1959

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CONSTITUTIONAL LAW—CENSORSHIP—FREEDOM TO ADVOCATE IDEAS.

*Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York* (U.S. 1959)

A license for exhibition was denied the film "Lady Chatterly's Lover," on the basis that it was immoral under a New York statute empowering a board of censors to examine every film prior to exhibition and to refuse to license any film found to be "immoral or of such a character that its exhibition would tend to corrupt morals or incite to crime." Upon review, the Regents of the State of New York upheld the denial of the license, but on the broader ground that "the whole theme of this picture is immoral under said law, for that theme is the presentation of adultery as a desirable, acceptable, and proper pattern of behavior." The appellate division annulled this determination, but on appeal the court of appeals overruled the decision of the lower court. The Supreme Court of the United States reversed and held that the statute was an unconstitutional interference with the freedom to advocate ideas guaranteed by the first amendment, and thus was an infringement of the due process clause of the fourteenth amendment. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, 79 Sup. Ct. 1362 (1959).

In *Mutual Film Corp. v. Industrial Com'n. of Ohio* the Supreme Court of the United States was for the first time presented with the contention that a state statute requiring prior approval of motion picture film was an unconstitutional violation of freedom of speech and press. The Court rejected this proposition and held that the guarantees of freedom of speech and press were not extended to motion pictures because the exhibition of them was a business conducted only for profit. A more liberal view in the area of first amendment rights began in 1925 when

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2. *Id.*, § 122-a.
the Court in *Gitlow v. New York* decided that the first amendment guarantees of freedom of speech and press are safeguarded against state action by the due process clause of the fourteenth amendment. "Big business" came within the doctrine of the *Gitlow* case when the Supreme Court held in *Thomas v. Collins* that profit making publications were protected by the first and fourteenth amendments. The first indication that a motion picture would be considered as a profit-making publication within the ambit of protection afforded by the guarantee of freedom of speech and press came in *United States v. Paramount Pictures*. Finally, in 1952, the Supreme Court was called upon to decide specifically whether the first and fourteenth amendment guarantees applied to motion pictures, and it held in *Joseph Burstyn, Inc. v. Wilson*, that a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious," because by the use of such a vague standard there is an unconstitutional infringement upon freedom of speech and press. However, the *Burstyn* decision cannot be construed as giving motion pictures absolute protection from infringement upon the guarantees of freedom of speech and press, as limitations on them in other areas have always been upheld. The limitations on freedom of speech and press, which are not within the bounds of constitutional protection, extend to the lewd, obscene, profane, libelous, and words which by their nature injure or incite to an immediate breach of the peace.

The problem before the Court in the instant case is determining whether a film advocating sexual immorality as a proper pattern of behavior in certain circumstances comes within those limitations which a state may constitutionally impose upon freedom of speech and press. As a result of prior Supreme Court decisions the expression of ideas can only be validly prohibited if it is found that they create a clear and present danger of producing a serious substantive evil; but the remoteness of proving such a contention in the instant case was so great that it was not made by the Board of Regents. Thus the statute in question is a limitation preventing the advocacy of an idea which is contrary to the prevailing

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7. 268 U.S. 652 (1925).
8. *Id.* at 666. The Court said: "... we may and do assume that freedom of speech and the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States." This decision has been subsequently affirmed. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931).
10. 334 U.S. 131, 166 (1948). The Court said: "We have no doubt that moving pictures, like newspapers and radios, are included in the press whose freedom is guaranteed by the First Amendment."
moral code of the community. Such expression is, nevertheless, protected by the first and fourteenth amendments, as it is clear that the advocacy of conduct proscribed by law is not a sufficient justification for denying free speech. While the decision in this case certainly solves a bothersome problem, its limited scope still leaves the area in an indecisive state. The contention that all prior restraints on motion pictures are unconstitutional still must be answered, since the majority gave no indication as to whether they are bad on their face, or whether their unconstitutionality would depend on the subject matter and the extent of the limitation. Even admitting the validity of censorship statutes, it still must be determined whether there are present in motion pictures certain characteristics which will permit a state to impose stricter regulations or whether they are to be guided solely by the constitutional safeguards which have been maintained for newspapers, books, and individual speech. Since the Court has traditionally based its decisions on the narrowest grounds possible, the answers to the questions remaining can only be determined when the proper factual elements arise. However, the Burstyn case and the present one are strong indications that the Court will adopt for motion pictures the same complete set of freedoms and limitations applicable to other publications protected by the first and fourteenth amendments.

Harry J. Oxman

CONSTITUTIONAL LAW—UNLAWFUL SEARCH—HEALTH INSPECTION WITHOUT WARRANT NOT VIOLATION OF DUE PROCESS.

Frank v. Maryland (U.S. 1959)

Upon receiving a complaint by a neighbor of the presence of rats in the vicinity of appellant’s house, a representative of the City Health Department began an inspection of the area. He found the exterior of appellant’s house in an extreme state of decay, and in the rear of the property stood a half-ton pile of straw, trash, and debris mixed with rodent feces. Though not in possession of a warrant, the inspector requested permission to conduct a further inspection of the house and appellant refused. The inspector left, returning the next day accompanied by two police officers, again without a warrant. His knock this time met with no reply. Shortly thereafter, appellant was arrested and fined

16. Justices Black and Douglas, in separate concurring opinions reaffirmed their previous stands that all such prior censorship is unconstitutional. Kingsley Int’l Pictures Corp. v. Regents of the Univ. of the State of New York, 79 Sup. Ct. at 1366 and at 1370.
twenty dollars for violating Section 120 of Article 12 of the Baltimore City Code which provides that the occupant of any house wherein the Commissioner of Health has cause to suspect a nuisance exists shall forfeit twenty dollars for every refusal to open the house for inspection. On appeal, the Criminal Court of Baltimore, in a de novo proceeding, also found appellant guilty. The Maryland Court of Appeals denied certiorari and, on appeal, the Supreme Court of the United States held, with four Justices dissenting, that appellant’s conviction for resisting inspection of his house without a warrant was not obtained without due process of law as guaranteed by the fourteenth amendment. Frank v. Maryland, 79 Sup. Ct. 804 (1959).  

Freedom from unreasonable searches and seizures has long been recognized as a basic liberty, guaranteed by the fourth amendment and protected from state interference by the due process clause of the fourteenth amendment. Although it is settled law that arbitrary intrusions to procure evidence for use against a suspect in a criminal proceeding are unreasonable and violate due process, there is little case law as to the constitutionality of health inspections of private homes without a warrant. A Maryland case, Givner v. State, held that while a state may not affirmatively authorize an unreasonable search and seizure, an attempted inspection by a health inspector is a valid exercise of the police power, and not an unreasonable search. Likewise the Supreme Court of Ohio, citing the Givner case, decided that the inviolability of a homeowner’s “castle” is subordinate to the general health and welfare of the community. This problem of health inspections was considered by the United States Court of Appeals in 1950 in District of Columbia v. Little, and the majority, with a strong dissenting opinion, held that “health officials without a warrant cannot invade a private home to inspect it to see that it is clean and wholesome . . . .” On certiorari to the Supreme Court how-

1. BALTIMORE, MD., CITY CODE art. 12, § 120 (1950).  
4. U. S. CONST. amend. IV. “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ..”  
5. U. S. CONST. amend. XIV, § 1. “. . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . .”  
6. “The knock at the door, whether by day or night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights . . . [and] we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.” Wolf v. Colorado, 338 U.S. 25, 28 (1949).  
8. 210 Md. 484, 124 A.2d 764 (1956). The state court upheld the same ordinance questioned in the principal case. Similar ordinances have been in effect in Baltimore since 1801. See Frank v. Maryland, 79 Sup. Ct. at 810.  
11. Id. at 20.
ever, the Court was content to affirm the decision of the lower court on the facts, and not discuss the constitutional question of unlawful search.\textsuperscript{12} The instant case, therefore, is the first time the Supreme Court has considered the constitutionality of an ordinance authorizing a health inspection without a warrant. In upholding this ordinance, the majority relied on the fact that the ordinance was not an infringement upon the right to be secure from unauthorized intrusions to obtain evidence,\textsuperscript{13} but only “the slightest restriction” on the right to personal privacy.\textsuperscript{14}

