RECENT CASES


In 1959, the plaintiff-employee, Raymond Drzewiecki, executed an employment contract with the defendant, H & R Block, Inc., a well-known firm engaged in the practice of preparing income tax returns for small taxpayers. The contract provided for plaintiff to manage a new branch office for defendant. The agreement stated that the period of employment would be for two years and that the term would automatically renew from year to year unless either party gave written notice of termination ninety days prior to the renewal date. The employer also agreed to give notice of termination "only in the case of [employee] improperly conducting the business."1

From 1960 to 1967, the plaintiff-employee increased the number of branch offices managed by him from one to twenty-three.2 The employer then decided that the percentage-of-profits method used for determining the salaries of its branch managers should be changed because the salaries were becoming, in the employer's opinion, excessive and unrealistic. The employer proposed a new contract which would have substantially reduced a manager's share of the net profits realized from additional growth in company business. The new contract was to go into effect in January, 1968.

Plaintiff refused to sign the proposed contract and continued to perform his duties as manager of his branch office until December, 1968, when the employer terminated the original con-

---

1. The specific contract clause was as follows:

13. This agreement shall be for a period of two years . . . and thereafter shall automatically renew from year to year unless either party gives written notice of termination 90 days prior to renewal date. [Employer] may give notice of termination only in the case of [employee] improperly conducting the business. . . .


2. Id. at 700, 101 Cal. Rptr. at 172.
tract. Plaintiff then sued for, inter alia, breach of contract. The judge, sitting without a jury, found that the contract promised employment to the plaintiff for as long as he properly conducted the employer's business and that it could not be terminated properly by the employer except for cause. The judge also determined that (1) ten years was a reasonable time for the employment to have continued had it not been wrongfully terminated, that (2) plaintiff would have earned $60,000 per year during that period but instead would probably earn only $10,000 per year, and that (3) plaintiff was damaged by the wrongful termination of his employment contract in the sum of $386,086.75. Judgment was entered according to these findings and both parties appealed. The Court of Appeal, Fifth District, affirmed the judgment. The employer's petition for review to the California Supreme Court was denied.

The primary issue presented for the court's determination was whether the employer's promise to provide employment for an indefinite period required separate consideration in addition to the services to be rendered by the employee. Under the terms of the contract, the employee could have terminated the contract at will by giving the requisite notice; the employer, however, had conditioned his right to terminate on the employee's satisfactory management of the employer's branch office.

The defendant claimed that prior California decisions dealing with the issue of permanent employment contracts had uniformly set forth the requirement of separate consideration, in addition to the employee's services, in order to enforce a promise of permanent employment. Because of the absence of additional consideration from the employee, the defendant claimed that he was free to terminate the employment relationship without liability, notwithstanding the contract clause permitting such action only in the event of unsatisfactory work by the employee.

3. Id. at 701, 101 Cal. Rptr. at 172.
4. Id.
5. Defendant argued that the contract was for permanent employment and, because there was no evidence of consideration other than the services to be rendered by plaintiff, that the agreement was terminable at the will of either party. Plaintiff asserted that the trial court erred in its method of determining damages. Id.
6. Id. at 706, 101 Cal. Rptr. at 176.
9. See note 1, supra.
The court observed that California follows the general rule concerning permanent employment contracts which states:

[A]n employment contract purporting to establish a permanent employer-employee relationship through the use of oblique language is terminable at the will of either party unless it is based upon some consideration other than the employee's services.12

Although California follows this rule, the court pointed out that it is one of construction, not substance, and held that "[A] contract for permanent employment, whether or not it is based on some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary."13

In reaching its decision, the court relied in part on a prior decision by a federal court of appeals.14 That opinion contained the following language:

*If it is their purpose,* the parties may enter into a contract for permanent employment—not terminable except pursuant to its express terms—by stating clearly their intention to do so, even though no other consideration than services to be performed is expected by the employer or promised by the employee. . . . [W]here no such intent is clearly expressed and, absent evidence which shows other consideration than a promise to render services, the assumption will be that—even though they speak in terms of "permanent" employment—the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party.15

The decision clearly preserves California's membership in the majority of states16 which follows the general rule that "permanent"

---

11. On page 702 of the official report, the court discusses the reasoning behind an employer's preference for the general rule but fails to mention an employee's reasons for also supporting the same rule. Such employee support might be based on the following: An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be lack of "mutuality."


13. *Id.* at 704, 101 Cal. Rptr. at 174 (emphasis added).


15. *Id.* at 37 (emphasis added).

employment contracts are ordinarily terminable at the will of either party. However, the decision also distinguishes these ordinary contracts from one in which a party forecloses his right to terminate at will by expressly or impliedly promising not to terminate except for cause. The decision is applicable only to those agreements in which such an express or implied promise is included; it does not affect employment contracts which provide only for "permanent" employment and which remain subject to termination at the will of either party.

The case is helpful in explaining the extent to which a so-called "permanent" employment clause will be enforced. If enforcement of a "permanent" clause is desired, the opinion implies that (1) a provision for separate consideration for the other party's promise of permanency might be sufficient, or that (2) an express or implied promise limiting the other party's right to terminate will also suffice. Without meeting at least one of these two requirements, it is probable that the contract is terminable at will by either party.

The case makes clear that, in California, the element of separate consideration is not controlling; in its place can be substituted a limitation on the other party's right to terminate the employment contract at will.\(^{17}\) Provided the parties' intent is clear, either the separate consideration or the limitation seems sufficient by itself. Together, however, they would seem unassailable as indicators of the parties' intent to form a truly permanent employment relationship.\(^{18}\)

---

**Lincoln A. Brooks**


18. If the employment contract is for personal services, it might be terminable at the will of the employee, the above two requirements notwithstanding, after a statutory period. In California, the period is seven years. *Cal. Labor Code* § 2855 (West 1971).
The West Valley Federation of Teachers, Local No. 1953, American Federation of Teachers, AFL-CIO (hereinafter referred to as West Valley Federation), plaintiff and appellant, was a certified high school employees' organization which initiated a mandamus proceeding to compel the Campbell Union High School District (hereinafter referred to as the District), defendant and respondent, to allow a direct presentation to the governing board of the District. Multiple certificated employee organizations existed within the Campbell Union High School District, and pursuant to the Winton Act, a negotiating council had been formed to represent the organizations. Because the West Valley Federation was numerically a minority organization, it was not represented on the negotiating council.

When the West Valley Federation attempted to make a direct appearance before the governing board of the District at its public meeting, the board refused to hear any matters with respect to which it was required to meet and confer with the negotiating council. The board disallowed requested oral presentations pertaining to such matters without prior consideration by the negotiating council. Subsequently, the West Valley Federation petitioned for and was granted an alternative writ of mandate ordering the District to allow direct presentation to the governing board. The District filed a demurrer and answer to the petition. The Superior Court, Santa Clara County, Stanley R. Evans, J., sustained the demurrer without leave to amend and denied requested relief by discharging the alternative writ and denying the peremptory writ. The West Valley Federation appealed. The Court of Appeal, First District, Division 2, affirmed the trial court judgment.

