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Abstracts of Recent Cases

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Walk, 3 Ill. 2d 313, 121 N.E.2d 483 (1954); *Mangnum v. Wilson*, 235 N.C. 353, 70 S.E.2d 19 (1952); *Stophlet v. Stophlet*, 22 Ohio App. 327, 153 N.E. 867 (1926). In the principal case this rule was held inapplicable since the court had found that the testator did not intend to create a fee simple, but only intended to create a life estate; therefore, there was no fee simple to be reduced by a subsequent clause. This rule amounts to nothing more than a presumption in favor of the absolute estate, and can be rendered ineffective by the application of another rule of construction holding that the latter of two conflicting provisions prevails. 1 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS 460 (1956).

It is submitted that the view of the principal case is the better one, since the other views can operate to defeat the intention of the testator. This decision is a clear indication that West Virginia follows the modern view that the testator's intention as gathered from the whole will is the paramount consideration, and that intention so found cannot be defeated by the application of rules of law which conflict with it.

J. O. F.

ABSTRACTS OF RECENT CASES

CRIMINAL LAW—INCEST—NO INTENT REQUIREMENT.—*P* was convicted of the crime of incest and was sentenced to a term of five to ten years imprisonment. He later sought a writ of habeas corpus *ad subjiciendum* on the ground that the indictment under which he was convicted was void in that it failed to state that he committed the act wilfully or with intent. *Held*, that incest is a statutory crime and that no particular mental state or condition is specified by the statute as a necessary element of the offense; therefore such a state or condition need not be alleged in the indictment. Writ denied. *United States ex rel. Preece v. Coiner*, 150 F. Supp. 511 (N.D. W. Va. 1957).

The first case in West Virginia to cast a spell of doubt upon the wholesomeness of the doctrine of absolute criminal liability was one involving the very question before the court in the principal case. *State v. Pennington*, 41 W. Va. 599, 23 S.E. 918 (1896). There Judge Brannon, referring to a Vermont case which stated that ignorance was no defense to an indictment for incest, wrote, "I must be allowed to doubt so much of that opinion as holds that

knowledge of relationship by the accused is not necessary." Although the court reached the same conclusion there as in the principal case, it is noteworthy that even this small doubt, as to whether justice is rendered by our statute, is no longer present in today's decisions. Query: Have the controversies surrounding the doctrine of absolute criminal liability been relegated to academic discussions alone? If they have, perhaps, in the interest of justice, they should once more be brought forth by the courts. For a full discussion on this subject, see Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34 (1955).

T. E. P.

CRIMINAL LAW—PREMEDITATED MURDER—DEFENSE OF MENTAL INCAPACITY.—*D* was convicted of murder in the first degree for the fatal shooting of his wife during a violent quarrel. When he attempted to present psychiatric evidence that his mental age was ten years and eleven months in order to establish that he was not mentally capable of premeditation, the evidence was refused. *Held*, that the trial court was not in error in refusing to let the evidence go to the jury. Judgment affirmed. *State v. Flint*, 96 S.E.2d 677 (W. Va. 1957).

The court stated that the principal case presented no substantial basis for departing from the so called "right and wrong" test.

This is the first case handed down by our court on this subject since *Durham v. United States*, 214 F.2d 862 (1954), which threw out the old *M'Naughten* rule as a test for insanity and adopted a rule similar to that in New Hampshire, the test being that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. Although the modern trend is followed only by a small minority of the courts, perhaps the West Virginia court would be more willing to review the new test if faced by a case more directly in point than the principal case. For further cases and discussion, see Annot., 70 A.L.R. 659 (1929), 173 A.L.R. 391 (1947), 45 A.L.R.2d 1430 (1954), 14 AM. JUR., *Criminal Law* §§ 35, 36 (1938).

T. E. P.

CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS—IRREGULARITY IN PREPARATION OF TRIAL TRANSCRIPT.—*P* was convicted of a series of felonies and was sentenced to death upon two counts charging

him with kidnaping for the purpose of robbery and with infliction of bodily harm. Under the California Penal Code, he was given an automatic appeal. After the trial the regular court reporter died and a substitute reporter was appointed. The latter reporter was an uncle by marriage of the deputy district attorney who was in charge of *P*'s prosecution. This reporter worked in close collaboration with the prosecutor in preparing the trial transcript. He also reviewed with police officers, who testified for the state, his transcription of their testimony. During the state court proceedings for settlement of the trial transcript, which constituted the appellate record, *P* was not represented in person or by court-appointed counsel. His conviction was later affirmed by the appellate court.

P applied for a writ of habeas corpus, but the district court denied the application, and the court of appeals affirmed the lower court's decision. The Supreme Court granted certiorari. *Held*, that "consistent with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand." Judgments of the lower courts were reversed and the case was remanded with instructions. *Cheesman v. Teets*, 77 Sup. Ct. 1127 (1957).

This case, along with *Griffin v. Illinois*, 351 U.S. 12 (1956), reflects a modern development in law, *e.g.*, a growing interest by the court in fairness in appellate procedures. The *Griffin* case, which has been followed by our court in *Linger v. Jennings*, 99 S.E.2d 740 (W. Va. 1957), held that the denial of full appellate review solely on the basis of the defendant's inability to pay for a necessary transcript was a violation of the due process and equal protection clauses of the fourteenth amendment. For further comment on the latter case, see Comment, 59 W. VA. L. REV. 79 (1956).

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CONSTITUTIONAL LAW—FAIR TRADES ACT—NONSIGNER PROVISION NOT EXPRESSED IN TITLE OF ACT IS UNCONSTITUTIONAL.—*P* instituted an action for an injunction to prevent retail sales by *D* of *P*'s trademarked products at less than the resale prices fixed by *P* in contracts with other retailers. *P* based his right of action on West Virginia's Fair Trade Act, W. VA. CODE c. 47, art. 11 § 6 (Michie 1955), which states that "wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in

any contract entered into pursuant to the provisions of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." *D* was not a party to any contract with *P* establishing fair trade prices for *P*'s product, and he contended that § 6 of the act, insofar as it was applicable to a person not a party to such a contract, was unconstitutional. He based his contention on the ground that the act, as passed by the state legislature, W. Va. Acts 1937, c. 123, § 6, did not meet the requirements of W. VA. CONST. art. VI, § 30, which provides that if any object is embraced in an act which is not expressed in the title, the act shall be void as to so much thereof. *Held*, that the nonsigner provision violated the state constitution. Injunction denied. *General Electric Co. v. Wender*, 151 F. Supp. 621 (S.D. W. Va. 1957).

This case is of interest inasmuch as it gives free reign to retail dealers who are not parties to fair trade contracts. As a result West Virginia's doors are now open to discount houses and other business establishments of a similar nature. Of course the legislature can still re-enact the statute with the nonsigner provision included in its title, and thus make the section constitutional. Annot., 103 A.L.R. 1331 (1936), 125 A.L.R. 1335 (1939).

T. E. P.