New York - Laws of the 178th Session - Publication and Distribution of Comic Books - Sale to Minors

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LEGISLATION

NEW YORK—LAWS OF THE 178TH SESSION—PUBLICATION AND DISTRIBUTION OF COMIC BOOKS—SALE TO MINORS.*

Together with the startling rise in juvenile delinquency has come an intense effort on the part of social workers, religious groups, and educators to isolate the causes of what has become a national problem of disturbing proportions. These civic minded groups have undertaken their project quite aware that the success of their investigations would be achieved, not merely in merely tracing the causes, but in classifying them according to the intensity of their deleterious contribution. To this, a monumental task in itself, has been added the realization that apparently trivial, at least neutral, factors took on suspicious proportions by virtue of their subtle inherence in certain media of mass communication. Apart from the difficulty peculiar to their classification, the selection of such factors as contributing items has given rise to some controversy.1 But such argument must accept the far-reaching availability of these media to the young, which is a basic premise to the advocates of a causal relationship.

"The beginning is the most important part of any work, especially in the case of a young and tender thing; for that is the time at which the character is being formed and the desired impression is more readily taken. Shall we just carelessly allow children to hear any casual tales which may be devised by casual persons, and receive into their minds ideas the very opposite of those which we should wish them to have when they are grown up?"2

It is understandable that agitation for the reform of these allegedly harmful media should have made a belated appearance in the studies of juvenile crime.3 What had been introduced as an accurately entitled "comic book" in 1935, has evolved, in recent years, to a pamphlet uncomic in its nature, featuring narratives in crime and horror, with sexually suggestive and sadistic illustrations.4

* See Appendix A.


2. Plato, Republic.


4. Id. at 14. "Offering an example of this practice of teaching crime techniques via crime through comic books, Dr. Wertham testified: 'I had no idea how one would go about stealing from a locker in Grand Central, but I have comic books which describe that in minute detail and I could go out now and do it.'"

(323)
Incensed and widespread complaints concerning the provocative content of these publications stimulated the creation in 1949 of the New York State Joint Legislative Committee to Study the Publication of Comics. The committee’s scope has since been extended to include pocket-books, picture magazines, radio, and television. At its formation, the Legislature announced the desirability of the committee’s submitting, after a thorough study, remedial recommendations. The 1951 committee report urged that the comic book industry take immediate steps to organize a self-regulatory association, with an independent administrator to act as a reviewing agency. A prior attempt at such organization, the Association of Comics Magazine Publishers, realized disheartening failure. Numerous reasons have been proffered, among them, the hesitation of relatively unassailable publishing houses to associate themselves with those of evident substandard policies, and, at the other extreme, an unwillingness to meet the standards of the association’s six point code. The current Comics Magazine Association of America, incorporating within its code a prohibition against horror and terror, but not crime, has evoked the approval of the Senate Subcommittee to Investigate Juvenile Delinquency; this approval being tempered with the apprehension that incomplete membership will again impair the effectiveness of this latest attempt at self-discipline within the industry.

However, a realization by the New York Committee of the limitations inherent in such effort, enforced by a conviction that objectionable reading material contributes to juvenile delinquency, has prompted the New York Legislature, on the recommendation of the committee, to enact Article 49, Sections 540-543 of the Penal Code.

I. PUBLICATION AND DISTRIBUTION OF COMIC BOOKS.

The section of this article expressly dealing with comic books condemns as a misdemeanor the publishing and distribution for resale of comic books with titles in which the words “crime,” “sex,” “horror,” or “terror” appear, or the content of which is principally devoted to pictures or accounts of “methods of crime, of illicit sex, horror, terror, physical torture, brutality or physical violence.” What might aptly be termed a distant predecessor of this section fell before the Supreme Court in the case of Winters v. New York, the Court holding that the failure of a statute, limiting freedom of expression, to give fair notice of what acts will be punished is unconstitutional as violative of the due process clause of the fourteenth amendment. That this section concerns itself with publication

5. Id. at 30.
6. Id. at 31.
7. See Appendix B.
10. See Appendix A.
and distribution as opposed to sale is immaterial.¹² Nor will its restriction to comic books remedy any inherent constitutional defect.¹³

Undoubtedly the section's constitutional possibilities are enhanced by the manner of sanction, provided therein. Had it included a provision for the censorship or suppression of books deemed objectionable, the courts would be alert to assert the repugnance of prior restraint to the guarantees of free speech and press.¹⁴ The framing of the section in terms of subsequent punishment surmounts an important impediment, but hardly exhausts the protections afforded under the first amendment.¹⁵

The Legislature has made an express finding that the objectionable matter constitutes "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth, and a clear and present danger to the people of our state."¹⁶ Though such a determination by a legislative body will be given serious attention, it no longer precludes the Court from an investigation as to whether any specific utterance will, in and of itself, bring about the substantive evil.¹⁷ Is the interest of the state of such a substantial nature as will justify a limitation of speech and press? Is the evil sought to be avoided, discounted by its improbability, such as will justify an invasion of free speech to the extent necessary to effect its avoidance?¹⁸ The constitutionality of both the "title" and "content" clauses of this section depends upon an affirmative reply.

Of necessity, the "title" and "content" clauses of the instant section do not enjoy equal freedom from vagueness. The specific enumeration of words forbidden to appear in the titles affords no room for uncertainty. Unlike section 542, the words of which are "well understood through long use in the criminal law,"¹⁹ the words within the "content" clause of section 541 must rely more heavily upon that precision which is gained "from the sense and experience of men."²⁰ A comparison of two paragraphs from the opinion of Justice Reed in Winters v. New York indicates that of the two clauses, the "content" clause should encounter the greater difficulty under the test for uncertainty.