The major issue in the present case is: Where multiple cer-
tificated employee organizations exist and a negotiating council has been formed as required by law to represent such multiple certificated employee organizations, is the governing board of a school district required by law to hear direct oral presentations by individual certificated employee organizations? The trial court answered this question in the negative, and the appellate court concurred and affirmed the decision. The rationale for the holding is based on the legislative purpose and intent and on the procedures expressed in sections 13080-13088 of the Education Code.  

Because the major question in this case arises under the Winton Act, sections 13080-13088 of the Education Code, a brief review of the statutory provisions of this legislation is required for an understanding of the issue.  


The Brown Act gave statutory recognition to the labor relations of all public employees as a matter of general public concern, and it emphasized the right of all employees of state and local governments to join or not to join employee organizations. School districts and their employees and employee organizations were expressly included under the provisions of this act. Four years later, with the adoption of the Winton Act, sections 13080-13088 of the Education Code, the legislature created separate statutory provisions covering the labor relations of school district employees.  

The purpose of the Winton Act, as expressed in section 13080 of the Education Code, is quite similar to that of the Brown Act. In the Winton Act, the statement of purpose recognizes the right of public school employees to join organizations of their own choice and to be represented by such organizations not only in their professional and employment relationships with their employers but also in the formulation of educational policy.  

2. Id.  
6. CAL. EDUC. CODE § 13080 states:  
It is the purpose of this article to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice and be represented by such organizations in their professional and employment relationships with public school employers and to afford certificated employees a voice in the formulation of educational policy.  
7. CAL. GOV'T CODE § 3500.
Section 13085 of the Winton Act is the section which is most significant\(^8\) in relation to the issue in the present case. The first paragraph of this section covers “meet and confer” sessions between public school employers or governing boards and representatives of employee organizations within the district.\(^9\)

The second paragraph of this section indicates that if there is only one employee organization within a district, the school board may recognize and bargain with that organization in behalf of all classified (non-certificated) employees; however, if there is more than one employee organization representing certificated employees, the board must bargain with the organizations jointly through a certificated employee negotiating council composed of representatives of employee organizations which are entitled to be represented.\(^{10}\)

---

8. Section 13081 defines the terms “employee organization,” “public school employer,” and “public school employee.” Sections 13082-13084, which parallel sections 3502-3504 of the Government Code, pertain to the rights of public school employees and employee organizations and the scope of representation.

Section 13086 of the Winton Act prohibits interference with individual employees' rights. Section 13087 provides for the adoption of reasonable rules and regulations for the administration of employer-employee relations. The final section exempts public school employees from the application of state labor policy.

9. CAL. EDUC. CODE § 13085 states:
A public school employer or the governing board thereof, or such administrative officer as it may designate, shall meet and confer with representatives of employee organizations upon request with regard to all matters relating to employment conditions and employer-employee relations, and in addition, shall meet and confer with representatives of employee organizations representing certificated employees upon request with regard to all matters relating to the definition of educational objectives, the determination of the content of courses and curricula, the selection of textbooks, and other aspects of the instructional program to the extent such matters are within the discretion of the public school employer or governing board under the law. The designation of an administrative officer as provided herein shall not preclude an employee organization from meeting with, appearing before, or making proposals to the public school employer at a public meeting if the employee organization requests such a public meeting.

10. CAL. EDUC. CODE § 13085 further states:
Notwithstanding the provisions of Sections 13082 and 13083, in the event there is more than one employee organization representing certificated employees, the public school employer or governing board thereof shall meet and confer with the representatives of such employee organizations through a negotiating council with regard to the matters specified in this section, provided that nothing herein shall prohibit any employee from appearing in his own behalf in his employment relations with the public school employer. The negotiating council shall have not more than nine nor less than five members and shall be composed of representatives of those employee organizations who are entitled to representation on the negotiating council. An employee organization representing certificated employees shall be entitled to appoint such number of members of the negotiating council as bears as nearly as practicable the same ratio to the total number of members of the negotiating council as the number of members of the employee organization bears to the total number of certificated employees of the public
In the present case, the West Valley Federation is in fact an employee organization representing certificated high school teachers employed by the District, but it is only one of a number of certificated employee organizations in the District. In attempting to make a direct presentation to the governing board of the District, the organization contends that the Winton Act should be read so as to draw a sharp distinction between the process of "meet and confer" and the mere "right of making proposals directly to the school board."

Both the appellant and the respondent rely upon the decision of California Federation of Teachers v. Oxnard Elementary Schools, which also involved mandamus and which "... is a veritable treatise on the history, scope, intent and constitutionality of the Winton Act." However, the court determined that the primary contention of the appellant's argument is not in accord with the fundamental objective of the Winton Act, as expressed in the Oxnard decision. As stated in Oxnard, the legislative purpose of the Winton Act is to create an efficient system for conducting negotiating sessions between certificated school em-

---

13. The court in California Fed'n of Teachers v. Oxnard Elementary Schools, 272 Cal. App. 2d 514, 534, 77 Cal. Rptr. 497, 513 (1969) declared: It must be recognized, as the trial court observed, that "the legislature expected that the employment of this medium for negotiation would effectuate a time saving to the employer in not having to meet and confer separately with two or more employee organizations; would also relieve the employer from having to deal with divergent viewpoints and to perform the difficult task of weighing and resolving inter-organizational disputes...; would eliminate the possibility of an employer playing one organization off against another and coming up with nothing particularly constructive for the benefit of employees; and, finally, would better facilitate a continuing and result-securing course of conferring compared with what had been experienced in the past under the wide open negotiation program featured by occasional concentrated campaigns and confrontations generated for the purpose of achieving employment goals." It is not the duty of the courts to evaluate the wisdom of specific legislation. We must assume that the legislature expected honest, sincere compliance and earnest consideration by negotiating council members of the minority organization's ideas and programs, and that if the system is abused, the legislature will amend or repeal the statute.
ployees and public school employers. In districts such as Campbell where multiple employee organizations exist, representatives of these organizations must act through a negotiating council to "meet and confer" with school district employers on all matters pertaining to employer-employee relations.

Permitting the West Valley Federation to make a direct presentation to the governing board of the Campbell Union High School District without first submitting proposals to the negotiating council would not only expressly contradict the intent of the Winton Act but would also require the governing board of the District to consider divergent viewpoints and decide policy issues which could be handled more efficiently by the negotiating council.14

The decision in Oxnard upholds the constitutionality of the Winton Act.15 Although minority organizations may not make direct presentations to the governing board of the districts, such organizations are not precluded from presenting proposals to negotiating councils. The Act does not deny individual employees the right to address the governing board of a school district.

Section 13085 of the Winton Act is especially significant because it establishes a definite procedure for presenting employee proposals to the school district employers. Under section 13085, in districts where only one employee organization represents certificated employees, an administrator or representative of the school district holds "meet and confer" sessions with members of the single organization. The sole procedural limitation imposed by the Winton Act is that in districts where multiple employee organizations exist, all presentations made by certificated employee organizations concerning employment relations with the public school employer must be directed through a negotiating council. Membership on the negotiating council is determined according to the number of members in each employee organization. Larger organizations are entitled to proportionately greater representation. Very small organizations may not qualify to have a representative on the council. Nevertheless, smaller organizations may present proposals concerning employment rights for consideration by the negotiating council.