The dissenting Justices sound a warning that the instant decision is a dangerous inroad into the age-old liberty characterized by the apothegm “a man’s home is his castle.”\textsuperscript{15} The majority however, does not deny this basic liberty of personal privacy, but decides that the invasion here is not an unreasonable one. The Court would seem to agree with the dissenting judge in the \textit{Little} case, that this right and the other personal liberties guaranteed in the Bill of Rights are not absolute and unqualified,\textsuperscript{16} and when balanced against the benefits accruing to the general health and safety of the public, this invasion of the privacy of a single citizen touches only on “the periphery of the important interests safeguarded by the fourteenth amendment.”\textsuperscript{17} Although the dissent would say that any search without a warrant is unreasonable, except in cases of emergency, the majority asserts that these inspections are of such importance that expediting them in this manner is a great advantage to the community. Search warrants are issued in the furtherance of criminal proceedings, usually allowing for the seizure of personal property for use as evidence therein,\textsuperscript{18} and it is questionable whether a health inspector could even obtain a warrant for a mere inspection of conditions.\textsuperscript{19} In addition, the insignificant number of refusals by individuals to allow inspections\textsuperscript{20} would make it appear that such warrants are not deemed necessary by the general public, and would serve only to hinder the administration of public

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\item \textsuperscript{12} District of Columbia v. Little, 339 U.S. 1 (1950). The Court decided that the mere failure of the defendant to unlock her door was not an “interference” which was prohibited by the District of Columbia regulation in question, and did not discuss the question of invasion of privacy.
\item \textsuperscript{13} Frank v. Maryland, 79 Sup. Ct. at 808. “... \textit{I}t was on the issue of the right to be secure from searches and seizures for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.” See Boyd v. United States, 116 U.S. 616 (1886).
\item \textsuperscript{14} Frank v. Maryland, 79 Sup. Ct. at 809. The majority urges that this is only a slight restriction based on the qualifications placed on the inspection by the ordinance — that there be valid grounds for inspection, that it be made in the day time, that a request be made of the homeowner, and that there be no forceful entry.
\item \textsuperscript{15} William Pitt, the Earl of Chatham, protested the invasion of the home most eloquently: “The wind may enter, the rain may enter, but the King of England may not enter. All his forces may not cross the threshold of the ruined tenement” (quoted by Charles Abrams in the \textit{NATIONAL HOUSING CONFERENCE, HOUSING YEARBOOK OF 1956, 17}).
\item \textsuperscript{16} District of Columbia v. Little, 178 F.2d at 24.
\item \textsuperscript{17} Frank v. Maryland, 79 Sup. Ct. at 809.
\item \textsuperscript{18} Camden County Beverage Co. v. Blair, 46 F.2d 648 (3d Cir. 1930); People v. Kempner, 208 N.Y. 16, 101 N.E. 794 (1913).
\item \textsuperscript{19} District of Columbia v. Little, 178 F.2d at 23.
\item \textsuperscript{20} Frank v. Maryland, 79 Sup. Ct. at 812.
\end{itemize}
health programs. Moreover, requiring the same quantum of probable cause for issuance of a health inspection warrant as is necessary in criminal proceedings would place a stumbling block in the path of an efficient health plan, while a “synthetic warrant”\textsuperscript{21} issued for little or no cause argues for the elimination of a warrant requirement completely. In any event, on the facts of the instant case, the search does not seem unreasonable, and the Court has left open to itself a method of retreat, in that on other facts, it may find the invasion unreasonable and invalid.

_Thomas J. Ward_

CORPORATIONS—INSIDER PROFITS—LIABILITY OF A DIRECTOR UNDER SECTION 16(b) OF THE SECURITIES EXCHANGE ACT OF 1934.

_Adler v. Klawans_ (2d Cir. 1959)

This action was brought under Section 16(b) of the Securities Exchange Act of 1934\textsuperscript{1} by a stockholder on behalf of his corporation to recover profits made by appellant, a director of the corporation, on the sale of its stock within six months after purchase. Despite the fact that appellant had not been a director at the time this stock was purchased, the district court rendered summary judgment for the stockholder in the amount of the profits realized. On appeal, the Court of Appeals for the Second Circuit affirmed and held that section 16(b) applied even to an individual who was not a director at the time of both the purchase and sale of the stock, provided he held the position of director at the time

\textsuperscript{21} Ibid. “Dispensing with rigorous constitutional restrictions for its issue,” and providing for a “loose basis for granting a search warrant,” would make such a warrant in effect a synthetic one, according to Mr. Justice Frankfurter.

\textsuperscript{1} 48 Stat. 897 (1934), 15 U.S.C. § 78 p(b) (1951). The applicable provisions of this section are:

“For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.”
of either purchase or sale. In the computation of profits, however, the court refused to consider as profits dividends paid on shares which were subsequently sold at a loss since the loss exceeded the amount of the dividends. Adler v. Klawans, 267 F.2d 840 (2d Cir. 1959). 2

Section 16(b) was designed to eliminate the profitable use of confidential information by corporate directors, officers, and ten percent beneficial owners, commonly called "insiders", in short-term (i.e., six month) trading in securities of their own corporation. 3 As a remedial provision, the section must not be strictly construed but must be interpreted as consistently with its legislative purpose as is possible. 4 This was accomplished in Smolowe v. Delendo Corp. 5 by the adoption of an objective standard whereby mere proof of a sale and purchase within six months is conclusive against the defendant. This eliminates the opportunity for any insider to impose such defenses as non-user of confidential information or intent to aid the corporation by stabilizing the price of its securities. 6 The Smolowe case also introduced a rule of profit computation designed to "squeeze all possible profits out of stock transactions" 7 by requiring that the highest selling price within the six month period be matched against the lowest purchase price therein, and the next highest selling price against the next lowest purchase price, and so on, with no deduction for losses. 8 The above holdings in the Smolowe case were complemented by the decision in Park & Tilford, Inc. v. Schulte 9 which defined a purchase to include an executory contract to purchase as well as an executed purchase, and thus prevented a scheme of buying now for delivery after the expiration of the six month period as a means of avoiding the effect of the statute. 10 The Park & Tilford case also decided that preferred stock convertible into common did not fall within the exemption for securities

5. 136 F.2d 231 (2d Cir. 1943).
6. Id. at 236, note 5.
7. 136 F.2d at 239.
8. In determining the profits the court rejected the first in — first out method (the security which is sold is presumed to be the first purchased within the period) and the average cost method (the average purchase price during the period is compared to the average selling price therein to determine profit) as inconsistent with the purpose of the section. This rule was reaffirmed after independent analysis by Judge Learned Hand in Gratz v. Clauthon, 187 F.2d 46 (2d Cir. 1951), and was applied to the purchase and sale of stock options in Steinberg v. Sharpe, 95 F. Supp. 32 (S.D.N.Y. 1950).
9. 160 F.2d 984 (2d Cir. 1947).
10. Id. at 987.
acquired in good faith in connection with a previously contracted debt.\textsuperscript{11} This restrictive interpretation of exemptions to the act was followed in\textit{Stella v. Graham-Paige Motors Corp.}\textsuperscript{12} which held that a person will be considered a ten percent beneficial owner at the time of purchase even if this purchase increased his ownership to ten percent, thus in effect denying to him the benefit of the exemption for ten percent beneficial owners who are not such both at the time of purchase and sale.\textsuperscript{13} Other cases under the statute have also emphasized its remedial nature by holding that the corporation cannot waive its rights under section 16(b);\textsuperscript{14} that it is immaterial if the corporation is benefited by the sale,\textsuperscript{15} and that a rule of the Securities and Exchange Commission which conflicts with the purpose of the Securities Exchange Act of 1934 is invalid.\textsuperscript{16}

The holding of the instant case that the director need not be such both at the time of the purchase and sale to be included within the provisions of section 16(b) is the first decision on that point in the circuit courts.\textsuperscript{17} This holding is important because it closes up what was a possible loophole\textsuperscript{18} in the statute, and also because it points up the fact that the courts are still construing the act so as to effectuate its remedial purpose. This consistent policy of the courts also tends to further the purpose of the act by discouraging insiders from engaging in practices which if questionable, will probably be comprehended as abuses within the act.