"It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punish-

¹² Ibid.
¹³ Id. at 510. "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." But see, (Dissenting opinion, Frankfurter) Id. at 528. "But to say that these magazines have 'nothing of any possible value to society' is only half the truth. This merely denies them goodness. It disregards their mischief."
¹⁶ See Appendix A.
ment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."\textsuperscript{21}

And in conclusion, by way of illustration, the learned judge observes:

"Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."\textsuperscript{22}

That otherwise unobjectionable matter would be included within the "content" clause of section 541 could render it "too indefinite to satisfy constitutional demands based on reason and fairness."\textsuperscript{23}

At this point it would seem necessary to examine the effect of the statute's separability clause upon the instant section. In the absence of such a clause, it is often presumed that the legislature intended the statute to be effective as an entirety. Consequently, should any provision be deemed unconstitutional, the remainder of the statute might be declared invalid. The insertion of a separability clause, however, serves to reverse this presumption, and gives rise to one in favor of divisibility. Although the burden of showing separability or entirety is shifted according to the presence or absence of the aforementioned clause, in either case, the final determination is reached by applying the same test, that is—What was the intent of the legislature?\textsuperscript{24} The effect of the clause upon the instant section gives rise to a presumption of separability, which may be overcome by a showing that upon the elimination of the "content" clause, the legislature would not have been satisfied with the remaining "title" clause.\textsuperscript{25} The interrelation of the two, and the apparent inadequacy of the "title" clause standing alone would indicate that should the "content" clause be deemed unconstitutional, both must fall.

\section*{II. Dissemination of Obscenity}

In condemning the unrestrained dissemination of "filth in print,"\textsuperscript{26} the New York State Joint Legislative Committee to Study the Publication of Comics, echoing the findings of the Senate Subcommittee to Investigate Juvenile Delinquency, noted the incalculable moral and psychological dam-

\textsuperscript{22} Id. at 520.
\textsuperscript{23} Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 528 (1952).
\textsuperscript{24} Carter v. Carter Coal Co., 298 U.S. 238 (1936).
\textsuperscript{25} Williams v. Standard Oil Co., 278 U.S. 235 (1929).
\textsuperscript{26} N.Y. State Joint Leg. Committee to Study the Publication of Comics Rep., Leg. Doc. 37, 137 (1955).
age of which such publications are capable. Their findings led to the enactment of section 542, aimed at a particularly harmful aspect of the mass media to which children have such easy access.

The problems of obscene publications present no novel questions to the courts, though the methods employed in their solution reflect some change since the early English cases. However, the very history of the cases contributes indirectly to their solution, in that the words of the legislature have acquired sufficient certainty before the bar. Illustrative of the somewhat outdated approach is the case of Regina v. Hicklin, wherein the court held the test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. The test therein enunciated was frequently utilized in early decisions in this country. Its gradual decline in popularity has probably been due to two defects: the selection of isolated passages in an effort to condemn the entire work, and the failure to limit the standard to the normal reader. With the introduction of the “judgement as a whole” theory, the selectivity test employed by the English courts fell into general disfavor. In reasoning toward their conclusion, the courts have observed that under the prior rule numerous works of unquestionable value, as the Bible and Shakespeare, could have encountered difficulty.

In their process of definition, the words in the instant section have shaken themselves free of those charges which would, by enlarging their scope, proportionately reduce their certainty. That obscenity and indecency do not include the libelous, the profane, scurrilous attacks upon individuals, or religious bodies, or matters merely offensive to propriety and

29. Swearingen v. United States, 161 U.S. 446 (1896); Duncan v. United States, 48 F.2d 128 (9th Cir. 1931); United States v. Limehouse, 58 F.2d 395 (E.D. S.C. 1931).
30. 118681 3 Q.B. 360.
31. Sec., e.g., Swearingen v. United States, 161 U.S. 446 (1896); People v. Doris, 14 App. Div. 117, 43 N.Y. Supp. 571 (1st Dep't 1897); People v. Muller, 96 N.Y. 408 (1st Dep't 1884).
33. United States v. Levine, 83 F.2d 156 (2d Cir. 1936); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); People v. Viking Press, 147 Misc. 813, 264 N.Y. Supp. 534 (N.Y. City Magis. Ct. 1933).
34. Swearingen v. United States, 161 U.S. 446 (1896).
36. Duncan v. United States, 48 F.2d 128 (9th Cir. 1931).
the public taste, has become quite evident. That the words "obscene, lewd, lascivious, filthy, indecent, disgusting" are synonomous and coextensive, in their relation to sexual impurity, moral corruption, and the stimulation of lustful and lecherous desires, has been generally accepted.