The enacted legislation in the present case reconciles the interest of employees in freedom of association in minority organizations with the governmental interest in dealing effectively with employer-employee relations in the public school system without unconstitutionally suppressing or jeopardizing individual rights.
Section 13085 contains specific procedures for carrying out the purpose and intent of the Winton Act. In the present case, the court correctly determined that the West Valley Federation must follow established procedures which require that proposals be presented to the negotiating council and not directly to the governing board of the District.

The holdings in both *West Valley Federation of Teachers v. Campbell Union High School District* and *California Federation of Teachers v. Oxnard Elementary Schools* affirm the validity and constitutionality of the Winton Act. The present case is significant because it emphasizes the procedural importance of section 13085 of the Education Code: in all school districts where multiple certificated employee organizations exist, presentations concerning employer-employee relations must be directed through negotiating councils composed of representatives of the organizations. Although individual employees may address the governing boards of the districts, organizations not qualifying for membership on the negotiating councils are precluded from making separate proposals and presentations. The holding in the present case is limited to school districts, but the rationale of the case might eventually be extended to all public employee organizations presently covered by the Brown Act and subsequent related legislation.

*Margaret A. Mulholland*
Mr. James Blumstein moved to Tennessee on June 12, 1970, to assume new employment and on July 1, 1970 attempted to register to vote in the upcoming August and November elections. Although he was a bona fide resident of the state and county, Mr. Blumstein was refused registration because, by election time, he would not have been a resident of the state for one year and of the county for three months as required by Tennessee statutes. Mr. Blumstein brought a class action in a three-judge federal court for declaratory and injunctive relief, challenging the durational residency requirements on constitutional grounds.

The district court panel held that Tennessee's durational residency requirements for voting violate the Equal Protection Clause of the fourteenth amendment. On direct appeal, the United States Supreme Court affirmed.

The Court reasoned that Tennessee's durational residency requirements divide bona fide residents into two classes based on the length of time they have been residents and then discriminate against the new residents as a class by denying them the right to vote. The question was whether such classification and discrimination is permissible under the Equal Protection Clause.

In deciding that question, the Court noted that two fundamental rights are infringed by the Tennessee requirement. The right to vote is denied new residents and the right to travel is abridged by penalizing recent travelers through restriction of their franchise. The question of what test shall be applied to decide whether the challenged statute constitutes a denial of equal protection is determined by the nature of the rights involved. The right to vote has been characterized as fundamental because it se-

1. TENN. CONST. art. IV, § 1, TENN. CODE ANN. §§ 2-204 & 2-304. These sections require as a precondition for registration and voting that a resident have lived within the state for twelve months and within the county for three months. New residents are those who have not met one or both of these requirements.


cures all other political rights. The right to vote in state elections does not originate from a constitutional grant but is constitutionally protected by the Equal Protection Clause requirement that all citizens must be allowed to vote on an equal basis. Similarly, the freedom to travel throughout the United States finds no explicit mention in the Constitution; however, that right has long been recognized as basic to our system of government and implicit in the Constitution.

Because of the fundamental nature and the constitutionally protected status of these rights affected by the durational residency requirements, the Supreme Court applied a strict standard to test the Tennessee statute against the Equal Protection Clause, requiring that the state show the challenged statute is "necessary to promote a compelling state interest." This case marks the first time the Court has applied the "compelling state interest" test to durational residency requirements affecting the right to vote in a state election. In Drueding v. Devlin, the Court affirmed a lower court decision which upheld Maryland's durational residency requirements after testing those requirements against the traditional equal protection standard of whether the statute bears a reasonable relation to a permissible state purpose. However, the Court's decision in Kramer v. Union Free School District presaged rejection of the latter test when the Court was again confronted with challenges to durational residency requirements.

6. The Supreme Court has based the right to travel at times on the Privileges and Immunities Clause of article IV, § 2 of the Constitution as in Paul v. Virginia, 8 Wall. 168 (1869), and at other times on the Privileges and Immunities Clause of the fourteenth amendment as in Williams v. Fears, 179 U.S. 270 (1900) and Oregon v. Mitchell, 400 U.S. 112, 285-86 (1970) (concurring opinion of Stewart, Burger, & Blackmun, JJ.). In several recent decisions, including the instant case, the Court has been content to reaffirm the existence of the right to travel without basing it on any particular constitutional provision. See, e.g., Griffin v. Breckenridge, 403 U.S. 88 (1971).
8. 405 U.S. at 342.
10. 234 F. Supp. at 724.
12. Although it was predictable in light of Kramer that the Court would apply the compelling interest standard once it agreed to hear a challenge to durational residency requirements, it was not at all clear that the Court would in fact agree to grant certiorari. Only one year before Dunn, the Supreme Court decided Oregon v. Mitchell, 400 U.S. 112 (1970), in which it upheld the 1970 Federal Voting Rights Act eliminating durational residency requirements for voting in presidential and vice-presidential elections. The majority opinion by Mr. Justice Black took a hands-off stand on voting requirements for local elections, stating that the power to control non-federal elections was reserved to the states and the Equal Protection Clause cannot limit that power in the absence of
In the Kramer case, the Court applied the "compelling interest" test in holding invalid a statute which required that one be either an owner of taxable property or a parent of a child in the schools in order to vote in school district elections. The Court's use of the same test for a statute which interferes with the right to travel also followed from an analogous handling of durational residency requirements for receiving welfare benefits in Shapiro v. Thompson.\(^{13}\)

Having established the appropriate test of constitutionality, the Court then looked at the two purposes asserted by Tennessee for its durational residency requirements to determine if the voting restrictions were in fact "necessary to promote a compelling state interest."\(^{14}\) Tennessee argued that the requirements were necessary to guard against fraudulent voting by non-residents and to guarantee that voters are knowledgeable.\(^{15}\) The Court recognized a compelling state interest in preventing voting fraud but decided that durational residency requirements were not a necessary means to that end.\(^{16}\) Voter registration requirements accomplish that purpose on an individual basis without the necessity for a conclusive presumption that all recent arrivals are not bona fide residents.\(^{17}\) Discussing the goal of guaranteeing knowledgeable voters, the Court stated that durational residency requirements were too imprecise to accomplish such a goal and furthermore, that Tennessee presented no factual evidence to support its presumption that new voters were uninformed.\(^{18}\) Thus, Tennessee's durational residency requirements denied residents equal protection of the laws.

The effect of Dunn is to invalidate all one-year state residency and 90-day county residency requirements. However, by sanctioning, at least in dicta, Tennessee's practice of closing voter registration 30 days before each election,\(^{19}\) the Court left open the question of the validity of residency requirements greater than 30 days and less than 90 days.

---

other specific constitutional limitations. 400 U.S. at 134-35. Dunn confronted and invalidated durational residency requirements for voting in non-federal elections squarely contrary to the Oregon dicta. Furthermore, it seems that even Kramer invaded the prohibited area delineated in Oregon by invalidating requirements for voting in local school district elections.