It should be noted, however, that in computing the profits in this case the court did not consider as profits dividends on stock subsequently sold at a loss in excess of the amount of the dividends, but held that dividends on a share of stock cannot be considered as a profit apart from the purchase and sale price of that share.\textsuperscript{19} Therefore, it seems that for the purpose of determining the profit on the sale of any one share of stock all monetary benefits which the owner has received as a result of his ownership of such stock must be evaluated along with the difference between

\textsuperscript{11} See note 1 \textit{supra}. Convertible stock is either preferred or common stock which can be traded in for stock of the other class at the owner's option. See \textit{Ballantine, Corporations} \textit{512} (2d Ed. 1946). The way in which convertible stock is used to secure profits can be best illustrated by an example. \textit{A} owns 100 shares of preferred stock (market price $10 per share), and each share is convertible into two shares of common stock. If common stock is worth $5.50 per share on the market and \textit{A} exercises his option, he makes a profit of $100 and he still owns 200 shares of common stock of the company. There may, of course, be a conversion price and no trade will then be necessary.

\textsuperscript{12} 232 F.2d 299 (2d Cir. 1956).

\textsuperscript{13} See note 1 \textit{supra}.

\textsuperscript{14} \textit{Jefferson Lake Sulphur Co. v. Walet}, 202 F.2d 433 (5th Cir. 1953).

\textsuperscript{15} \textit{Magida v. Continental Can Co.}, 231 F.2d 843 (2d Cir. 1956).


\textsuperscript{17} 267 F.2d at 842. \textit{Blau v. Allen}, 163 F. Supp. 702 (S.D.N.Y. 1958) decided the question in the same way in the district court. For an interesting prediction of the decision see \textit{Loss, Securities Regulation, supra} note 3 at 578.

\textsuperscript{18} If the case were decided the other way, prospective directors who have confidential information could buy stock of the corporation prior to their formal installation as directors and sell it at will.

\textsuperscript{19} 267 F.2d at 849.
the purchase and sale price of the stock. Even though the court did not expressly decide the problems of whether dividends are profits when such dividends exceed the subsequent loss on the sale of the stock or when the dividends are accompanied by a profit on the sale of the stock, it did provide a means whereby these situations can be resolved when they arise.

George R. Kucik

CRIMINAL LAW—INSANITY AS A DEFENSE—TESTS FOR CRIMINAL RESPONSIBILITY.

State v. Lucas (N.J. 1959)

Defendant was convicted of felony murder on evidence from which the jury found he set fire to a church rectory resulting in the death of three persons. On appeal, the defendant urged that the M'Naghten rule not be continued as the test for insanity in New Jersey. Although the state argued that the issue was not properly raised, the court chose to by-pass the state's argument and decide the issue on its merits. The court affirmed the conviction, holding that the M'Naghten rule will continue to be the test for criminal responsibility in New Jersey, until the court should be firmly convinced by scientific fact that a test other than the M'Naghten one would serve the basic end of the state's criminal jurisprudence.


The classic test of criminal responsibility adhered to by a majority of the common law jurisdictions derives from the rule in M'Naghten's Case. In an advisory opinion following the decision in that case the judges set forth what has since popularly come to be known as the "right and wrong" test, which from its inception has been subject to criticism.
and to attempts at revision.\textsuperscript{4} In spite of its stormy history the rule has been constantly reaffirmed,\textsuperscript{5} and thus far, no other rule for determining criminal responsibility has made any serious inroad on its supremacy.\textsuperscript{6} The M'Naghten rule has been broadened in some jurisdictions to include the irresistible impulse test\textsuperscript{7} and in a few the irresistible impulse test replaces the right and wrong test.\textsuperscript{8} The most complete rejection of the right and wrong criterion occurred in 1870, when the Supreme Court of New Hampshire,\textsuperscript{9} sweeping aside both the M'Naghten and the irresistible impulse tests, set forth a broad rule for determining legal insanity.\textsuperscript{10} New Hampshire stood alone until the decision in Durham v. United States was handed down by the Circuit Court of Appeals for the District of Columbia in 1954,\textsuperscript{11} admittedly following New Hampshire and repudiating both the M'Naghten and the irresistible impulse tests.\textsuperscript{12} The court formulated a broad rule, similar to the New Hampshire rule, to be applied prospectively, saying that the test to be used in the Durham retrial and in all future cases in the jurisdiction in which insanity shall be a defense is "simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect".\textsuperscript{13} In the Lucas case, the New Jersey court considered both the Durham and irresistible

\textsuperscript{4} Courts were asked to broaden the rule at least as early as 1846. Commonwealth v. Mosler, 4 Pa. 264 (1846).

\textsuperscript{5} In the Lucas opinion, Judge Burling says, "It [the M'Naghten rule] has been periodically attacked as unsound or archaic for six decades, but the New Jersey courts have adhered to the rule." State v. Lucas, 152 A.2d 50, 66 (N.J. 1959); and in Commonwealth v. Novak, 395 Pa. 199, 210, 150 A.2d 102, 108 (1959), the Pennsylvania court says, "The M'Naghten Case rule or 'the right and wrong test' has been repeatedly reaffirmed by this court."

\textsuperscript{6} In some jurisdictions the rules have been incorporated into the statutes. N. Y. PENAL LAW § 1120; ORLA. STAT. tit. 21, § 152 (1951).

\textsuperscript{7} "The irresistible impulse doctrine is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act." Thompson v. Commonwealth, 193 Va. 704, 806, 70 S.E.2d 284, 292 (1952). See also, State v. Green, 78 Utah 580, 6 P.2d 177 (1931); State v. Johnson, 40 Conn. 136 (1873).

\textsuperscript{8} Generally, the first of the M'Naghten rules is eliminated, the second is left in because if the accused does not know the difference between right and wrong there is no need to apply the irresistible impulse test. The defendant "must be so bereft of mind as to render him incapable of knowing right from wrong, or, if knowing, incapable of controlling his actions." Sharp v. Commonwealth, 308 Ky. 765, 767, 215 S.W.2d 983, 984 (1948). See also, Korzak v. State, 202 Ark. 921, 154 S.W.2d 348 (1941); Commonwealth v. McCann, 325 Mass. 510, 91 N.E.2d 214 (1950).

\textsuperscript{9} State v. Pike, 49 N.H. 399 (1869).

\textsuperscript{10} The court held that no particular test of mental disease is a matter of law, but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury. State v. Pike, 49 N.H. 399 (1869).

\textsuperscript{11} 214 F.2d 862 (D.C. Cir. 1954).


\textsuperscript{13} Durham v. United States, 214 F.2d 862, 874, 875 (D.C. Cir. 1954).
impulse rules and concluded by strongly reaffirming its adherence to the M'Naghten rule.\textsuperscript{14} New Jersey is among the more recent jurisdictions which have refused to follow \textit{Durham}.\textsuperscript{15} At least nine other jurisdictions have rejected the \textit{Durham} rule within the last five years, reaffirming existing tests,\textsuperscript{16} and California courts have suggested that any proposed changes in the test for criminal responsibility should be addressed to the legislature not to the judiciary.\textsuperscript{17} But the very bulk of material written by way of criticism and discussion and the number of times courts have found it necessary to review the right and wrong test before reaffirming, would seem to indicate that courts, legal experts and medical experts alike have felt that the inadequacies of existing rules need correction. \textit{Durham} is obviously not an answer, at least not an answer the courts will accept. The rule that critics hailed as enabling psychiatrists to give expert testimony without being shackled by the archaic terminology of “right and wrong”,\textsuperscript{18} the courts have found vague, undefined and incapable of application.\textsuperscript{19} The disagreement among modern schools of psychiatry has impressed courts as resulting in uncertain and unreliable definitions of mental disease leaving the jury with no guide for decision.\textsuperscript{20} Justice Burling in the \textit{Lucas} opinion reiterates all of these criticisms.\textsuperscript{21} It is apparent that the courts do not intend to reject rules which have proved durable and practical in favor of no test at all. Therefore, the answer must be with M'Naghten rather than without it. To be acceptable a test for determining criminal responsibility must comply with traditional Anglo-American legal ethics which dictate that persons able to make relatively free moral decisions be responsible for their voluntary conduct. The judgment required of the jury under the M'Naghten rule, whether the accused “knew” right from wrong, reflects this attitude toward responsibility. A person knows, not only through intellectual cognizance but through emotional experiences, physical sensations, psychic reactions to group associations and adjustment to reality, as well. If defined in these terms, “know” comprehends “understand”, “realize”, “experience”, and other words appropriate to the vocabularies of the experts and juries alike. With this construction of the word “know”, the psychiatrist when called upon as an expert witness, would be able to testify in the language of his profession, and com-