To assist in the determination of obscenity, a question for the jury, the reasonably prudent man has once again been called upon. His deductive processes, no longer static or restricted, are to be exercised in the light of present day mores. In fashioning his judgment, he is to examine the relevance of objectionable passages to the general theme, being cautious not to overlook the verdict of the past if the work is ancient, and the estimation of approved critics should it be modern. Some conflict however, has arisen over the admissibility of the opinions of critics. Courts adhering to the traditional rule exclude such, holding that the issue is one of which the jury is as qualified as the expert to determine. Those espous-


39. See Appendix A.


49. United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934).

ing the admissibility of literary criticism as well as the testimony of other established authorities reason that such evidence isrationally helpful to the jury.\textsuperscript{51} In addition such testimony would aid in determining the artistic value of the work, thus tending to decide whether it merits the exceptional status given scientific treatises and genuine literary endeavour.\textsuperscript{52}

It seems well settled that obscenity, together with profanity, and libel, has been relegated to that area which "has never been thought to raise any Constitutional problems."\textsuperscript{53}

"It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality."\textsuperscript{54}

With the advent of that doctrine which examines obscenity in the light of its effect, it has become increasingly necessary to determine the audience to which the questionable work is to be directed. That important medical texts could become harmful among the immature admits of no doubt. But treatises of this type must not be condemned on this basis. Their justification arises in that they are directed not to those upon whom they could exert a harmful influence, but to those upon whom their influence is necessary and beneficial. That such books admit of the possibility of incidental harm to the immature is not fatal,\textsuperscript{55} and provides sound reason for rejecting the restrictive \textit{Hicklin} rule.

While the legislative trend is to consider those works objectionable, the dominant effect of which is the stimulation of lecherous desires in the normal adult reader, section 542, in its effort to curb juvenile crime, looks to the effect upon the normal youth. A proper test which has long been observed within the New York courts is whether the allegedly objectionable matter tends to corrupt the morals of youth by lowering their standards of right and wrong specifically as to sexual matters.\textsuperscript{56} Such a test is very much in keeping with the remedial purpose of section 542.

Though section 542 presents few, if any, problems involving uncertainty, the inclusion of the requirement of a willful or knowing violation serves to further buttress this section against any attack on the basis of


\textsuperscript{52} United States v. One Book Entitled "Ulysses," 72 F.2d 705 (2d Cir. 1934); United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); \textit{In re} Worthington Co., 30 N.Y. Supp. 361 (Sup. Ct. Spec. T. 1894).


\textsuperscript{54} \textit{Id.} at 572; Burke v. Kingsley Books, 142 N.Y.S.2d 735 (1st Dep't 1955); People v. Gitter, 133 Misc. 693, 234 N.Y. Supp. 213 (Sup. Ct. 1929).

\textsuperscript{55} United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).

vagueness. The necessary specific intent will overcome an objection that the statute punishes without warning.57 As early as Regina v. Hicklin it is seen that the intent involved in the dissemination of obscene literature is immaterial.58 The adoption of subterfuges such as attached brochures depicting pictures as examples of sincere artistic endeavour, will not sway the court in the face of a blatant infraction of the statute.59 Knowledge of the character and content of the publication, or a failure to exercise reasonable inspection thereof suffices. Ordinarily the determination of these issues is a question of fact for the jury. What constitutes a reasonable inspection will generally vary with the circumstances of each case. Undoubtedly any burden upon retailers could be lessened by the circulation of lists of objectionable reading, a practice which has proven highly effective in discouraging the sale as well as the publication of pornography.60 Since section 542 calls for a knowing violation, it excludes from its operation these areas in which there appears elements of real doubt. To sustain a conviction it must be shown not only that the prohibited acts were committed, but that their commission constituted a willful or knowing act on the part of the accused. The remedial effect of such a clause has been often acknowledged by the courts:

"The Statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that the application of the Regulation would be so unfair that it must be held invalid."61

Finally the imposition of the duty to execute a reasonable inspection offers little solace to an alleged offender, for

"the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."62

Since it would appear that section 541 will not survive constitutional demands of certainty, whereas section 542 embraces a sufficiently ascertainable standard of guilt, the question of separability again arises. An analysis of the two sections reveals that they are not mutually interdepend-
ent. Furthermore, it can be fairly inferred that the legislature, had the defects of section 541 been made known to it, would have intended that section 542 remain operative.

III.
CONCLUSION.

The difficulty with which the legislature is faced in drafting a statute, sufficiently extensive in scope to include the legislative purpose, yet reasonably precise so as to avoid the problems of uncertainty, is appreciable. Nevertheless, it is doubtful that this difficulty will ameliorate the doctrine of void for vagueness. Such a dilemma has led writers to call for a suspension or total abolition of the void for vagueness rule on the basis of proper judicial activity, and social desirability, so that an examination of the case on its merits might take place. In the alternative, it has been suggested that the obstacles confronting the drafting of such statutes would indicate that the legislature might better attack the "roots of crime," rather than concern itself with "superficial aggravating influences."

Certainly the formation of an effective self-regulatory program within the comic book industry, similar to that which is operative within the movie industry, is to be encouraged. That such self-policing, combined with the efforts of an enlightened citizenry can approach the effectiveness of legislation is quite probable.

John J. Collins

APPENDIX A

LAWS OF NEW YORK 1955
COMIC BOOKS - REGULATIONS
Chapter 836
The People of the State of New York, represented in Senate and Assembly, do enact as follows:
Section 1. The penal law is hereby amended by inserting therein a new article, to be article forty-nine, to read as follows:

ARTICLE 49
COMIC BOOKS

Section
540. Legislative findings.
541. Publication and distribution of comic books.
542. Sale to minors.
543. Separability.
§ 540. Legislative findings
It is hereby declared that the publication, sale and distribution to minors of comic books devoted to crime, sex, horror, terror, brutality and violence and of "pocket books", photographs, pamphlets, magazines and pornographic films devoted to the presentation and exploitation of illicit sex, lust, passion, depravity, violence, brutality,

64. 23 Ind. L.J. 272 (1948).
nudity and immorality are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state. Therefore, the provisions, hereinafter prescribed, are enacted and their necessity in the public interest is hereby declared as a matter of legislative determination.

