gains realized . . . ."[8] The legislative history of section 1231, though not specifically answering this question, contains language which permits the inference that receiving money or other compensation is a necessary element of an involuntary conversion.[9] Thus, this court was forced to answer the question, "Is receiving something in exchange for the converted property a necessary ingredient of an involuntary conversion?" with little help from statute, legislative history, or prior case law.

4. "For purposes of section 1231, the terms 'compulsory or involuntary conversion' and 'involuntary conversion' of property mean the conversion of property into money or other property as a result of complete or partial destruction, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof. Losses upon the complete or partial destruction, theft, seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion whether or not there is a conversion of the property into other property or money . . . ." Treas. Reg. § 1.1231-1(e) (1960).

5. As the term is used in §§ 1033 and 1034, the term involuntary conversion carries with it the connotation of an involuntary sale or exchange in which the taxpayer receives something in exchange for his converted property. Section 1033(a)(1) deals with conversions into similar property. Section 1033(a)(2) deals with conversions into money occurring before 1951. Section 1033(a)(3) deals with conversions into money or property "not similar or related in service." In each of these instances an event akin to a sale or exchange occurs; the taxpayer receives something in exchange for the converted property. See also section 1034 dealing with the sale of residences and 1033(f) dealing with the sale or exchange of livestock because of drought.

6. Section 1033(e) provides that if livestock are destroyed by or on account of disease, or are sold or exchanged because of disease, such destruction or sale or exchange shall be treated as an involuntary conversion. Here nothing akin to a sale or exchange is required if the livestock are destroyed. Treas. Reg. § 1.1033(e)-1 (1960).

7. 3B MERTENS, FEDERAL INCOME TAXATION § 22.125, at 517-18.

8. McDowell, *Casualty Losses*, 17 N.Y.U. INST. ON FED. TAX. 627, 650 (1959). PRENTICE-HALL, FEDERAL TAX HANDBOOK (1961), states that an involuntary conversion occurs "when property is destroyed in whole or in part, or is stolen or seized, and property or money, such as insurance or condemnation award, is received." *Id.* at 97.

9. H.R. 2333, 77th Cong., 1st Sess. § 10 (1942).

The court held that "Section 1231 is aimed at involuntary conversions where 'other property or money' is received in return, i.e., compensated losses, leaving Section 165 applicable to uncompensated losses."[10] The court based its conclusion on two grounds. First, the legislative history of section 1231 indicates that this section applies only to compensated involuntary conversions.[11] Second, section 1231 is contextually similar to the sections dealing with capital gains and losses.[12] The inference is that a 1231 involuntary conversion is a "taxable event closely akin to a 'sale or exchange' albeit an involuntary one." In answer to the Commissioner's argument that this result reads the definition of involuntary conversion out of the statute, the court replied that the definition still has application to compensated losses.[13]

The rule laid down in the principal case is sound, notwithstanding the Internal Revenue Service's announcement that the case will not be followed.[14] In a prior case involving similar facts, the Commissioner did not raise the argument advanced in this case.[15] If the word conversion is given its ordinary meaning,[16] it is essential that the taxpayer receive money or other property in exchange for the converted property. Moreover, the legislative history of section 1231 is couched in terms of an exchange.[17] This case leaves unanswered what is probably the most difficult problem in this area. Suppose this taxpayer had insurance which covered only a portion of the loss. The opinion indicates that if compensation is received, there is a basis for applying section 1231. Does this mean that the entire transaction will be brought within section 1231? The answer to this question must await future legislation or judicial decision.

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10. 284 F.2d at 124.
11. *Ibid.*
12. *Ibid.* See note 5 *supra.*
13. 284 F.2d at 124.
14. Technical Information Release 304, March 16, 1961.
15. Buttram v. Jones, 87 F. Supp. 322 (W.D. Okla. 1943). Here it was held that a loss to residential property due to a severe drought was a casualty loss and hence deductible under section 165 (section 23 of the 1939 code). If the Commissioner's argument were accepted, a case like Rosenberg v. Commissioner, 198 F.2d 46 (8th Cir. 1952), holding damage to a residence caused by termites and hence deductible under section 165, would require the deduction to be taken under section 1231.
16. WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1955) defines "conversion" as converting "from one thing to another by substitute."
17. See note 9 *supra.*

TORTS—NEGLIGENCE—FIREMAN IN PERFORMANCE OF DUTIES ALLOWED RECOVERY AS INVITEE

Plaintiff, a fireman, was injured by the collapse of a wooden staircase while fighting a fire in defendant's hotel. Defendant knew that the building needed repairs and that it was being negligently maintained in violation of certain fire ordinances. In an action for personal injury, the trial court entered judgment for the defendant notwithstanding the verdict.[1] On appeal to the Supreme Court of Illinois, *held,* reversed. A fireman, rightfully on the premises of another, may recover for the landowner's failure to exercise reasonable care in the maintenance of his property when the injury occurred in a part of the premises where firemen might reasonably be expected to be. A fireman performing his duty on private property is an invitee, not a licensee.[2] *Dini v. Naiditch,* 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

During the feudal period, the proprietary interests of the landowner were of singular importance and their significance became part of the English common law, the basis of the American legal system.[3] Since the landowner was considered sovereign within the boundaries of his property, the rule developed that the landowner owed to a licensee, who was barely more than a trespasser,[4] only the duty not to cause him wanton or willful injury.[5] Firemen have historically been treated as a mere licensees to whom no duty of reasonable care has been extended.[6] Because they entered private property at irregular times

1. The jury returned a verdict for the plaintiff and awarded $235,000 damages for his personal injuries. Dini suffered permanent loss of motion and flexion in the affected parts of his body and a considerable loss of income.