\textsuperscript{14} State v. Lucas, 152 A.2d 50, 68 (N.J. 1959).
\textsuperscript{16} In the \textit{Lucas} opinion Judge Burling cites ten jurisdictions as having recently rejected \textit{Durham}. Some of these, Illinois, Indiana, Massachusetts and Michigan follow the irresistible impulse test. State v. Lucas, 152 A.2d 50, 67 (1959).
\textsuperscript{17} People v. Berry, 44 Cal.2d 426, 282 P.2d 861 (1955); People v. Ryan, 140 Cal. App.2d 312, 295 P.2d 496 (1956).
\textsuperscript{18} 22 U. Chi. L. Rev. 325 (1954).
municate to the laymen on the jury information they can use to make their determination on the sanity issue. The jury can use the psychiatrist's clinical data especially in deciding whether or not defendant knew the nature and quality of his act. Beyond this, since the criminal law recognizes distinctions other than guilty and not guilty, responsible or not responsible, expert testimony can be utilized in mitigation or sentence. Modifying or revising the M'Naghten rule to admit such interpretation would leave the courts with a test which utilizes expert testimony in words meaningful to laymen, satisfies its requirements for definiteness and retains the requirement of rationality.

Catherine M. McEntee

CRIMINAL LAW—PLEA OF GUILTY TO MURDER—ABUSE OF DISCRETION IF COURT FAILS TO INVESTIGATE THOROUGHLY DEFENDANT'S BACKGROUND BEFORE IMPOSING DEATH PENALTY.


Three fifteen year old boys, one of whom was the defendant-appellant Green, entered a drug store with the intent to commit a robbery. The seventy-five year old druggist noticed Green at the rear of the fountain and ordered him to get from behind the fountain, whereupon Green shot and killed him. When apprehended, the youths confessed and a plea of guilty to murder generally was entered by counsel for the three defendants. The trial court heard testimony to determine the degree of guilt and found all three defendants guilty of murder in the first-degree. To determine the appropriate penalty the court then heard testimony as to any mitigating circumstances, after which the court fixed the penalty for Green at death by electrocution and at life imprisonment for his two accomplices. On appeal, the Supreme Court of Pennsylvania, with Justice Bell dissenting, remanded the case to the trial court with instructions to sentence Green to life imprisonment, and held that the trial court had abused its discretion by imposing the death penalty where it had considered the criminal act but had not thoroughly investigated and considered the criminal himself. Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).1

Death was the mandatory penalty for first-degree murder in Pennsylvania prior to the Act of May 14, 1925,2 which created a statutory exception to the previously mandatory death penalty and vested in the trial court the discretion to impose a sentence of life imprisonment when suffi-

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cient mitigating circumstances were present. Since the discretion of the court in fixing the punishment must be exercised on some rational basis, justice generally requires consideration of not merely the particular acts by which the crime was committed, but also the character and propensi-
ties of the offender. Therefore, it is the duty of the trial court to con-
sider any evidence of mitigating circumstances which may warrant sentence to life imprisonment instead of death. While the trial court's deter-
mination of the penalty is subject to appellate review the question is not whether the appellate court would have imposed the same penalty as did the trial court but whether that court manifestly abused the discretion confided to it by the statute. The supreme court is without authority to modify the death penalty unless the trial court overlooked pertinent facts or disregarded the force of evidence or erred in its law. Furthermore, the Supreme Court of Pennsylvania has stated broadly that where a murder is not the result of emotional impulse but occurred in the per-
petration of a robbery, the sentence of death will not be modified, because considering the atrocity of this type of offense the death penalty is appro-
riate and not an abuse of discretion. In the only two prior instances where the supreme court has reduced the death penalty to a sentence of life imprisonment, the murder was clearly a result of emotional impulse, so that in the view of the supreme court the trial court was not justified in imposing the death penalty. In the instant case the supreme court

3. See Commonwealth v. Hipple, 314 Pa. 76, 170 Atl. 258 (1934) for a dis-
cussion of that statute. The act provided that, in determining what penalty is appro-
priate the court should consider: (1) the facts of the crime; (2) the defendant's background; and (3) the extent to which the defendant's mental responsibility is diminished. That act was repealed by the Act of June 24, 1939, PA. LAWS 872 §
1201, PA. STAT. ANN. tit. 18, § 5201 (Purdon), and replaced by a new statutory provision, PA. STAT. ANN. tit. 18, § 4701 (Purdon 1939), which continues to vest the discretion in the trial court as to the fixing of punishment at life imprisonment or death but did not reenact the above provision respecting what factors the trial court should consider.


6. The court should consider any and all available information, Kopp v. United States, 55 F.2d 878 (8th Cir. 1932); including the general moral character of the offender, his mentality, his habits, his social environment, his abnormal or sub-normal tendencies, his age, his natural inclination or aversion to commit crime, the stimulii which motivate his conduct, his past record, his family, his occupation, People v. McWilliams, 348 Ill. 333, 180 N.E. 832 (1932); his good conduct both before and after the offense, State v. Noble, 155 La. 843, 180 N.E. 832 (1932); as well as the nature of the offense and the attending circumstances, Carter v. United States, 63 F.2d 108 (4th Cir. 1933).


13. See Commonwealth v. Garramone, 307 Pa. 507, 161 Atl. 733 (1932) in which an industrious man without prior criminal record shot and killed a neighbor under provocation of learning that his 18 year old son had been assaulted by deceased. In Commonwealth v. Irelan, 341 Pa. 43, 17 A.2d 897 (1941), an emotionally distraught woman asphyxiated her illegitimate child under such circumstances that the death penalty was clearly unwarranted.
took the position that the duty falls upon the trial court to conduct a thorough, complete, and exhaustive examination into the background of the convicted criminal because the death penalty can be imposed only when it is the sole penalty justified by both the criminal act and the criminal himself.

The instant case appears to change drastically the criminal law of Pennsylvania to the extent that the statutory exception to the once mandatory penalty of death has, in effect, "swallowed the rule." Hereafter, life imprisonment must be given except where the trial court conducts an exhaustive investigation, the results of which justify no other penalty but death. Since the supreme court now places the duty of inquiry into mitigating circumstances upon the court, rather than defense counsel, such investigation must apparently be conducted at public expense. The abuse of discretion found here was the failure to gather sufficient facts upon which to exercise sound judicial discretion, rather than a failure to weigh properly a factor such as emotional impulse. Therefore, in the instant case it seems to be an unjustifiable usurpation of the discretion vested by statute in the trial court to have modified the sentence rather than to remand the case for further investigation. Perhaps this can be explained by the sympathy displayed in the opinion for this youthful offender and the fact that no person under the age of sixteen years and only one person under the age of nineteen years has ever suffered the death penalty in Pennsylvania.

Michael D. Battaglini

14. The Act of 1925 did not contemplate an independent inquiry as to evidence in mitigation of the sentence, but did contemplate that the determination was to be based solely on the evidence admissible on the issues made by the indictment and the plea of the defendant. Mitigating circumstances in relief of the penalty could be admitted in a proper case, but it was largely a matter in the discretion of the trial judge. Commonwealth v. Williams, 307 Pa. 134, 160 Atl. 602 (1932).

15. See Fed. R. Crim. P. 32(c)(1) which provides for a presentence report by the probation department. A similar rule has recently been proposed in Philadelphia County in the new Proposed Rules Of Criminal Procedure, submitted by The Philadelphia Bar Association Committee on Criminal Justice and Law Enforcement, June 2, 1959, Rule 303(a)(2).

16. Where the abuse of discretion was that the death penalty was clearly unwarranted by the facts of the case on the record, no valid purpose would be served by remanding the case to the trial court for further consideration since the supreme court has already determined that life imprisonment is the only acceptable penalty on the facts. However, where the supreme court finds that there was error in the manner in which the penalty was arrived at by the trial court, it would appear that remanding the case for further investigation and possible resentencing would cure the error without usurping the discretion of the trial court. This was the procedure recommended by Mr. Justice Bell in his dissent in the instant case. See Commonwealth v. Green, 396 Pa. 137, 155, 151 A.2d 241, 250 (1959).