§ 541. Publication and distribution of comic books
A person who publishes or distributes for resale any book, pamphlet or magazine consisting of narrative material in pictorial form, colored or uncolored, and commonly known as comic books, the title or titles of which contain the words crime, sex, horror or terror or the content of which is devoted to or principally made up of pictures or accounts of methods of crime, of illicit sex, horror, terror, physical torture, brutality or physical violence shall be guilty of a misdemeanor.

§ 542. Sale to minors
A person who willfully or knowingly sells, lends, gives away, shows, advertises for sale or distributes commercially to any person under the age of eighteen (18) years or has in his possession with intent to give, lend, show, sell, distribute commercially, or otherwise offer for sale or commercial distribution to any individual under the age of eighteen (18) years any pornographic motion picture; or any still picture or photograph, or any book, "pocket book", pamphlet or magazine the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which consists of pictures of nude or partially de-nuded figures, posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use shall be guilty of a misdemeanor.

For the purposes of this section "knowingly" shall mean having knowledge of the character and content of the publication or failure to exercise reasonable inspection which would disclose the content and character of the same.

§ 543. Separability
If any provision of this article or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of this article and the applicability of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This act shall take effect July first, nineteen hundred fifty-five.

APPENDIX B

CODE OF THE COMICS
MAGAZINE ASSOCIATION OF AMERICA, INC.
CODE FOR EDITORIAL MATTER

GENERAL STANDARDS PART A

1. Crimes shall never be presented in such a way as to create sympathy for the criminal, to promote distrust of the forces of law and justice, or to inspire others with a desire to imitate criminals.
2. No comics shall explicitly present the unique details and methods of a crime.
3. Policemen, judges, government officials and respected institutions shall never be presented in such a way as to create disrespect for established authority.
4. If crime is depicted it shall be as a sordid and unpleasant activity.
5. Criminals shall not be presented so as to be rendered glamorous or to occupy a position which creates a desire for emulation.
6. In every instance good shall triumph over evil and the criminal punished for his misdeeds.
7. Scenes of excessive violence shall be prohibited. Scenes of brutal torture, excessive and unnecessary knife and gun play, physical agony, gory and gruesome crime shall be eliminated.
8. No unique or unusual methods of concealing weapons shall be shown.

https://digitalcommons.law.villanova.edu/vlr/vol1/iss2/7
9. Instances of law enforcement officers dying as a result of a criminal's activities should be discouraged.
10. The crime of kidnapping shall never be portrayed in any detail, nor shall any profit accrue to the abductor or kidnapper. The criminal or the kidnapper must be punished in every case.
3. Although slang and colloquialisms are acceptable, excessive use should be discouraged and wherever possible good grammar shall be employed.

Religion
1. Ridicule or attack on any religious or racial group is never permissible.

Costume
1. Nudity in any form is prohibited, as is indecent or undue exposure.
2. Suggestive and salacious illustration or suggestive posture is unacceptable.
3. All characters shall be depicted in dress reasonably acceptable to society.
4. Females shall be drawn realistically without exaggeration of any physical qualities.

Note: It should be recognized that all prohibitions dealing with costume, dialogue or artwork applies as specifically to the cover of a comic magazine as they do to the contents.

Marriage and Sex
1. Divorce shall not be treated humorously nor represented as desirable.
2. Illicit sex relations are neither to be hinted at or portrayed. Violent love scenes as well as sexual abnormalities are unacceptable.
3. Respect for parents, the moral code, and for honorable behavior shall be fostered. A sympathetic understanding of the problems of love is not a license for morbid distortion.
4. The treatment of love-romance stories shall emphasize the value of the home and the sanctity of marriage.
11. The letters of the word "crime" on a comics magazine cover shall never be appreciably greater in dimension than the other words contained in the title. The word "crime" shall never appear alone on a cover.
12. Restraint in the use of the word "crime" in titles or sub-titles shall be exercised.

General Standards Part B
1. No comic magazine shall use the word horror or terror in its title.
2. All scenes of horror, excessive bloodshed, gory or gruesome crimes, depravity, lust, sadism, masochism shall not be permitted.
3. All lurid, unsavory, gruesome illustrations shall be eliminated.
4. Inclusion of stories dealing with evil shall be used or shall be published only where the intent is to illustrate a moral issue and in no case shall evil be presented alluringly nor so as to injure the sensibilities of the reader.
5. Scenes dealing with, or instruments associated with walking dead, torture, vampires and vampirism, ghouls, cannibalism and werewolfism are prohibited.

General Standards Part C

All elements or techniques not specifically mentioned herein, but which are contrary to the spirit and intent of the Code, and are considered violations of good taste or decency, shall be prohibited.