2. The court also overruled Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892), and other cases by holding that a fireman is entitled to the protection of generally worded safety ordinances designed to prevent loss of life and injury in case of fire, and that the common law status of firemen will henceforth be an invitee. Defendant, owner of the hotel, was held liable even though he had leased the premises at the time of the injury.

3. Ryan v. Chicago & N.W. Ry. 315 Ill. App. 65, 42 N.E.2d 128 (1942) (history of common law landowner theory); BOHLEN, TORTS 156-206 (1926); Bohen, *The Duty of a Landowner Toward Those Entering His Property of Their Own Right,* 69 U. PA. L. REV. 142, 147 (1921).

4. Bremer v. Lake Erie & W.R.R., 318 Ill. 11, 148 N.E. 862 (1925) (trespasser on train killed by engineer's negligence allowed recovery); PROSSER, TORTS § 76 (2d ed. 1955). "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." RESTATEMENT, TORTS § 329 (1934).

5. Scuddy Coal Co. v. Couch, 274 S.W.2d 388 (Ky. 1954) (licensee injured when mule stumbled on railroad, recovery denied); Brauner v. Leutz, 293 Ky. 406, 169 S.W.2d 4 (1943) (painter injured on carpenter's scaffold; held, licensee and no recovery); POLLOCK, TORTS 405-10 (15th ed. 1951); PROSSER, TORTS § 77 (2d ed. 1955). "A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission." RESTATEMENT, TORTS § 330 (1934). There has been considerable revision of this definition in the tentative draft of the second *Restatement.* RESTATEMENT (SECOND), TORTS § 330 (Tent. Draft No. 5, 1960).

6. See, *e.g.,* Anderson v. Cinnamon, 365 Mo. 304, 282 S.W.2d 445 (1955) (fire-

in carrying out their duties and often without the consent of the landowner, the courts refused to classify them as invitees.[7] There does exist, however, a considerable difference of opinion among the courts as to what constitutes a licensee or invitee.[8] Some courts in recent cases refused to classify firemen as licensees, saying that they are *sui generis*. This treatment affords firemen a higher degree of protection and allows recovery where the defect can be characterized as a trap or nuisance.[9] Other courts, to avoid the harsh common law rule, have classified firemen as invitees or "business visitors" by noting certain particular factors of the landowner-fireman relationship in each case.[10] Still other courts have adopted unconditionally the

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man injured by collapsing porch of burning building; held, licensee and denied recovery); Lunt v. Post Printing & Publishing Co., 48 Colo. 316, 110 Pac. 203 (1910) (fireman killed by nitric acid while fighting fire at defendant's plant; held, licensee, recovery denied); Pennebaker v. San Joaquin Light & Power Co., 158 Cal. 579, 112 Pac. 459 (1910) (fireman killed by accidental contact with power lines in yard of burning building; held, licensee and no recovery); Woodruff v. Bowen, 136 Ind. 431, 34 N.E. 1113 (1893) (fireman injured by building collapse due to large quantity of water on merchandise therein; held, licensee and recovery denied). See 26 COLUM. L. REV. 116 (1926).

7. Some courts have decided that a fireman should be considered a mere licensee because of his location at the time of injury, and that he is not to be protected by safety ordinances intended for employees or lodgers. See, *e.g.*, Aldworth v. F. W. Woolworth Co., 295 Mass. 344, 3 N.E.2d 1008 (1936) (fireman using fire escape as vantage point from which to fight nearby fire injured by fall therefrom; held, licensee, recovery denied); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899) (city fireman injured by fall through unguarded elevator shaft; held, licensee and outside protective statute); Beehler v. Daniels, 18 R.I. 563, 29 Atl. 6 (1894) (fireman injured by fall down unprotected elevator well; held, licensee). *But see* Drake v. Fenton, 237 Pa. 8, 85 Atl. 14 (1912) and Maloney v. Hearst Hotels Corp., 274 N.Y. 106, 8 N.E.2d 296 (1937) wherein the courts allowed firemen to recover for direct violations of safety ordinances. See COOLEY, TORTS § 251 (4th ed. 1932).

8. See James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605 (1954); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 576-85 (1942). The economic benefit test for the invitee classification was previously adopted in the *Restatement*. RESTATEMENT, TORTS § 332 (1934). However, the tentative draft of the second *Restatement* seems to have changed to the more lenient "implied invitation" test requiring only an implied invitation that the land is safe. RESTATEMENT (SECOND), TORTS § 332. (Tent. Draft No. 5, 1960); 2 HARPER & JAMES, TORTS § 27.12 (1956); 2 POLLOCK, TORTS 392-402 (15th ed. 1951).