14. 405 U.S. at 342.
15. Id. at 345.
16. Id.
17. Id. at 346.
18. Id. at 357-58.
19. The 30-day registration cut-off was not at issue in this case, but the Court did note that 30 days appeared sufficient from an administrative standpoint. Id. at 348.
Less than two months after Dunn, the California Supreme Court decided Young v. Gnoss in which plaintiffs challenged California's 90-day county residency requirement for voting and its 54-day precinct residency and pre-election closing date provision. As commanded by the Dunn decision, the California court held the 90-day requirement unconstitutional and then went on to test the 54-day requirement by the strict equal protection standard. The court found that the state had a compelling governmental interest in transmitting voter registration affidavits and indexes to each precinct by election day, but that the state did not show that the 54-day period was necessary to accomplish that task. The court therefore concluded that this requirement was also unconstitutional as violative of the Equal Protection Clause.

Moreover, the California Supreme Court went one step beyond Dunn and held that "[N]o durational residence requirement in excess of 30 days may constitutionally be imposed, and general voter registration must remain open at all times except during the 29 days immediately preceding an election." The court based that decision on language in Dunn to the effect that 30 days is ample time for the state to complete its administrative tasks prior to elections. In addition, the court cited a prohibition in the 1970 Federal Voting Rights Act against closing registration more than 30 days before presidential and vice-presidential elections, accompanied by a congressional finding that, as to presidential elections, any more restrictive registration practice is not required by any compelling state interest.

These two decisions dictate sweeping changes in the voter residency laws of a vast majority of the states. No fewer than 48 states have state residency requirements of more than 90 days and several have county or district residency requirements longer than the 90-day maximum set by Dunn. If the rationale of the California decision fixing a 30-day residency limit were adopted by the courts of the other states, state residency requirements in all states, county residency requirements in 32 states and district requirements in 18 states would all be invalid. Such changes could have a substantial effect on the voting population.

---

22. 7 Cal. 3rd at 27-28, 496 P.2d at 452, 101 Cal. Rptr. at 540.
23. 405 U.S. at 348.
26. Id.
27. Id.
in our highly mobile society.\textsuperscript{28} The Bureau of the Census estimates that over five million persons were disqualified from voting in congressional, state and local elections in 1968 by residency requirements.\textsuperscript{29} Thanks to Dunn and Young the number of disenfranchised will be decreased in 1972.

\textit{Marian Kennedy Pollack}

\begin{itemize}
\item \textsuperscript{28} 18.4\% of all persons in the United States over age one changed residences between March 1969 and March 1970, including 3.6\% who moved between states and 3.1\% who moved between counties within a state. \textit{United States Bureau of the Census, The Statistical Abstract of the United States: 1970}, at 34 (92 ed. 1971).
\item \textsuperscript{29} 115 CONG. REC. 13992-93 (1969) (remarks of Senator Kennedy).
\end{itemize}
SEARCH AND SEIZURE — TOTALITY OF CIRCUMSTANCES MAY PROVIDE PROBABLE CAUSE FOR ARREST AND SEARCH ABSENT A VALID WARRANT—


On January 24, 1970, officers of the Menlo Park Police Department executed a search warrant issued against Jonathan Weidman, Robert Garret and "other unidentified persons." During the search, Carlton Warren Tenny entered the premises without knocking. Upon observing the activities of the arresting officers, he attempted to run, but was subsequently apprehended, searched, and ultimately convicted of violating § 11530 of the Health and Safety Code on the evidence thus obtained. Carlton Tenny appealed this conviction to the California Court of Appeals on the basis that the lower court's denial of defendant's motion to suppress is an error of law justifying reversal.

In determining whether the marijuana discovered by the search pursuant to Tenny's apprehension should be admitted as evidence, the court first considered whether the defendant was covered by the original warrant, because of the clause in that warrant referring to "unidentified persons." The U.S. Constitution stipulates that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The defendant contended that the phrase "unidentified persons" is too broad to be constitutionally valid, as it does not describe the persons to be searched with suitable particularity. However, if the phrase is interpreted as the lower court construed it, to mean "unidentified residents," it is too narrow to cover the defendant within its scope, as he was not a resident of the premises, nor was he believed to be by the arresting officers.

Since there have been no California cases dealing specifically with the degree of particularity deemed constitutionally sufficient to validate a search of a person, the court considered precedential case standards dealing with the particularity with which

---

1. Every person who possesses marijuana, except as otherwise provided by law, shall be punished by imprisonment in the county jail for a period of not more than one year... or... the state prison for a period of not less than one year... or more than 10 years.
premises and property must be described, and concluded that the constitutional requirement is met when the person to be searched is described with "reasonable particularity." The court further concluded that the phrase "unidentified persons" did not sufficiently meet the standard of "reasonable particularity," and that the warrant was therefore invalid, as applied to the search of Carlton Tenny.

The court then dealt with the legality of the search independent of the invalid warrant, recognizing that a search may properly be made incidental to a lawful arrest. Grounds for arrest include reasonable or probable cause for the arresting officer to believe that the defendant had committed a felony. In this case, that probable cause was Tenny's relationship to the furnishing or possession of narcotics. Probable cause was therefore predicated on the notion that defendant was more than a casual visitor to premises associated with known narcotics activity, and that the deliberate furtive conduct of defendant under the circumstances supported reasonable suspicion of criminal activity.

The court noted that the mere presence of the defendant on the premises did not justify either his arrest or a search of his person, absent additional factors indicating his association with criminal activity. Further, neither defendant's time of arrival nor his entrance without knocking established probable cause on which association with the narcotics could be based. The court observed that nine-thirty at night is not an uncommon time to call, and that most callers did not knock before entering the premises at 206 San Margarita Ave. The court reasoned, however, that Tenny's flight from the premises and failure to halt upon command demonstrated that he had reason to flee from the police, making him more than a casual visitor. This conclusion was substantiated by the fact that the police were clearly visible from the door, and that the testimonies of both the defendant and the arresting officers indicated that the defendant was aware of the police and ensuing arrests.

The court then concentrated on the "furtive gesture," Ten-

ny's flight, and evaluated the extent to which it demonstrated the defendant's association with known narcotics traffic. The court pointed out that a furtive gesture, in itself, is not sufficient to justify a search or an arrest. However, the court considered the incident of flight as "a strong indicia of mens rea, which when coupled with specific knowledge on the part of the officer relating the suspect to the crime," is a proper factor to be balanced in the officer's decision to make an arrest. The "specific knowledge" relating Tenny to narcotics possession consisted of the fact that narcotics were present on the premises when he arrived, and that he entered without knocking and attempted to flee upon observation of the police officers. The court then concluded that the totality of the circumstances constituted probable cause for defendant's arrest for involvement in narcotics activity. Accordingly, the court held that the search was incident to a lawful arrest, and was therefore proper. The appeal from the order denying defendant's motion to suppress evidence was dismissed.

The court's analysis in People v. Tenny pivots on a series of tenuous observations and conclusions. First, the court finds it significant that Tenny failed to knock before entering. However, the record emphasizes that it was the custom of most visitors not to knock. Police surveillance indicated that out of thirty-two people entering the house, only five or six were observed to knock. The court noted that this fact, standing alone, did not justify a belief that defendant was more than a casual visitor. Indeed, the failure to knock is so insignificant that it is remarkable the court considered it at all. It does not demonstrate that the defendant was more than a "casual visitor," nor does it indicate that he was involved in narcotics.