Dialogue
1. Profanity, obscenity, smut, vulgarity, or words or symbols which have acquired undesirable meanings are forbidden.
2. Special precaution to avoid references to physical afflictions or deformities shall be taken.
5. Passion or romantic interest shall never be treated in such a way as to stimulate the lower and baser emotions.
6. Seduction or rape shall never be shown or suggested.
7. Sex perversion or any inference to same is strictly forbidden.
CODE FOR ADVERTISING MATTER

These regulations are applicable to all magazines published by members of the
Comics Magazine Association of America, Inc. Good taste shall be the guiding
principle in the acceptance of advertising.
1. Liquor and tobacco advertising is not acceptable.
2. Advertisement of sex or sex instruction books are unacceptable.
3. The sale of picture postcards, “pin-ups,” “art studies,” or any other reproduction
   of nude or semi-nude figures is prohibited.
4. Advertising for the sale of knives, or realistic gun facsimiles is prohibited.
5. Advertising for the sale of fireworks is prohibited.
6. Advertising dealing with the sale of gambling equipment or printed matter dealing
   with gambling shall not be accepted.
7. Nudity with meretricious purpose and salacious postures shall not be permitted
   in the advertising of any product; clothed figures shall never be presented in such
   a way as to be offensive or contrary to good taste or morals.
8. To the best of his ability, each publisher shall ascertain that all statements made
   in advertisements conform to fact and avoid misrepresentation.
9. Advertisement of medical, health, or toiletry products of questionable nature are
   to be rejected. Advertisements for medical, health or toiletry products endorsed
   by the American Medical Association, or the American Dental Association, shall
   be deemed acceptable if they conform with all other conditions of the Advertising
   Code.

PENNSYLVANIA—1955 SESSION—DECEDEDS’
ESTATE LAWS AMENDMENTS.

Because the revision of the several acts relating to decedent’s and trust
estates and their administration\(^1\) has failed to produce a single-unit codifi-
cation of this field of the law, legislative changes must be traced through an
extensive series of statutes. Moreover, due to the overlapping of various
statutes, amendments to one statute usually require supplementary amend-
ments in others. In discussing the changes produced by the Pennsylvania
Legislature at its 1955 session, the amendments will be reviewed by topic,
rather than by dealing with each bill individually.

The first change in the intestate laws relates to the share of the surviv-
ing spouse in cases of partial intestacy.\(^2\) The 1947 revision,\(^3\) unlike the
1917 act,\(^4\) did not make specific provision for those instances where one
died partially intestate, though the courts interpreted the 1947 act as though
it included the provisions which appeared in the prior legislation.\(^5\) Further
confusion was created by the specific withholding of the ten thousand dollar
($10,000) intestate share when the surviving spouse elected to take against
the will of the decedent. The current legislative session has provided that
the surviving spouse will be entitled to the ten thousand dollar ($10,000)
intestate share and one half of the balance, where there are no issue, in

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cases of partial intestacy; but it also provided that any amount taken under
the will is to be applied pro tanto to satisfy the intestate share.⁶

The spouse is no longer a preferred distributee of the ten thousand
dollar ($10,000) intestate allowance.⁷ The right to choose specific prop-
erty⁸ has been abolished, as well as the present procedure⁹ for determining
the surviving spouse's interest in land where there are no other heirs.¹⁰
These changes directly reflect the changes made in the Fiduciaries Act,
subsequent to the passage of the Wills Act in 1947,¹¹ which extended the
administrative jurisdiction to include real property. For the same purpose,
a change is also made in the section relating to escheat¹² (or conveyance to
the commonwealth as statutory heir) to reflect the greater power of the ad-
ministrator over land.¹³

The right of the spouse to elect to take against the will has been
amended to condition this right upon an election to take not only against
the will, but against all inter vivos trusts (except life insurance trusts)
which are voidable at the election of the surviving spouse under section
eleven of the Estates Act.¹⁴ Section eleven of the Estates Act was enacted
in 1947 to adopt the rule of Newman v. Dore,¹⁵ permitting the spouse to
elect against illusory transfers while retaining her share under the de-
dent's will. In a current decision (Brown's Estate¹⁶), reviewed elsewhere
in this issue, section eleven was interpreted as extending to life insurance
trusts. However, the recent amendment noted above excluding contracts of
life insurance, whether payable in trust or otherwise, from the operation of
section eleven would appear to alter the effect of the Brown decision.

Further additions to section eleven designed to integrate it with the
noted amendment to the Wills Act specify that where the surviving spouse
elects to take against illusory trusts created by the decedent spouse (and
necessarily therefore against the latter's will) where the decedent is par-
tially intestate, the amount taken by the surviving spouse under these pro-
visions is to be credited against the ten thousand dollar ($10,000) allow-
ance granted in cases of full intestacy in determining the sum due the sur-
viving spouse.¹⁷

A further change in the Wills Act abolished the time-honored rule
that a will made by a person domiciled outside of the commonwealth pass-

10. Pa. S. 690, § 3 (10) & (11), Sess. of 1955, respectively.
ing title to land situated in Pennsylvania must comply with the appropriate provisions of the Pennsylvania law.\textsuperscript{18} Now a will made by a party domiciled anywhere in the United States becomes valid if executed in accordance with the laws of the testator’s domicile.\textsuperscript{19} Complementary changes are found in the amendment to the Register of Wills Act for admitting such wills to probate after domiciliary probate.\textsuperscript{20} Wills of parties domiciled outside of the United States remain subject to the old rule. However, where the domiciliary procedure does not determine all the facts necessary to satisfy the Pennsylvania probate requirements the court may require the taking of additional evidence.\textsuperscript{21}

A revisor’s correction in the Wills Act changes “widow” to “surviving spouse” to reflect the extension of the old “widow’s exemption” to the “surviving spouse” provision\textsuperscript{22} adopted by the passage of the Fiduciaries Act of 1949.