INSURANCE—VARIABLE ANNUITIES—NOT EXEMPT AS INSURANCE FROM REGULATION UNDER THE SECURITIES ACT OF 1933 AND THE INVESTMENT COMPANY ACT OF 1940.


An injunction was sought by the Securities and Exchange Commission (SEC) restraining defendant insurance company (VALIC) from selling variable annuity policies unless and until those policies were registered with the SEC under the Securities Act of 1933, and VALIC complied with the Investment Company Act of 1940. VALIC, a life insurance company incorporated under the laws of the District of Columbia, sells only variable annuity policies and is regulated by the Insurance Superintendent of the District of Columbia and similar officials in the other states in which it has qualified to do business. The district court dismissed the complaint under the provisions of the McCarran-Ferguson Insurance Regulation Act which provides that no act of Congress shall be interpreted in a manner which “invalidates, supersedes, or impairs” any state law regulating insurance unless the federal act expressly refers to insurance. In affirming, the court of appeals held that the determination of a state insurance commissioner that a certain business is within his scope of authority is conclusive as to whether that business comes within the provisions of the McCarran-Ferguson Act as insurance.

On appeal, the United States Supreme Court, with four Justices dissenting, reversed: that variable annuities are subject to the provisions of the Securities Act of 1933 since they are securities as defined in that act, and are not annuities or insurance so as to be exempted from that act, that VALIC must comply with the provisions of the Investment Company Act of 1940 since it is an investment company as defined in that act, and

1. See note 14 infra for a brief explanation of variable annuity contracts.
2. 48 Stat. 74 (1933), 15 U.S.C. §§ 77a-aa (1952). This requires issuers of securities to file registration statements and prospectuses with the SEC containing information regarding the issuer and the security.
3. 54 Stat. 789 (1940), 15 U.S.C. §§ 80a-1-a-5. This requires investment companies to register with the SEC for purposes of disclosure and also restricts the form of capital structure they may have and their investment operations.
4. Arkansas, Kentucky, and West Virginia. Since the trial VALIC has qualified to do business in Alabama and New Mexico.
9. 48 Stat. 75 (1933), as amended, 15 U.S.C. § 77c (1952): “(a) Except as hereinafter provided, the provisions of this subchapter shall not apply to any of the following classes of securities: . . . (8) Any insurance . . . policy or annuity contract subject to the supervision of the insurance commissioner . . . or officer performing like functions, of any state . . . .”
RECENT DECISIONS

is not an exempt insurance company as defined in that act;\(^\text{11}\) and that the McCarran-Ferguson Act does not apply to variable annuities since they are not annuities or insurance.\(^\text{12}\) S.E.C. v. Variable Annuity Life Ins. Co., 79 Sup. Ct. 618 (1959).\(^\text{13}\)

In both conventional and variable annuity contracts the annuitant pays a premium in either a lump sum or in fixed installments, and in return receives periodic payments (annuities), beginning when he reaches a certain age and continuing until his death. They differ in that in a conventional annuity the company obligates itself to pay a fixed amount in each annuity, whereas in the variable annuity policy the amount of each payment will vary. This is because the conventional annuity company invests in bonds and mortgages, securities with a relatively fixed value in terms of both principal and income, while the variable annuity company invests in common stocks which have greater fluctuation in both principal and income. Thus, the variable annuity is designed as a safeguard against inflation on the theory that market prices of common stocks will rise as the dollar depreciates.\(^\text{14}\) In the instant case, the Court decided that a variable annuity is neither an annuity nor insurance by stressing the fact that a conventional annuity insures the annuitant against the risk of investment loss whereas the variable annuity does not.\(^\text{15}\) Due to the recent origins of the variable annuity there were few precedents on which to base this decision. However, this case agrees with the Connecticut view on the nature of variable annuities,\(^\text{16}\) but is apparently contra to the position taken by New York\(^\text{17}\) and by the Internal Revenue Service.\(^\text{18}\) There is also authority for the general proposition that payments that are fixed

\(\text{vesting, . . . ; (2) is engaged . . . in the business of issuing face-amount certificates of the installment type, . . . or (3) is engaged . . . in the business of investing, . . . owning, . . . or trading, in securities, and owns . . . securities having a value exceeding 40 per centum of the value of such issuer's total assets.}^{11}

11. 54 STAT. 797 (1940), 15 U.S.C. § 80a-3 provides that an insurance company is not an investment company for purposes of the act. 54 STAT. 790 (1940), 15 U.S.C. § 80a-2 defines insurance company as "a company . . . organized as an insurance company, whose . . . predominant business . . . is . . . insurance . . . and which is subject to supervision by the insurance commissioner of a State. . . ."

12. 59 STAT. 34 (1945), as amended, 15 U.S.C. § 1012 (1952): "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . ."


14. A summary of a variable annuity company's operations is as follows: the acquisition of a portfolio of common stocks and division of that portfolio into units analogous to shares in a mutual fund; the crediting to the premium payer, at the time of payments, of the number of units then equivalent in market value to the amount of the premium; payment of annuities, the amount of units in each payment being determined on an actuarial basis. (Actual payment is made in dollars equal to the value of the units at the time of payment.) See generally Becker, Variable Annuity Contracts: Insurance or Securities, 1958 INS. L. J. 612.


in terms of dollars are essential to an annuity, but other courts seem to require only that the amount of each payment be calculable at the time of payment. Without discussing at length the reasons for its decision, the Court, in the instant case, held that "the term 'security' as defined in the Securities Act is broad enough to include any annuity contract, and the term 'investment company' as defined in the Investment Company Act would embrace an insurance company."

According to the Court, the essence of insurance is the assuming of risks by the insurer. Although both conventional and variable annuities require the insurer to assume the risk that the annuitant will outlive his life expectancy, variable annuities do not insure against the risk of investment loss while, according to the Court, conventional annuities do. Thus, it would seem that the Court has held that a variable annuity is neither an annuity nor insurance, because it does not insure against all that a conventional annuity does. But in fact, the conventional annuity does not insure against all investment losses, such as depreciation of the dollars it has promised to pay, just as the variable annuity does not insure against depreciation of the units in its portfolio of common stocks. The investment loss to the annuitant caused by inflation is just as real as any other investment loss. In other words, the only essential difference between a conventional and a variable annuity is that the former promises payment in a commodity known as money forcing the annuitant to depend on the value of the dollar for purchasing power, while the latter offers payment in units of an equity portfolio forcing the annuitant to depend on the value of those units for purchasing power. Therefore, the only real objection to characterizing variable annuities as annuities or insurance is the fact that a company like VALIC does not have the same incentive to follow a sound investment program that a conventional annuity company would have, since no matter how poor its investments it could still meet its obligations to the annuitants. This objection raises the question of whether variable annuities should be regulated, not that of whether they are within the provisions of the Securities Act and the Investment Company Act. Thus the Court has equated what the law is with what it should be. On policy grounds the holding is defensible, but it may have resulted in a precedent applicable to any new insurance policy.

Leslie J. Carson, Jr.

21. See note 8 supra.
24. An annuity policy tied to the Consumer Price Index would probably eliminate this objection since it would provide a standard for measuring the amounts paid annuitants independent of the success or failure of the annuity company's investments. This would be a real fixed annuity, fixed in terms of purchasing power or real value.
INTERNAL REVENUE—INCOME TAX—TAX BENEFIT RULE INAPPLICABLE TO FDIC CREDITS.


Plaintiff, a mutual savings bank, paid an annual premium assessment to the Federal Deposit Insurance Corporation (FDIC) in 1951 and 1952. In 1952 plaintiff received a credit, applicable to future assessments, from the net assessment income of the FDIC for 1951. Plaintiff failed to include the 1952 credit in its gross income for that year, although it did deduct that year's assessment as a necessary operating expense. Pursuant to the ruling of the Commissioner of Internal Revenue that the 1952 credit was subject to the federal income tax, the plaintiff paid the tax on it but filed for a tax refund. The plaintiff bank, which was not subject to the federal income tax in 1951, argued that the credit was a refund of its 1951 assessment, for which it had received no tax benefit as a deductible business expense and, therefore, the credit came under the tax benefit rule. The court rejected this theory by deciding that the credit was not a refund of the prior year's assessment and that, therefore, the tax benefit rule was inapplicable. Philadelphia Saving Fund Soc'y v. United States, 269 F.2d 853 (3d Cir. 1959).