More important, however, is the weight given by the court to the fact that the defendant fled from the scene and failed to halt on command. The court considers this a "strong indicia of mens rea, and when coupled with 'specific knowledge' on the part of the officer relating the suspect to the evidence of crime, is a proper factor to be considered in the decision to make an arrest." The court seems to imply that the defendant fled because he was fearful that he would be arrested for possession of narcotics. Further, the officer's knowledge that the defendant

See also Chimel v. California, 395 U.S. 752 (1969).
15. Id. at 16, 101 Cal. Rptr. at 427.
was entering a locus of known narcotics activity supposedly implicates him in the crime, to the point of providing probable cause for his arrest and search. It is precarious logic that the "specific knowledge" of contraband on given premises will render anyone who enters upon them subject to arrest upon probable cause.

Once the court established to its satisfaction that the defendant was related to evidence of a crime, it coupled that notion to defendant's flight as an "indicia of mens rea." The court held that Tenny's acts could have meant that he fled knowing the men were police officers, and that his motivation was a matter of conflicting testimony and inference properly resolved by the trier of fact. However, the court completely neglected the possible motivations of fear, astonishment, or prior experience with police, and discounted the defendant's own testimony that he believed the men were robbers.16 This attitude manifests the court's indifference toward alternative explanations concerning defendant's flight—a factor so important to the prosecution as an indicia of mens rea.

The point is that Tenny's thoughts as he fled are not relevant here, nor were they "properly resolved by the trier of fact." The court found that Tenny knew the men to be officers, and fled with the knowledge that he was in possession of marijuana and would be arrested. The important thing, however, is not what Tenny actually believed, but how his objective acts could reasonably be interpreted by the arresting officers. Through subjective analysis, objectively ambiguous acts are construed to be a manifestation of mens rea. A retroactive speculation as to Tenny's state of mind does not belong in an appraisal of whether the officer had objectively established probable cause for arrest. After all, the fact that defendant was found to be in possession of narcotics was legally irrelevant to the existence of probable cause, as probable cause for his arrest and subsequent search cannot be based on a belated interpretation of conduct which is probable only in retrospect, through consideration of evidence uncovered by that search.17 So too, a subsequent determination that Tenny in fact fled because he was conscious of guilt, is irrelevant to a determination of the officer's interpretation at the time of the arrest. If there is an innocent explanation of Tenny's acts which was equally probable at the time the arrest was made, then as a matter of law, the court ought to have found that no probable cause existed. Objectively, it would have been just as reasonable to assume that by virtue of his presence alone, Tenny feared he would be arrested, properly or not, guilty of crime or not. It is

16. Id.
RECENT CASES

RECENT CASES

quite possible that Tenny would make an effort to avoid such involvement by flight, merely to avoid the unpleasantness and stigma associated with police detention.

None of the factors considered by the court, in themselves, constituted reason to believe that the defendant was more than a "mere visitor." It therefore appears that the court has combined a series of factors which are individually devoid of merit to establish probable cause for defendant's arrest. The court has taken the whole, the "totality of the circumstances," to be far more than the sum of its parts.

Although the holding does not conflict with the present state of the law, it stretches the law concerning probable cause for arrest to an absurd degree. A mere furtive gesture does not constitute probable cause for arrest, except when coupled with specific knowledge on the part of the officers relating the suspect to evidence of crime. Here, defendant was not named in any search warrant, nor does the record indicate that he was an uncommonly frequent or otherwise special visitor of the premises. There is no "specific knowledge" on the part of the officer linking defendant to any crime, other than his mere presence and the fact that he fled, possibly to avoid involvement in what was sure to be an extremely humiliating and degrading situation. There was no prior information that defendant was involved in criminal activity. Equating mere flight with a gesture of guilt or mens rea falls short of demonstrating that the officers were justified in concluding that defendant was more than a "casual visitor." Probable cause to arrest or search must be tested by "facts which the record shows were known to the officers at the time the arrest (or search) was made." The only facts known to the arresting officers were that the defendant arrived upon the premises where criminal activity was occurring, entered without knocking as was the custom, and fled at the sight of police. These actions do not, in and of themselves, establish probable cause for arrest, but merely demonstrate speculation on the part of the arresting officers that the defendant might have been involved in criminal activity. Speculation has never been sufficient to justify arrest, nor should it now be elevated to the status of probable cause. Because speculation has been equated with probable cause this holding does not merely demonstrate poor legal reasoning, but undermines the objective determination of probable cause for arrest, and replaces it with a doctrine of relation back which has no place in the law of searches and seizures.

Harry Shulman

REAL PROPERTY—COMMON LAW RULE AGAINST RESERVING AN INTEREST IN PROPERTY TO A STRANGER TO TITLE OVERRULED, Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, — P.2d —, 102 Cal. Rptr. 739 (1972).

Genevieve McGuigan owned two abutting lots in Pacifica known as lots 19 and 20. Lot 19 had a building on it and lot 20 was vacant. Because she was a member of the First Church of Christ, Scientist, she permitted use of lot 20 for parking during the services. She later sold lot 19 to Peterson who used the pre-existing building as an office and listed the property for resale. Then Willard expressed an interest in buying both lots 19 and 20, and Peterson signed a deposit receipt for sale of both lots. At the time he agreed to sell lot 20, Peterson did not own it but he soon reached an agreement for sale with McGuigan. McGuigan agreed to sell on the condition that lot 20 would continue to be used as a parking lot for church services. She referred the matter to the church’s attorney who drafted an easement into the deed to accomplish this purpose.1 Once the clause was inserted in the deed, McGuigan sold the property to Peterson, who recorded the deed. Willard paid the agreed purchase price and ten days later he received Peterson’s deed for both lots in fee simple. He recorded the deed, which did not mention an easement for parking for the church. There is no evidence that Willard was ever notified about the easement. He did not become aware of it until several months later at which time he commenced action to quiet title against the church.

The trial court found that McGuigan and Peterson “intended to convey an easement to the church but that the clause they employed was ineffective for that purpose because it was invalidated by the common law rule that one cannot ‘reserve’ an interest in property to a stranger to title.”2 From the ruling quieting title in Willard, the Church appealed. In a decision written by Justice Peters, the Supreme Court of California held

1. Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, — P.2d —, 102 Cal. Rptr. 739 (1972). The provision in the deed stated the conveyance was “subject to an easement for automobile parking during church hours for the benefit of the church on the property at the southwest corner of the intersection . . . such an easement to run with the land only so long as the property for whose benefit is given is used for church purposes.” Id. at 475, — P.2d —, 102 Cal. Rptr. at 740.
2. Id. at 476, — P.2d —, 102 Cal. Rptr. at 741.
that absent reliance on the old common law rule that one could not reserve an interest in property to a stranger to title, such rule would not be allowed to defeat the grantor’s intent to reserve an easement running to the church in deeding the real property to Willard.

The Supreme Court rejected Willard’s argument that the easement was defeated by the doctrine of ancient title as not supported by the facts, and held that the case presented two issues. First, should the old common law rule barring reservation of an interest in a third party stranger to title be abandoned? Second, if the rule were discarded, how could the court best balance two conflicting interests: the grantor’s intent and reliance on the old rule.

Justice Peters uses this case as an opportunity to abandon the much maligned, often evaded technical requirements of a feudal rule, which had already been stricken by the Court of Appeals of Kentucky and the Supreme Court of Oregon. A modern view was taken by the Restatement of Property as early as 1944.