There is, in addition to the surviving spouse’s intestate allowance of ten thousand dollars ($10,000),\textsuperscript{23} the family exemption for living expenses in the sum of seven hundred and fifty dollars ($750)\textsuperscript{24} which is treated as a claim or allowance against the estate. Since this latter pecuniary allowance was permitted only to the widow\textsuperscript{25} at the time of the revision of the Intestate Act, that act has also been amended to substitute “spouse” for “wife”\textsuperscript{26} to reflect the fact that this allowance has been expanded in application to include both spouses under the revision of the Fiduciaries Act of 1949.\textsuperscript{27} The latter act has been further amended to provide that where the allowance is made to children in the absence of an eligible spouse it may be paid only to such children who “are members of the same household as the decedent.”\textsuperscript{28} This change would appear to remove the question implied in the original phrasing as to whether or not the children must be dependent on the decedent at the time of the latter’s demise in order to qualify for the allowance. Thus a son who was the head of a household, in which his mother resided, would not be a member of the decedent’s household, and hence not entitled to the family exemption.\textsuperscript{29} However, under the amendment he would be entitled to the allowance because he would be a member of the same household as the decedent.

\textsuperscript{19} Pa. S. 689, § 1 (4) (b), Sess. of 1955.
\textsuperscript{20} Pa. S. 692, § 1, Sess. of 1955.
\textsuperscript{21} Ibid.
\textsuperscript{22} Pa. S. 689, § 1 (12), Sess. of 1955.
\textsuperscript{23} Pa. S. 690, § 2 (3), Sess. of 1955.
\textsuperscript{26} Pa. S. 689, § 1 (12), Sess. of 1955.
\textsuperscript{28} Pa. S. 697, § 2 (211), Sess. of 1955.
\textsuperscript{29} In re Rossi’s Estate, 69 Pa. D.&C. 190 (O.C., Phila. 1950).
The amendments also clarify several relatively minor points in the Fiduciaries Act. There had been some doubt whether the phrase, "first complete advertisement of the grant of letters," meant after the full period of three successive publications had elapsed or after the initial publication. This uncertainty has been removed by the addition of a new section which fully spells out the intent of the legislature on this point, especially as to the publication of letters in counties having no legal newspaper, but having papers of general circulation.

Though jurisdiction could be obtained over a foreign fiduciary by service upon him within the commonwealth, there was previously no jurisdiction to grant letters where the decedent neither resided nor had assets in Pennsylvania. The Fiduciaries Act has now been amended to permit the grant of letters in any county once service has been had on the foreign fiduciary, and such granting of letters will be deemed as conclusive throughout the commonwealth. From a practical standpoint the statutory jurisdiction would appear to be of little value when both the assets and the decedent’s residence are outside the state. Also, the amendment is not in accord with the generally accepted theory that administration of an estate is an in rem proceeding.

Another amendment makes crystal clear what was already fairly obvious. The statute of limitations on claims against the decedent is not shortened by the death of the latter. (note: though the running of the statute will not be tolled by the demise of the party against whom the claim is held, the claimant will not be entitled to participate in the distribution of the estate if the claim is not presented in time.)

Agreements creating charges on land are brought within the provisions of the Fiduciaries Act providing for a presumption of release or extinguishment after twenty years. The Fiduciaries Act of 1949 provides that a foreign executor, administrator c.t.a., testamentary trustee or testamentary guardian who wishes to exercise a power granted by will over Pennsylvania realty must probate the will in the commonwealth. By amendment, a foreign executor, administrator c.t.a., testamentary trustee or testamentary guardian is now required to probate the will in the commonwealth in all cases where he wishes to control Pennsylvania real estate, whether he wishes to exercise a testamentary or a mere administrative power. Purchasers from such a fiduciary are thus enabled to determine

32. Ibid.
34. PA. S. 697, § 2 (301), Sess. of 1955.
35. Ibid.
37. PA. S. 697, § 7 (804) (a), Sess. of 1955.
whether or not the power has been specifically conferred, whether it has been implied, or whether it has been denied. Further, they now may have a public record upon which to rely.

The provisions relating to partial revocation of a will by the subsequent divorce of the testator have been revised so that this statutory revocation refers not only to those provisions of the will favoring the former spouse,40 but also to those merely relating to the former spouse.41 The immediate question raised by this section is whether it will be interpreted to include appointments as executors and testamentary guardians as well as powers conferred upon the spouse. The language of the amendment seems to demand an affirmative reply. The new section states that if the testator is divorced all provisions referring to the former spouse (in favor of, and relating to) will thereby become ineffective for all purposes.42

Another change is presented by the extension of the power of a testamentary guardian to include the management of funds conveyed to minors by inter vivos conveyances.43

It had heretofore been provided that in construing a will gifts to children would include adopted and illegitimate children in certain cases.44 It is now provided that the same rules will apply to the construction of the three sections of the Wills Act relating to lapsed and void devises and legacies. Thus a legacy will not lapse in those cases where a legatee is survived by an adopted or illegitimate child who would have been considered his child in construing dispositive provisions of a will.45

Two other important changes have been made in the Estates Act of 194746 in addition to the revision of section eleven which was noted previously. The provisions for termination of trusts have been made retroactive and the statutory rule against accumulations has been repealed. According to the comment of the Joint State Government Commission section two was added to the Estates Act to avoid the rule that a trust could not be terminated without the consent of all parties in interest. This rule made it impossible to terminate a trust in which unborn or unascertained parties, or those not sui juris, were parties in interest.47 This is to be distinguished from the problem of terminating a spendthrift or indestructible trust without the consent of the settlor or testator when all the other parties consent. The language of the act, "regardless of any spendthrift or similar provisions therein," is more consistent with an intent to permit termination of spendthrift trusts than that