The tax benefit rule provides for the exclusion from gross income of all or any part of a recovery of a loss or expenditure for which no tax benefit was received in the year in which the loss or expenditures occurred; i.e., the deduction, if taken, did not reduce the taxpayer's tax. Although this rule was rejected when first proposed in a hearing before the Board of Tax Appeals (BTA) in 1932, the Treasury Department, in subsequent rulings, recognized the tax benefit principle as applied to bad debts and tax recoveries. An attempt by the BTA to extend the rule laid down

1. 64 STAT. 873 (1950), 12 U.S.C. § 1817(a) (1957) provides that the banks whose deposits are insured will pay an annual premium equal to one-twelfth of one percent of their deposit liability.
2. 64 STAT. 873 (1950), 12 U.S.C. § 1817(d) (1957) provides that the “net assessment income” of the FDIC will be sixty percent of the difference between the total assessments paid to the FDIC by the insured banks and the operating expenses of the FDIC in that year.
by the Treasury Department was opposed by the federal courts when
the cases came up on review,9 and the resulting conflict led Congress to
enact the tax benefit rule into law, in so far as applicable to the recovery
of bad debts and taxes.10 However, the Supreme Court permitted the
tax benefit rule to be extended to recoveries other than those mentioned
in the statute by holding in Dobson v. Commissioner11 that there was no
tax regulation compelling the tax court to find the results of a transaction
to be income if no economic gain had resulted.12 Thereupon, the Treasury
Department further expanded the tax benefit rule to include “all other
losses, expenditures, and accruals made the basis of deductions from gross
income for prior taxable years...”13 In the instant case the plaintiff
sought to bring the credit within the tax benefit rule by claiming that
the credit was a return of part of the 1951 assessment and that as such
a return, it constituted no economic gain or tax advantage14 and therefore,
could not be income. The court of appeals held, however, that the appel-
ellant failed to show that the district court “clearly erred” when it ruled
that the credit was not a recovery of a particular assessment and that the
status of an insured bank was an advantage retained by appellant from
the transaction.15

The court in its opinion in the instant case does not deal with the
tax benefit question because that issue could not have arisen unless the
credit was found to be a return of the 1951 assessment. The court de-
determined that it was not such a return, basing its decision on the fact
that neither the legislative history nor the phraseology of the act com-
pelled such a conclusion.16 This decision is in accord with the view ex-
pressed in debate by Congressman Brown of Georgia, a member of the
House sub-committee which drafted the bill,17 and with the language used

10. Int. Rev. Code of 1939, ch. 1, § 22(b), 53 STAT. 1 (now INT. RIV. CODE OF
1954 § 101).
11. 320 U.S. 489 (1943). The Court here said that although it did not adopt
the tax benefit rule, there existed no tax regulation which compelled the tax court
to find the results of a transaction taxable income if no economic gain had resulted.
12. Tye, The Tax Benefit Doctrine Reexamined, 3 TAX L. REV. 329, 330 (1947-
1948).
14. To support his position the plaintiff relies on the rule of the Dobson case,
supra note 11, and Bartlett v. Delaney, 75 F. Supp. 490 (D. Mass. 1948), aff'd 173
F.2d 535 (1st Cir. 1949), cert. den. 338 U.S. 817 (1949) as cited by Biggs, C.J.
in his dissent. Philadelphia Sav. Fund Soc'y v. United States, supra note 5. The
Dobson case is concerned with the deduction of a loss sustained on securities, and the
Bartlett case deals with the recovery of interest on an illegally paid tax.
15. Philadelphia Sav. Fund Soc'y v. United States, supra note 5. The district
16. Ibid. The court cites the authority upon which the appellant relied to argue
that the credit was a return of a prior assessment.
17. 96 CONG. REC. 10654 (1950).
in the House report on the bill,18 as well as the language of the bill itself.19 The Commissioner reached the same result in 1955 when he ruled that FDIC credits were a part of gross income.20 An opposite conclusion was reached in the dissenting opinion by Chief Judge Biggs who assumed that the credit was a recovery of part of the taxpayer’s 1951 assessment and argued that, as such a recovery, it was analogous to a payment of returns from a mutual insurance company to a policy holder and, consequently, should come under the tax benefit rule.21 Although it would be unjust to tax a refund of an expenditure from which the taxpayer retained no advantage22 or from which no economic gain resulted,23 the status of an insured bank was certainly an economic advantage to plaintiff.24 Moreover, the cases cited by plaintiff to sustain its position that the recovery should come under the tax benefit rule were all instances where the taxpayer retained a reversionary or residuary interest in the expenditure so as to be able to characterize the recovery as a return of capital.25 Since by statute the FDIC can distribute its net assessment income only if operating expenses do not exceed sixty per cent of its total assessments,26 it would seem that the credits given to member banks are more in the nature of dividends than a return of capital. However, the instant case leaves open the question of whether the tax benefit rule should be applied to the recovery of an expenditure which occurred in a prior non-taxable year. It might be argued that since the Commissioner, in expanding the tax benefit rule, specifically enlarged it as applied to expenditures made in prior taxable years,27 he meant to exclude expenditures made in non-taxable years. On the other hand, it would not be unreasonable to apply the tax benefit rule to prior non-taxable years, in the light of its previous application to returns of losses or expenditures which had never been

19. 64 Stat. 873 (1950) 12 U.S.C. § 1817(d) (1957). By referring to the credit as issuing from the FDIC’s net assessment income, the legislature indicated that although the distribution of the credit is to be determined pro-rata in proportion to the prior year’s assessment, it is still the distribution of an asset which belong solely to the FDIC and in which the plaintiff retains no legal or equitable interest.
24. It might be argued that the credit is analogous to a dividend declared by mutual insurance companies, which dividends are really returns of overpayments of premiums. Brief for Appellant, pp. 5-6, Philadelphia Sav. Fund Soc’y v. United States, supra note 5, citing the dictum in Penn Mut. Life Ins. Co. v. Lederer, 252 U.S. 523 (1920); Mutual Ben. Life Ins. Co. v. Herald, 198 Fed. 199 (3d Cir. 1912), aff’d per curiam, 201 Fed. 918 (3d Cir. 1913). Like such dividends it is argued, the credits, being overpayments, would not be taxable.
deducted to reduce gross income, even though they could have been deducted. However, the fact that the credit was adjudged not to be a return of a specific expenditure and the fact that an economic advantage was retained, viz., the status of an insured bank, rule against the possibility of enlarging the tax benefit rule to encompass the instant case.

Robert E. Slota

LABOR LAW—PRE-EMPTION OF JURISDICTION—FAILURE OF NATIONAL LABOR RELATIONS BOARD TO ASSERT JURISDICTION OVER PEACEFUL PICKETING.


Plaintiff union sought an agreement from respondents to employ only those workers who were presently members of the union or who would apply for union membership within thirty days of a union shop agreement. The respondents refused on the grounds that no employee had expressed a desire to join the union and, that no contract could be negotiated until the employees had designated a union as their collective bargaining agent. When the union began peacefully to picket the respondents' place of business, the Superior Court of the County of San Diego enjoined such conduct and awarded the respondents one thousand dollars damages. Simultaneously with the state court action, respondents filed proceedings before the National Labor Relations Board, but the Board declined jurisdiction. The Supreme Court of California affirmed the decision holding that since the NLRB had declined jurisdiction, the state courts had jurisdiction over the dispute and, further, that the conduct involved was an unfair labor practice under section 8(b)(2) of the National Labor Relations Act and not privileged under California law.

On certiorari, the Supreme Court of the United States reversed the decision holding that the refusal of the NLRB to assert jurisdiction did

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29. See generally, Webster, The Claim of Right Doctrine: 1954 Version, 10 Tax L. Rev. 381 (1955); 1959 Duke L. J. 151, Taxation of Refunded Amounts Deducted in Prior Years, 29 Texas L. Rev. 966 (1951), for another perspective on the problem of the taxability of recovery of prior losses or payments, previously deducted.