"It is an inherent weakness of common law evolutionary process that its stringent rules of property survive in one form or another long after the reasons which initially gave them birth have faded into obscurity." So it was with this rule. Initially, property rules were extremely rigid, requiring the formal livery of seisin. Later, deeds were used in place of the feudal ceremony and it was necessary to "establish some semblance of order by promoting uniformity in the instruments of conveyance . . . When confronted with a choice, the courts sacrificed the intentions of the individual grantors by invoking rules calculated to establish uniformity and necessary limitations and designed to benefit society as a whole." Each clause of the deed was of vital importance. It was inevitable that modern courts would relax enforcement of this rule and realize that there should be fewer restrictions on the ability to freely alienate property.

3. Id. at 479, — P.2d —, 102 Cal. Rptr. at 743.
4. Townsend v. Cable, 378 S.W.2d 806 (Ky. 1964).
6. RESTATEMENT OF PROPERTY, § 472 (1944) reads as follows: "By a single instrument of conveyance there may be created an estate in land in one person and an easement in another."
7. Harris, Reservation in Favor of Strangers to Title, 6 OKLA. L. REV. 127 at 131 (1953) [hereinafter cited as Harris].
8. Id. at 132.
9. Id. at 133.
10. Id. at 134. This trend was formalized in what Harris calls the "Rule of Intention." Id. The rule states: "If the intent of the parties is apparent from an examination of the deed 'from its four corners' without regard for its technical and formal division, it will be given effect even though in doing so tech-
The break with tradition took place slowly and cautiously. Prior to this opinion, California courts either applied the strict common law rule or circumvented it or refused to apply it, depending on the particular facts of each case. For example, there "seemed to be a greater inclination to apply the common law rule when the interest sought to be reserved [was] only an easement or similar interest than when it reach[ed] the dignity of an estate in land." Also, the closer the relation of the third party to the grantor the more willing was the court to uphold the reservation as a matter of public policy.

The courts' efforts to safeguard the intentions of the grantor took many forms. For example, although "[t]heoretically, an 'exception' exists when some part of the ownership of the grantor is never parted with; while a 'reservation' is a term applicable when the instrument transfers all the grantor had but creates in the grantor some specified interest with respect to land transferred," a deed with a provision containing what appeared to be a reservation would be construed as an exception of title in the grantor. In a California case, Boyer v. Murphy, the court found that "while the distinction between reservation and exception has been uniformly recognized the terms 'reservation' and 'exception' are often used interchangeably; and the technical meaning will give way to the manifest intent even though the technical term to the contrary is used." In Mott v. Nardo the court mentioned yet another way to approve of the reservation in a stranger. The court found that although reservation or exception in a deed in favor of a stranger thereto creates no estate or interest in him, it may operate as an admission in his favor, an estoppel against the grantor or an exception from the thing granted. However, in deciding the case, the court reaffirmed the common law rule because it did not conflict with the intentions of the parties.

Perhaps the most significant change of view came down in 1961 in Dandini v. Johnson. In this case, plaintiff had conveyed to her husband her undivided one-half interest in the pre-
ises described, reserving, however, to herself and to her sister the right to use and occupy the lands during the terms of their respective lives. The court held the grant was sufficiently ambiguous to require extrinsic evidence from which they determined that the effect of the intention was to reserve to plaintiff and her sister the nonexclusive right to use the property. By including the sister's rights in the reservation, the court was actually preserving a right in a third person stranger to title. Thus, the court approved the modern view that in the construction of deeds, as in the construction of other instruments, the intention of the parties is to be gathered from the whole document and that such intention shall govern. This decision was followed by a series of decisions through the 1960's which took the position that the primary object of the interpretation of a deed is to ascertain and give effect to the parties' intentions, especially that of the grantor at the time the instrument was executed.18 In practice, the Draconian common law rule against reserving an interest in a stranger to title has increasingly been ignored in favor of contract interpretation principles which looked to the intention of the parties. Finally, in Willard the California Supreme Court has taken a step toward streamlining the conveyancing procedure by breathing life into Civil Code § 1066,19 which applies contract principles of construction to land transfers. In doing so, it puts to rest one of the longest lasting and most stubborn technicalities.

As courts frequently do when seeking to overturn a long-standing rule of law, the Supreme Court seized upon a case in which the reliance of the grantee upon the old rule was practically negligible. First, Willard, a man well-versed in real estate sales, neglected to seek title insurance which would certainly have pointed up the defect. Therefore, no insurance company could be said to be relying on the old rule. Second, Willard himself never searched the record to determine if there was an encumbrance. Since he was on constructive notice of any previously recorded deed in the chain of title, he can be held to knowledge of the encumbrance.20 He cannot have been relying on the common law rule because he never read the deed. Willard gave the California Supreme Court an opportunity to reroute the path of the common law with no risk of injustice to the parties.


19. CAL. CIV. CODE, § 1066 (West 1970) reads as follows: "A deed of conveyance is a contract and is subject to the usual rules of construction applicable to such instruments."

As to future land sale contracts, the court unequivocally states that it will follow "the lead of Kentucky and Oregon and abandon the common law rule entirely." However, it tempers that language by refusing to give the new ruling retroactive effect. Therefore, presently existing deeds will have to be treated individually. In other words, the court is giving some weight to the dissenting opinion in the Townsend case, which was the first to discard the common law rule:

When a rule of property is abandoned, I believe that past transactions entered into in reliance upon it should be excluded from the effect of the opinion. Though such an opinion may theoretically constitute nothing more than dictum, nevertheless it has the useful effect of providing guidance for future transactions without an ex post facto divestiture of rights heretofore considered to have been settled.

There is no doubt, however, that a revised common law rule has been stated and that Willard is a valuable precedent for the application of the over-looked Civil Code § 1085 which allows a valid grant in any natural person.

Logically, a reservation in favor of a third person should be operative. "Certainly any rule which can only operate to defeat grantor's intention is undesirable and should be discarded unless some overriding public policy requires its retention." In this case, the California Supreme Court found no such public policy.

James L. Stoelker

22. Id. "Competing interests may warrant application of the common law rule to presently existing deeds."
23. Townsend v. Cable, 378 S.W.2d 806 (Ky. 1964).
24. CAL. CIV. CODE, § 1085 (West 1970) reads as follows: "A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto."
25. The court states that § 1085 is clearly not applicable in this case because the church is not a natural person.
26. Harris, supra note 7 at 154.

William Nance was driving from Santa Rosa to San Francisco with four other men when the car in which they were riding ran low on gas. They decided to steal fuel from pumps at the Marin County Airport, but could not do so because the pumps were electrically operated. Nance and three of his companions then broke into and entered the airport administration building with the intent to switch on the pumps. While inside, they took candy, gum, the emergency transmitter, a tape recorder, and a record player. Nance was seen setting fire to curtains in the company’s office.

After a trial by jury Nance was found guilty of burglary¹ and arson.² He pleaded diminished capacity as a defense to the charge of arson, claiming that he suffered from uncontrollable urges to start fires. The court held that diminished capacity may not be raised as a defense to a charge of arson. Arson is a crime which does not require a specific mental state; therefore, a diminished capacity defense is inapplicable.