42. Ibid.
43. Pa. S. 689, § 3 (18) (b), Sess. of 1955.
contemplated by the commission. The statute has now been made retroactive apparently in response to the decision in Bosler's Estate. The revision now raises the question of the act's constitutionality in permitting the taking of property from non-consenting beneficiaries of a trust created prior to the enactment of the revision on April 1, 1956, as discussed in McKean's Trust Estate. This raises the further problem of whether the act is to apply to indestructible and spendthrift trusts only where the wish of the testator and not the absence of consenting parties makes termination a problem.

Pennsylvania has regulated accumulations in trusts by statute since 1853, imposing an even more drastic rule than that on which it was modeled—England's Thellusson Act. Accumulations were permitted in the commonwealth during the lifetime of a settlor. Though income accruing to a minor could be withheld until such child reached majority it could not be permanently capitalized. The statute threatened an incidental effect on some administrative matters, and in 1947 the provision was made more liberal, allowing a true accumulation in the case of minors and exempting administrative provisions. The current legislative enactment has now abolished the rule, and has substituted in its place the period of the Rule against Perpetuities which was held to be applicable in the leading English case, Thellusson v. Woodford. However, it is to be noted that the amendment spells out the fact that the Pennsylvania interpretation of the rule is to be applied, thus indicating that accumulations will be governed by the actuality rather than the possibility interpretation. Since there were no cases concerning accumulations heard by the Pennsylvania courts prior to the adoption of the statutory provision in 1853, it will be interesting to note whether or not the courts will adhere to the rather clear legislative intent in setting up an accumulation statute based on the English Thellusson Acts as altered by the actuality rule or whether they will devise a new rule in the absence of a Pennsylvania common-law definition.

Jurisdiction over incompetent's estates has now been transferred to the orphan's court in all counties except Philadelphia, and there is a general revision of the Incompetent's Estate Act of 1951 to accompany the transfer. The old act remains applicable in Philadelphia county. The new act

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51. The original "Thellusson Act" was 1800, 40 Geo. 3, c. 98. For the present English statute, see 1950, 16 Geo. 5, c. 20, §§ 164-166. (20 Halsbury's Statutes of England, 2d ed., 1950, pp. 771 ff.)
55. Pa. S. 696, Sess. of 1955. (art. VIII, § 801(a) contains the text repealing the Incompetents' Estates Act of 1951 in all counties except Philadelphia, with the further exception of those cases which are already under the jurisdiction of the various Courts of Common Pleas of the counties. Complementary changes are to be found in Senate Bill 693, which amends the Orphans' Court Act of 1951.

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increases to fifteen hundred dollars ($1500) the size of the estate which may be settled without administration; it clarifies the relationship between the guardian and the personal representative of the incompetent in accordance with the decision in Rambo's Estate, and provides for docketing judgments against guardians in the court of common pleas. In an amendment to the Orphan's Court Act of 1951 the right to trial by jury on the issue of incompetency has been preserved, the orphan's court being required to treat a verdict on this issue as conclusive.

In the administration of decedent's estates an important revision increases the amount which may be distributed without administration to fifteen hundred dollars ($1500). Heretofore, wages and salaries had been made payable by the decedent's employer to certain dependents whether or not there had been an administration, and these amounts have not been included in the computation of whether an estate exceeded the old ceiling figure of one thousand dollars ($1000) for the purpose of making formal administration a necessity. Under the revision pensions have been added to the excluded class. In cases where the gross real and personal estate is found not to exceed fifteen hundred dollars ($1500) the personal representative may petition for discharge without a formal accounting. Here too the amount has been increased from one thousand dollars ($1000) to fifteen hundred dollars ($1500).

In cases where distributees live in foreign countries, and where it is suspected that any sums awarded to them will simply be confiscated, it has been felt that the court should have power to withhold distribution. Thus a new section provides for the withholding of such sums until that court is satisfied that the distributee will have the actual "benefit, use, enjoyment and control." The amount to which the beneficiary is entitled is to be converted into cash and paid into the state treasury where the beneficiary will be credited with two per cent (2%) interest until the court directs payment of the gross amount.

62. Ibid.
68. Interview with John George Stephenson, III, Esquire, Professor of Law, Villanova University School of Law, Villanova, Pa., on March 17, 1956, concerning subjects discussed at recent meetings of the Pennsylvania Bar Association.
70. Ibid.
The legislature has also put an end to the requirement that there be an appraisal to accompany the inventory, since independent appraisals are made by the taxing authorities (both state and federal). The appraisals filed under the old rule have never been deemed conclusive, and in reality have become superfluous. Under the amendment the personal representative simply files his inventory and any valuations may be contested by any interested party at any time prior to the expiration of the period for making objections to the first accounting.

There has been an extensive revision of the applicable procedure for filing claims made necessary by the fact that realty now passes through the administration of an estate. The personal representative may now distribute real property as well as personal property after the expiration of one year from the first complete advertisement of his account. All claims not properly filed at that time are discharged. This change extends to realty the rule formerly applicable only to personalty. The procedure for making claims against personal property is generally unchanged, the claimant being entitled to notify the personal representative before actual distribution. However, in order to bind real property the claimant must file his claim with the court clerk, within one year after the decedent's death, and this filing establishes a lien for five years. Such claim will expire at the end of that period unless the personal representative files an account or the claimant files a petition to compel an accounting within the five years. It is believed that the practice of filing claims with the clerk will become general and that it may ultimately be made available as to all claims. Existing liens and charges created before death are not affected by administration.