2. Jurisdiction was declined presumably because the Board's monetary standards as to jurisdictional requirements were not fulfilled. See note 18 infra.
not leave to the states power over activities they would otherwise be pre-
empted from regulating, but the issue of damages was remanded to de-
termine if it could be sustained under California law. Accordingly, the
Supreme Court of California sustained the award of damages, holding
that the union's activity constituted a tort under state law as an unfair
labor practice. Again on certiorari, the United States Supreme Court
reversed the decision holding that where an activity is arguably protected
by Section 7 or prohibited by Section 8 of the Taft-Hartley Act and the
NLRB has not adjudicated the status of such conduct, then the states
do not have the power to control such activity by an award of damages.

Since the NLRA, as amended by the Taft-Hartley Act, was enacted
pursuant to the power of Congress, under the commerce clause, to
protect interstate commerce from interruption or harassment by labor-management
disputes, the jurisdiction of the NLRB extends to all unfair labor
practices "affecting commerce." It is evident both from the wording of the statute and its legislative history that Congress sought to dele-
gate to the NLRB the widest scope of possible jurisdiction. Congress'
intent has been implemented by the courts which have uniformly held
that only the NLRB can determine whether an alleged unfair labor prac-

8. Congress in the Labor Management Relations Act, known as the Taft-Hartley
Act, enumerated certain activity which is to be protected under § 7, as the right
of employees to self-organization, collective bargaining and the like. It also pre-
scribed under § 8 what would constitute unfair labor practices for employees and
also unfair labor practices for a labor organization or its agents.
10. U.S. CONST. art. I, § 8: "To regulate Commerce with foreign Nations, and
among the several States, and with the Indian Tribes; . . . To make all laws which
shall be necessary and proper for carrying into Execution the foregoing Powers, . . . ."
merce means in commerce, or burdening or obstructing commerce or the free flow
of commerce, or having led or tending to lead to a labor dispute burdening or ob-
structing commerce or the free flow of commerce."
the bill of course does not intend to go beyond the commerce power of Congress,
as that power may be marked out by the Courts, it seeks the full limit of that power."
15. The basis of pre-emption by the Federal Government is found in U.S. CONST.
art. VI: "This constitution, and the Laws of the United States which shall be
made in pursuance thereof; and all treaties made, or which shall be made, under
the Authority of the United States, shall be the Supreme Law of the Land; and
the judges in every state shall be bound thereby, anything in the Constitution or
Laws of any State to the Contrary notwithstanding."
16. Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944). In NLRB v. Fainblatt,
306 U.S. 601 (1939), the court said the operation of the act does not "depend
on any particular volume of commerce affected more than that to which the courts
would apply the maxim de minimis." NLRB v. Suburban Lumber Co., 121 F.2d
829 (3d Cir. 1941).
tice is within the scope of the act. As a result of this definition of the Board's powers and jurisdiction, the Supreme Court has held that neither state courts nor state agencies may enjoin an unfair labor practice within the scope of the act when the Board has not ceded jurisdiction to a state agency as provided within the act, or when the Board has declined to assert its jurisdiction because the amount of interstate commerce involved does not meet the prescribed minimum monetary standards. Although it is well settled that, under their police powers, states have full authority by use of injunctions, damage suits or criminal prosecutions to deal with instances of violence or threats of violence, mass picketing and coercion, even where such conduct is within the scope of the Taft-Hartley Act, the question remains whether state courts can award damages for losses sustained as the result of unfair labor practices not involving violence or threats of violence. In International Union v. Russell, the Supreme Court upheld an award of damages by a state court against a union which had deprived a member of work by illegally discharging him from the union. Similarly, the Court, in United Constr. Workers v. Laburnum, upheld an award of damages in a tort action by a state court, although the conduct constituting the tort was also an unfair labor practice under the Taft-Hartley Act. The instant case distinguishes the Russell and Laburnum cases by noting that in both these instances the

18. STAT. 146 (1947), 29 U.S.C. § 160(a) (1952). This section provides that when the Board declines to act, it may cede disputes to state agencies having similar labor laws and policies as those expressed in federal enactments. There is no record of this power being used.
19. The Board, through case law and promulgated rules, has exercised a discretionary power by refusing to accept jurisdiction in cases arising in industries doing less than a certain dollar volume of business. 5 CCH LAB. L. REP. (4th Ed.) ¶ 50,086, 50,092 (1958). The Board's discretionary jurisdiction has been upheld without limiting its possible area of activity. Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir. 1951).
20. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) wherein a state board was ousted of jurisdiction though the Board refused to assert its jurisdictional powers. See also Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957), wherein the state court could not act though the Board refused to assert its jurisdiction. In both instances the Court made reference to the conflict of remedies naturally resulting if both the states and the federal government could enjoin the same activity.
22. 356 U.S. 634 (1958). In this case there was violence and mass picketing but the court also noted that in this instance the Board could not have awarded punitive damages and thus a clear conflict of remedies was not in issue.
23. 347 U.S. 656, 665 (1954). "To the extent that Congress prescribed preventative procedure against unfair labor practices, that case [Garner v. Teamsters Union, 346 U.S. 485 (1953)] recognized that the Act excluded conflicting state procedure to the same extent. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated".
activity regulated was within the jurisdiction of the state because of its power to prevent actual or threatened violence under its police powers. In *Guss v. Utah Labor Relations Bd.*, the Court noted that in the injunctive relief area, federal and state remedies would conflict and thus federal pre-emption resulted. The instant case now extends federal pre-emption to include damage actions though no provision has been made by Congress in any labor legislation for a recovery of damages for losses sustained in labor disputes. The Court views a damage action as a restraint on activity, similar to an injunction, rather than mere compensation for an actual loss.

The NLRB alleged that there was a limit to the number of cases it could adequately handle and thus, the dollar volume jurisdiction rule was promulgated. This, of course, excluded many small enterprises from the coverage of the Taft-Hartley Act. When the Supreme Court in the *Guss* case and in the instant decision precluded the parties from seeking relief from state courts or agencies, a "no man's land" was created which was not under the jurisdiction of the state courts or the NLRB. To meet this problem, Congress amended the Labor Management Relations Act, to eliminate this "no man's land". The amendment explicitly sanctions the policy of the NLRB of refusing to accept jurisdiction of labor disputes where such disputes do not have a substantial effect on commerce. However, the dollar volume jurisdiction rule promulgated by the Board as of August 1, 1959 may not be changed to exclude disputes now within the Board's jurisdiction. Furthermore, it is provided that no provision of the act shall prevent a state court or agency "from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction." Thus, the Taft-Hartley Act as now amended codifies the practice of the Board but at the same time eliminates the effect of federal pre-emption in the "no man's land". However, it should be recognized that the solution of this problem only raises a two-fold problem in its place. First, it is clear that provisions of state law may differ not only with other states but also with the federal enactments, thus resulting in conflicting decisions among the state courts. Secondly, many states have no labor laws under which appropriate relief can be granted in every case. Thus, in certain limited areas the "no man's land" will continue to exist.

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24. See note 19 *supra*.
PROPERTY—Tenancy by the Entirety—Alienability of Wife’s Right of Survivorship.


Plaintiff’s interest in a tenancy by the entirety was levied upon and sold at sheriff’s sale to A, who later joined with plaintiff’s husband in a conveyance of all their interest in the properties to B. B later conveyed to defendants, plaintiff’s husband having died in the meantime. Plaintiff instituted an action for possession, contending that, as surviving spouse, she is the sole owner of the property and that the sheriff’s deed conveyed only one-half of the rents, issues and profits of the property during the joint lives of both spouses but did not convey her right of survivorship. The trial court found for plaintiff but on appeal the Supreme Court of New Jersey, with two justices dissenting, reversed and held that a wife’s right of survivorship can be levied and executed on for her separate debts. King v. Greene, 153 A.2d 49 (N.J. 1959).1

An estate by the entirety is, in effect, a joint tenancy between husband and wife, with a right of survivorship protected against the unilateral action of the other spouse. The common law rule was that a conveyance to a husband and wife created a tenancy by the entirety unless some other form of estate was specified.2 Under the common law a creditor of the husband might levy and sell on execution his interest in an estate by the entirety, and a purchaser at such a sale would acquire the right to immediate possession of the whole estate and title subject only to the wife’s right of survivorship;3 but the creditors of the wife could not levy upon her interest.4 Although some courts are divided as to the effect which married women’s property acts,5 allowing married women to hold property in their own right, have had on tenancies by the entirety,6 three general approaches are discernable. Some courts have held that estates by the entirety still exist but are so modified by these acts so as to put the spouses on an equal footing in regard to their rights,