Nance appealed to the California Court of Appeals, which affirmed the lower court’s decision, holding that the requirement of malice in the statutory definition of arson means merely “... a deliberate and intentional firing of a building, or other defined structure, as contrasted with an accidental or unintentional ignition thereof; in short, a fire of incendiary origin ...”³ The court thus characterized arson as a crime requiring general rather than specific intent.⁴

2. Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or of another; or any church, meetinghouse, courthouse, workhouse, school, jail or other public building or any public bridge; shall, upon conviction thereof, be sentenced to the penitentiary for not less than 2 nor more than 20 years. CAL. PEN. CODE § 448a (West 1970).
4. 25 Cal. App. 3d at 930, 102 Cal. Rptr. at 270.
Justice Brown, writing for a unanimous court concisely and correctly explained the law of diminished capacity as it is currently construed in California. Beginning with the landmark case of People v. Wells, he traced the use of the diminished capacity defense in relation to both homicide and non-homicide cases. The defense was first established in homicide cases in response to the rigidity of the bifurcated trial system established in California in 1927.

Under this system no evidence of defendant’s mental condition could be introduced at the guilt stage of trial. Only after being found guilty could the defendant introduce evidence of his impaired mental condition at the second, or insanity, phase of the trial. Thus, all pertinent issues, save defendant’s sanity based on the “right-wrong test”, were decided before expert medical witnesses could be heard. The defendant was conclusively presumed sane at the first stage of the trial and it was virtually impossible for him to dispute any of the mental elements of the prosecution’s prima facie case.

The Supreme Court of California declared in 1949 in Wells that the defense should be allowed, in the guilt stage of trial, to introduce testimony relating to the accused’s mental condition at the time of the alleged crime, in order to negate the specific mental state or intent necessary for the particular crime.

The Nance court pointed out that in homicide cases the effect of a successful diminished capacity plea is the reduction of the charge to a lesser included offense. The defense may negate the requisite malice aforethought and thus reduce murder to manslaughter or lack of premeditation may be shown and re-

7. People v. Troche, 206 Cal. 35, 273 P. 767 (1928); People v. Leong Fook, 206 Cal. 64, 273 P. 779 (1928).
8. M’Naghten’s Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843); People v. Pico, 62 Cal. 50 (1882). The 1971 proposed revisions to the California Penal Code provide:

§ 535. Insanity

(a) A person is not criminally responsible for an offense if, at the time of the offense, as the result of mental illness, disease, or defect, he lacked the capacity to know and understand what he was doing, or to know and understand his conduct was wrongful and a violation of the rights of another person.

(b) A person raising the defense of insanity, as defined by subdivision (a) of this section, has the burden of establishing that defense by a preponderance of the evidence.

THE CRIMINAL CODE: PENAL CODE REVISION PROJECT STAFF DRAFT, (Joint Legislative Committee for Revision of the Penal Code, 1971).
10. 33 Cal. 2d at 346, 202 P.2d at 63.
11. 25 Cal. App. 3d at 928, 102 Cal. Rptr. at 267; accord, People v. Mosher, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969); People v. Waters, 266
duce first degree murder to second degree.\textsuperscript{12}

The use of a diminished capacity defense in non-homicide cases has not been as widely accepted as its use in homicide cases.\textsuperscript{13} Despite questions of policy raised in some appellate cases,\textsuperscript{14} the California Supreme Court has implicitly stated that the defense is acceptable to negate the specific intent element in cases of burglary, robbery and rape.\textsuperscript{15} The California appellate courts have recognized a diminished capacity defense in cases of forgery\textsuperscript{16} and of battery on a police officer.\textsuperscript{17} Battery\textsuperscript{18} is considered a general rather than specific \textit{mens rea} crime, and the court in \textit{People v. Glover} pointed out that the defense of diminished capacity is only available when a particular mental state, such as specific criminal intent, is by statute made an essential element of the crime. Although neither battery\textsuperscript{19} nor battery on a police officer\textsuperscript{20} makes mention of specific criminal intent as an element of the crime, the court concluded that the statutory crime of battery on a police officer requires a particular mental state: the knowledge that the victim is a police officer engaged in the performance of his duties.\textsuperscript{21}

The issue presented in the instant case was whether arson qualifies as a crime requiring a specific mental state and is therefore susceptible to a diminished capacity defense. The lower courts have often disagreed as to whether a particular crime requires a specific or general intent. Justice Traynor provided an

\begin{itemize}
  \item \textsuperscript{13} The diminished capacity defense is so well established in murder cases that the appellate court has held that it is proper for the court to give a diminished capacity instruction when the evidence warrants it, even if this is objected to by the defense. \textit{People v. Olea}, 15 Cal. App. 3d 508, 93 Cal. Rptr. 265 (1971).
  \item \textsuperscript{15} People v. Mosher, 1 Cal. 3d 379, 392, 461 P.2d 659, 667, 82 Cal. Rptr. 379, 387 (1969).
  \item \textsuperscript{16} People v. Gentry, 257 Cal. App. 2d 607, 65 Cal. Rptr. 235 (1968).
  \item \textsuperscript{17} People v. Glover, 257 Cal. App. 2d 502, 65 Cal. Rptr. 219 (1967). The \textit{Nance} court is misleading in its discussion. It cites \textit{Glover} as a case of battery, implying a simple battery, when in fact it was a case of battery on a police officer. 25 Cal. App. 3d at 929, 102 Cal. Rptr. at 269.
  \item \textsuperscript{18} \textit{CAL. PEN. CODE} § 242 (West 1970).
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} \textit{CAL. PEN. CODE} § 243 (West 1970).
  \item \textsuperscript{21} 257 Cal. App. 2d at 505-06, 65 Cal. Rptr. at 221-22.
\end{itemize}
excellent discussion of this problem in People v. Hood. Noting the artificiality of the distinction between specific and general mens rea crimes, he pointed out that policy considerations often dictate how a crime is to be classified.

The Nance court's reasoning is founded primarily on policy grounds. Unlike a homicide case in which successful use of a diminished capacity defense will merely reduce the charge and unlike an insanity plea which imposes compulsory treatment on the defendant if successful, a successful defense of diminished capacity to the crime of arson would free the defendant. Consequently, in determining whether arson requires a specific mental state, the court defined "malice" when related to the crime of arson as an intentional (as opposed to accidental) firing of a structure. The Nance court concluded that "maliciously", in the statutory definition of arson, means only "an intent to do a wrongful act." The court does not view "maliciously" as "a wish to vex, annoy, or injure another person." The court cites to several appellate cases in which the former definition is used. In the first of these arson cases, People v. Andrews, the court reasoned that "... 'malice' denotes nothing more than a deliberate and intentional firing of a building ..." However, this definition was not supported by the cases cited by the Andrews court.