Worthy of specific mention is the fact that the Orphan's Court Partition Act of 1917 and its amendments as to partition, valuation, and sale of real estate of persons dying after December 31, 1949 have been repealed. Apparently the legislature feels that the Fiduciaries Act of 1949 will encompass this area of the law (distribution of the realty of decedents), and, hence, the Orphan's Court Partition Act and its amendments are no longer needed. Notwithstanding the weight of this argument, it may well be argued by some that the Revised Price Act will take juris-

72. Ibid.
73. Pa. S. 697, § 3 (405), Sess. of 1955.
75. Ibid.
77. Ibid.
diction over part of the field heretofore covered by the repealed legislation due to the particular wording of the Price Act. If this is so, the orphan’s courts will continue to have concurrent rather than exclusive jurisdiction over the partition and exchange (sale) of land.83

In revising the Orphan’s Court Act of 195184 the legislature provided that the verdict of a jury in the orphan’s court should be conclusive85 rather than merely advisory as had formerly been the case.86 This was in accordance with the recommendation of the Joint State Government Commission87 which regarded as historically sound the dissenting opinion in Fleming’s Estate.88 It was there pointed out that since the validity of the bequest could only be tried in an action of ejectment at law, and was not within the jurisdiction of the ecclesiastical courts, the Pennsylvania constitution required preservation of the right to trial by jury as in an action in ejectment. The change was unpopular with orphan’s court judges who were accustomed to treating the verdict as advisory only. Further, they felt that the majority opinion in Fleming’s Estate89 had resolved the constitutional question. The act has now been amended so that the verdict once again is advisory only except where title to the decedent’s realty is being determined, and on the question of the decedent’s competency.90 The procedure for impanelling jurors and conducting the trial has been somewhat amplified.91

Other basic changes have been made with respect to investments by fiduciaries.92 The first relates to the method of determining whether the stock of a corporation which has merged or consolidated within the prior sixteen years may be considered as a qualified investment.93 Under the new rule earnings of the predecessor or constituent corporations are consolidated to determine whether the corporation has met the net profit requirements.94 As a further liberalization of the old rule the dividend requirements for the consolidated corporation are satisfied so long as one of the predecessor of constituent corporations has met the statutory dividend requirements.95 Secondly, the amount which may be invested in an interest-bearing time deposit with a savings institution has been increased from fifteen hundred dollars ($1500)96 to the full amount insured by the Federal

86. Comment, 1 Vill. L. Rev. 129 (1956).
87. Supra note 68.
88. 265 Pa. 399, 109 Atl. 265 (1919) (dissenting opinion).
89. 265 Pa. 399, 109 Atl. 265 (1919).
95. Ibid.
Deposit Insurance Corporation,\(^97\) which is now ten thousand dollars ($10,000).

The Proposed amendment to the Banking Code\(^98\) was defeated. It proposed to amend the Code insofar as it relates to mortgage investment funds for the collective investment of trust estates.\(^99\) Since the passage of the Internal Revenue Act of 1936\(^100\) all common trust funds must be operated in accordance with the regulations of the Board of Governors of the Federal Reserve System if they are to enjoy corporate exemption from taxation.\(^101\) The regulations of the Board of Governors,\(^102\) however, permit the operation of mortgage investment funds only when authorized by state law. It is therefore necessary to recognize two controlling sources of law, as is done in the Fiduciaries' Investment Act of 1949.\(^103\)

The Banking Code has contained provisions authorizing mortgage investment funds similar to the federal regulations since 1937.\(^104\) These provisions would be repealed and replaced by a single section.\(^105\) The proposed section is greatly simplified and less detailed, no doubt in recognition of the fact that it is a slow process to amend the state law to reflect changes in the administrative regulations. The tenor of the new section is similar to the old with a few exceptions. Participations are now limited to five thousand dollars ($5000).\(^106\) Mandatory provisions for closing the fund to new investments\(^107\) and for placing it in liquidation\(^108\) have been replaced by an authorization to the Board of Directors or the Secretary of Banking to take such action when it is deemed advisable or necessary for the protection of the participating trusts.\(^109\) The amendment would be retroactive in effect,\(^110\) as was its predecessor.

\(\textit{Neale F. Hooley}\)

\(^{97}\) Pa. S. 688, \$2 (12) (3), Sess. of 1955.


\(^{100}\) Internal Revenue Code of 1936, 49 Stat. 1648-1756.

\(^{101}\) Ibid, \$ 169; now \$ 584 of the INT. REV. CODE of 1954, 68 Stat. 203.

\(^{102}\) Regulation F, 1 F.R. 483, as amended; 12 C.F.R. \$ 206.17 (Supp. 1954).


\(^{105}\) Pa. S. 695, \$2, Sess. of 1955. (This bill is still in committee and has not yet been passed by the legislature.)

\(^{106}\) Pa. S. 695, \$2 (d), Sess. of 1955.


\(^{109}\) Pa. S. 695, \$2 (g), Sess. of 1955.

\(^{110}\) Pa. S. 695, \$2 (h), Sess. of 1955.