2. In re Brown, 60 F.2d 269 (W.D. Ky. 1932); Simon’s Estate, 4 Clark 204 (Pa. 1847).
3. Raptes v. Cheros, 259 Mass. 37, 155 N.E. 787 (1927); Pray v. Stebbins, 14 Mass. 219, 4 N.E. 613 (1886). The Massachusetts rule is that modern legislation in regard to property rights of married women does not apply to tenancy by the entirety, and therefore, the common law rule on tenancy by the entirety is still in effect in that state. See note 9 infra.
5. The New Jersey statute, N. J. Rev. Stat. § 37:2-12 (1937), provides:
   “The real and personal property of a woman which she owns at the time of her marriage, and the real and personal property, and rents, issues, and profits thereof, of a married woman, which she receives or obtains in any manner whatever after her marriage, shall be her separate property as if she were a feme sole.”
privileges and immunities. A second approach is to view such legislation as abolishing estates by the entirety altogether. Finally, other courts declare that the acts do not apply to the estate and therefore, estates by the entirety exist as at common law. The instant case is the first decision in New Jersey dealing with the effect of the Married Women's Property Act on the alienability of the wife's right of survivorship. However, it overrules two cases at the trial level by allowing the wife's right of survivorship to be alienated for her separate debts. The court proceeds on the theory that the Married Women's Property Act gives the wife all the rights that the husband had in an estate by the entirety under the common law. Therefore, if at common law the husband can alienate his right of survivorship, the wife, by virtue of the property act can now alienate her right of survivorship.

The legal concept of the estate by the entirety was developed in a completely different social milieu and in consequence of certain ideas then dominant, namely, that a married woman had no separate legal existence of her own. Thus, this fictional unity of the husband and wife was the basis of the estate by the entirety, since the wife, having no legal existence of her own, could not hold property in her own right. This fictional basis for the estate is completely repudiated by the married women's property acts, which allow a woman to hold property in her own right as would a feme sole. As a result, some states have concluded that these acts have thereby destroyed the estate by the entirety without exploring the possible social advantage of maintaining such an estate even in a modified form. When weighing the relative value and utility of these

7. Ibid. In New Jersey the effect of the Married Women's Property Act is to create, in effect, an estate in common between the spouses with right of survivorship existing as at common law. Buttlar v. Rosenblath, 42 N.J. Eq. 651, 9 Atl. 695 (1887).
8. Ibid.
9. Raptes v. Cheros, 259 Mass. 37, 155 N.E. 787 (1927); Pray v. Stebbins, 14 Mass. 219, 4 N.E. 613 (1886); see Phipps, supra note 7.
10. See supra note 5.
11. For dictum supporting the holding in the instant case see Taub v. Shampanier, 95 N.J.L. 349, 112 Atl. 322 (1921); Frzynski v. Radler, 23 N.J. Super. 274, 93 A.2d 35 (1952); Bilder v. Robinson, 73 N.J. Eq. 169, 67 Atl. 828 (1907); Buttlar v. Rosenblath, 42 N.J. Eq. 651, 9 Atl. 695 (1887).
14. Ibid.
15. Ibid.
16. Kerner v. McDonald, 60 Neb. 663, 84 N.W. 92 (1900).
18. "But the universal tendency of modern legislation has been to abrogate this theoretical unity of husband and wife, to recognize and maintain the legal identity of the wife, and to secure to her a distinct and separate right to the acquisition and enjoyment of property."
19. Ibid. See also Phipps, supra note 7 at 29.
estates courts should bear in mind two separate and often conflicting interests. On the one hand, the just claims of creditors of the separate spouses should be protected; but on the other hand, there is the social desirability of protecting family security by depriving an improvident spouse of the opportunity of dissipating the family's entire wealth. A fair balance could be obtained by limiting the peculiar incidents of the estate by the entirety in either of two respects; namely, by either confining the restriction on alienation to property actually occupied as a home, or by allowing this restriction on alienation only to protect the non-debtor spouse's right of survivorship.

Joseph G. Manta

WILLS—CONSTRUCTIVE TRUST—ENFORCEMENT OF ORAL AGREEMENT TO MAKE MUTUAL WILLS.


Decedent and his wife simultaneously executed wills with reciprocal dispositions, whereby decedent's residual estate would go to his present wife, unless she predeceased him, in which case it would be divided evenly among his four children, two by a previous marriage and two by his present wife. The wife's will provided that her residual estate should go to decedent but if she survived him the property willed to her by decedent would go to his four children. Decedent's wife survived him and after his death made a new will leaving her entire estate to her own two children by decedent and nothing to the children of his previous marriage. When this later will was admitted to probate at her death, the children of decedent's first marriage brought this action to establish a constructive trust on property which had passed to their stepmother under decedent's will. The New York Supreme Court, Appellate Division, with Justice Frank dissenting, affirmed the decision of the supreme court imposing a constructive trust on the wife's estate in favor of the plaintiffs. Oursler v. Armstrong, 186 N.Y.S.2d 829 (App. Div. 1959). 1

The mutual will agreement and the secret trust are two situations where courts have been called upon to enforce agreements to make specific testamentary dispositions. The former are wills executed pursuant to an agreement to dispose of property in a particular manner made in consideration of each other, which, although they remain revocable during the joint lives of the makers, become irrevocable on the death of either. A secret trust is created where a testator is induced to make or not to change a will by a legatee's promise that he will devote his legacy to a certain lawful purpose. Although in most jurisdictions these agreements are not found to be within the statute of frauds and may be specifically enforced even when proved by parol, in New York there are statutory requirements that not only a contract to make a testamentary disposition or to bequeath property but also one to establish a trust must be in writing. Consequently, when these agreements are merely expressed orally, the New York courts enforce them through a constructive trust which is a device used by equity to impose a trust to prevent unjust enrichment, irrespective of the express or implied intent of the parties. It is sufficient for the creation of the constructive trust that property innocently acquired is fraudulently retained by one who enjoys a relationship of confidence with the grantor, and since it arises by operation of law, the constructive trust is specifically exempted from the operation of the statute of frauds.

In the instant case, without terming the arrangement either a secret trust or an agreement for mutual wills, the court found that decedent's wife took property under decedent's will with an implicit understanding between them that a distribution to the four children was an obligation. The majority relied on the relationship of confidence created by the nuptial union, coupled with statements by the wife that she wanted to dispose of property left her by decedent "as he would do it himself" to impose a constructive trust in favor of the plaintiffs.

In holding that evidence sufficient to prove a binding agreement to make a will prior to the amendment of the statute of frauds is now sufficient to establish a constructive trust, the instant case follows a line of New York cases dealing with the purchase money resulting trust.

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2. Edson v. Parsons, 155 N.Y. 555, 50 N.E. 265 (1898).
4. O'Hara v. Dudley, 95 N.Y. 403 (1884).
11. Supra note 8.
In the principal New York case on that subject, *Foreman v. Foreman*, a constructive trust was imposed on land by the court relying on a relationship of trust and confidence existing between a payor husband and grantee wife, thereby accomplishing the same result as that reached by other jurisdictions by use of the resulting trust. The constructive trust is traditionally based on fraud, duress, or undue influence but in these cases where oral agreements are involved the courts in New York grasp the fact that the agreement is made between persons in a relationship of confidence and utilizes the subsequent breach thereof to supply the requisite fraud. This appears to be strained reasoning at best and, in the case of agreements to make wills, of questionable desirability. In the case of *Hamlin v. Stevens*, the court, in discussing contracts to make testamentary dispositions, stated:

"Such contracts are easily fabricated and hard to disprove because the sole contracting party on one side is always dead when the question arises. . . . We wish . . . to protect the community from the spoilation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses."

The fears expressed by the court in the *Hamlin* case were apparently shared by the state legislature when such agreements to make testamentary dispositions were expressly brought within the statute of frauds thirty years later. With this in mind one might well question the propriety of the court in effectively nullifying this statute.

*Norman J. Shachoy*

15. RESTATEMENT, RESTITUTION § 184 (1937).
16. 177 N.Y. 39, 47, 48, 69 N.E. 118, 120, 121 (1903).
17. N. Y. PERS. PROP. LAW § 31.