9. See, *e.g.*, Campbell v. Pure Oil Co., 15 N.J. Misc. 723, 194 Atl. 873 (Sup. Ct. 1937) (negligent maintenance of gas and oil pumps, tanks; held, a nuisance and fireman allowed recovery); James v. Cities Serv. Oil Co., 66 Ohio App. 87, 31 N.E.2d 872 (1939) (open manhole in gas storage tank called hidden danger); Shypulski v. Waldorf Paper Prods. Co., 232 Minn. 394, 45 N.W.2d 549 (1951) (collapsing wall characterized as a trap and fireman, receiving *sui generis* classication, allowed recovery); Smith v. Twin State Gas & Elec. Co., 83 N.H. 439, 144 Atl. 57 (1928) (fireman killed by explosion from leaking gas main permitted recovery). See also McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. REV. 45 (1936).

10. Clinkscales v. Mundkoski, 183 Okla. 12, 79 P.2d 562 (1938) (volunteer fireman designated an invitee as to dangers known by landowner); Zuercher v. Northern Jobbing Co., 243 Minn. 166, 66 N.W.2d 892 (1954) (volunteer fireman treated as business visitor when on defendant's property to install

term "invitee" respecting firemen.[11] The majority of courts, however, continue to classify firemen as licensees under all circumstances, with the accompanying set of limited rights and duties.[12]

In the instant case, the court unequivocally stated that it considered the fireman to be a member of the invitee class.[13] It observed, after a review of the cases, that the legal fiction which classifies firemen as licensees, to whom no duty of reasonable care is owed, is outmoded and unreasonable. To the court it seemed illogical to say that a fireman cannot be an invitee because there has been no invitation given him, yet can be a licensee even though there has been no license or permission.[14] This lack of logic becomes more evident by noting that the same courts which have thus disposed of firemen's cases have not applied the licensee classification to other public employees, such as postmen and safety inspectors, who are also required to go on another's property in the performance of their duties.[15] Firemen confer on landowners and the general public the economic benefits and protection which are the traditionally recognized bases for imposing on the landowners the duty of using reasonable care to invitees.[16] To the Illinois court, these reasons were sufficient to induce it to join the minority of jurisdictions which have refused to apply the obsolescent classifications and labels of a vastly different social order to modern problems in the name of stare decisis. The majority of the court herein noted that from the evidence of negligent maintenance shown, the jury could have found that the defendants failed to keep the premises in a reasonably safe condition and that the hazards of fire and loss of life fighting it were reasonably foreseeable.[17]

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sump pump, recovery allowed). "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them." RESTATEMENT, TORTS § 332 (1934). For a recent definition and explanation of invitee and business visitor see the tentative draft of the second *Restatement,* § 332 cited in note 8 *supra.* See also Note, 28 CORNELL L.Q. 232 (1943).

11. See, *e.g.,* Buckeye Cotton Oil Co. v. Campagna, 146 Tenn. 389, 242 S.W. 646 (1922) (city fireman working outside city; held, licensee); Taylor v. Palmetto Theater Co., 204 S.C. 1, 28 S.E.2d 538 (1943) (fireman injured by fall into pit maintained in public passageway of theatre; held, invitee, recovery allowed). *Compare with* cases cited in note 10 *supra* where the courts relied upon specific circumstances to bring the fireman *sub judice* within the invitee classification.

12. PROSSER, TORTS § 78, at 461-62 (2d ed. 1955). See also 6 DE PAUL L. REV. 97 (1956); 35 MICH. L. REV. 1157 (1936); 30 MISS. L.J. 340 (1959).

13. 170 N.E.2d at 886.

14. *Ibid.*

15. PROSSER, *op. cit. supra* note 12 and cases cited therein.

16. *Ibid.* For an excellent resume of the land occupier's liability in Oregon today, see Lansing, *The Liability of Land Occupier's for Negligence to Persons on the Land,* 1 WILLAMETTE L.J. 314 (1960).

17. The dissent herein, through Justice Klingbiel, agreed that negligence was shown and that the defendant would be liable for any injury proximately

The proposition announced by the court in the present case—that a fireman performing his duty on private property is an invitee—is most realistic. Perhaps, however, a better approach would be to allow the fact finder, under proper instructions, to classify the fireman as invitee or licensee under the facts of each case. Should the fact finder decide that the landowner could have reasonably foreseen that a fireman would come upon this portion of his premises in the performance of his duties, then it would impose upon the landowner the duty owed to an invitee—the use of reasonable care. To deny firemen the benefit of this determination simply because of arbitrary historical classifications would be to reach an unjustifiable result.

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caused by the fire. Klingbiel, however, did not think that the injuries received by the fireman in this case could be reasonably foreseen as a result of the mere accumulation of trash and other existent conditions. To extend liability for every injury which would not have happened but for the fire is, of course, not reasonable. Where, however, the cause of the injury is a faulty staircase being constantly used by tenants, it was not unforeseeable that someone, tenant or fireman, would be injured on this staircase in the event of a fire.