In choosing the Andrews definition, the Nance court failed to consider an earlier and arguably better reasoned definition of malice than that found in Andrews. In People v. McCree the crime of arson was distinguished from the crime of injuring a

23. Id. at 456-58, 462 P.2d at 377-79, 82 Cal. Rptr. at 625-27.
24. 25 Cal. App. 3d at 930, 102 Cal. Rptr. at 270.
25. Id.
26. "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law. . . ." CAL. PEN. CODE § 7(4) (West 1970).
29. Id. at 75, 44 Cal. Rptr. at 98.
30. The Andrews court cites People v. Clagg, 197 Cal. App. 2d 209, 17 Cal. Rptr. 60 (1961) and People v. Cape, 79 Cal. App. 2d 284, 179 P.2d 426 (1947). In Cape the court merely finds that evidence, though circumstantial, may be used by the jury to show defendant's criminal intent. The court does not differentiate as to the type of intent necessary. Id. at 289-90, 179 P.2d at 428-29. In Clagg the court does not discuss the issue of malice but merely states that "(a)ll that is needed to establish the corpus delicti, in addition to the actual burning, is that the fire was intentional or of incendiary origin." Supra at 212, 17 Cal. Rptr. at 61.
32. CAL. PEN. CODE § 448a (West 1970). Arson and related offenses are
place of confinement. The former requires that the act be done "willfully and maliciously"; the latter requires the act be done "willfully and intentionally." The court in McCree concluded that "(t)he fact an act was done intentionally or knowingly does not result in the conclusion that it was done maliciously. . . ." The words malicious and intentionally are not synonymous; nor does the one include the other. Something more than an intention to do the thing afterwards pronounced as wrong and inexcusable is necessary to constitute malice."

At least in McCree, malice in the case of arson is construed to involve a particular state of mind. The court in Nance, while not discussing McCree, implicitly rejects its analysis not for legal but for policy reasons; since "a pyromaniac would not, under our present system, be subject to compulsory treatment." The court looks to legislative action to provide an answer to the problems created by a "successful" defense of this nature.

The early proponents of this defense hoped to see the rule extended to all areas of criminal activity, but the court today seems to be restricting rather than expanding its scope. The court in Nance objected to the lack of procedural safeguards in applying a diminished capacity defense to non-homicide cases such as arson. In these cases a person found not guilty by reason of insanity is subject to commitment if, in the opinion of the court, he represents a danger to society. Therefore, if such a

33. Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any place of confinement, is punishable by fine not exceeding ten thousand dollars ($10,000), and by imprisonment in the state prison not exceeding five years, except that where the damages or injury to any city, city and county or county place of confinement is determined to be two hundred dollars ($200) or less, he is guilty of a misdemeanor. CAL. PEN. CODE § 606 (West 1970).

34. 128 Cal. App. 2d at 202, 275 P.2d at 99.

35. Id. citing In re Carncross, 114 F. Supp. 119, 120 (W.D. N.Y. 1953).

36. 25 Cal. App. 3d at 930, 102 Cal. Rptr. at 270. "Policy reasons weigh in our decision even more strongly than do the technical distinctions between the general mens rea and specific intent."


38. 25 Cal. App. 3d at 930, 102 Cal. Rptr. at 270.

39. CAL. PEN. CODE § 1026 (West 1970) provides, in part:

If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the State hospital for the criminal insane, or if there be no such State hospital then that he be confined in some other State hospital for the insane. . . . A defendant committed to a State hospital shall not be released from confinement unless and until the
person is acquitted based upon a diminished capacity defense, he is freed. Presently, there is no legal basis for restraining him. If proposed revisions to the Penal Code are enacted, a defendant acquitted under a diminished capacity defense would be subject to commitment similar to a civil commitment under the Lanterman-Petris-Short Act.

Even if the legislature enacts these revisions, closing the loopholes indicated by the Nance court, that court’s definition of arson would still preclude the use of a diminished capacity defense. It is questionable whether legislative inaction should provide the basis for institutionalizing a judicial definition which, by

court which committed him, or the superior court of the county in which he is confined, shall, after notice and hearing, find and determine that his sanity has been restored.


41. Sherry, Penal Code Revision Project-Progress Report, 43 CAL. ST. B.J. 900, 916 (1968). In commenting on the “loopholes” noted by the Nance court, Sherry concludes,

The draft proposal closes this door to the release of one who may be dangerous because of his mental condition by giving the court in such an instance authority to direct an evaluation of defendant’s condition as provided in the case of civil commitments under the California Mental Health Act of 1967. In those cases in which a defendant is found not guilty as a result of his defense of mental illness, the proposed revision permits release of the defendant, as does the present law, if the court is satisfied that he has recovered and is no longer dangerous to others. Like-wise, it permits commitment to an appropriate state institution where treatment in such an agency appears to be desirable. It also includes procedures for committing such individuals to local custodial care and to probationary supervision. The court is given broad interlocutory power to permit release under supervision, to require further inquiry and evaluation of the person so released and, if necessary, to require commitment to the Department of Mental Hygiene where circumstances indicate that the public safety so requires. Procedural protections are accorded to the person subjected to these restraints and controls. They are based upon existing statutory provisions to which have been added appropriate due process safeguards.

42. CAL. WELF. & INST’NS CODE § 5000 et seq. (West 1972).

43. A note of caution, however, to the attorney contemplating a diminished capacity defense. Under the proposed revisions, a client might face longer incarceration than if he was convicted of the crime for which he was originally charged.

A conviction of violation of CAL. PEN. CODE § 448a (arson) involves a sentence of “not less than 2 nor more than 20 years.” Under the proposed revisions to the Penal Code a defendant could be incarcerated for a considerably longer period than the minimum two year penalty for arson. If, because of a successful diminished capacity defense, the defendant were committed to the “care” of the Department of Mental Hygiene he might well be subject to an indeterminate commitment either under the proposed revisions of the Penal Code, PENAL CODE REVISION PROJECT TENTATIVE DRAFT NO. 2, (Report of the Joint Legislative Committee for the Revision of the Penal Code, 1968), 92, or under the MDSO provisions of the California Code. CAL. WELF. & INST’NS CODE §§ 6450-6457 (West Supp. 1970); see, Comment, The MDSO—Uncivil Civil Commitment, 11 SANTA CLARA LAW. 169 (1970).
operation of the doctrine of *stare decisis* may make it difficult to change the rule even if the legislature subsequently acts.\textsuperscript{44}

*Susan G. Tanenbaum*

44. The latest publication by the revisors of the Penal Code fails to mention the commitment procedure in a diminished capacity case as outlined in the 1968 version. Instead it provides for a degree-reduction plan when diminished capacity is found to have seriously affected the defendant's intent to commit some specific intent crime. If the trier of fact determines that the defendant had no intent, the defendant would be entitled to an acquittal, but a finding of lessened intent would be treated as follows:

§ 550. *Diminished capacity and self-induced intoxication effect of verdict or finding*

550. In any prosecution in which evidence of diminished capacity or self-induced intoxication has been introduced, when the trier of fact determines that the person has committed a crime requiring a specific intent as the culpable mental state, but also determines that the person's specific intent was seriously affected by diminished capacity or self-induced intoxication, or both, the verdict or finding shall so state, and the court shall, in sentencing the person or otherwise disposing of the case, reduce the degree of the crime as follows:

(a) When the crime is a felony of the first degree, to a felony of the second degree.
(b) When the crime is a felony of the second degree, to a felony of the third degree.
(c) When the crime is a felony of the third degree, to a felony of the fourth degree.
(d) When the crime is a felony of the fourth degree, to a felony of the fifth degree.
(e) When the crime is a felony of the fifth degree, to a misdemeanor of the first degree.
(f) When the crime is a misdemeanor of the first degree, to a misdemeanor of the second degree.