[HIGH COURT OF AUSTRALIA.]

BEHSMAN . . . . . APPLICANT ;

AND

ANSELL . . . . . RESPONDENT.

BEHSMAN . . . . . APPLICANT ;

AND

BAKER . . . . . RESPONDENT.

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PERTH, *Sept.* 18;

SYDNEY, *Nov.* 22.

Dixon C.J., Webb and Kitto JJ.

Children's Court (W.A.)—Validity of constitution—Appointment of magistrates by ambulatory class description—Exclusive jurisdiction—"Offences committed . . . against children"—Crime of incest—Whether such an offence—Criminal Code (W.A.), s. 197—Child Welfare Act 1947-1955 *(W.A.) (No. 66 of* 1947*—No. 45 of* 1955*), ss.* 19 (1), 20 (*a*).

Section 19 (1) of the *Child Welfare Act* 1947-1955 (W.A.) provides:—"The Governor may by Order in Council establish special courts to be called Children's Courts, and may appoint a special magistrate for any particular court or courts, and may by Order in Council from time to time determine the area in and for which each court shall exercise jurisdiction."

Held, that the sub-section contemplates the appointment of a particular person to be a special magistrate for a particular children's court or children's courts.

Accordingly, where an Order in Council purported to appoint the magistrates for the time being and from time to time respectively assigned to the magisterial districts enumerated thereunder to be special magistrates for the purposes of the *Child Welfare Act* for the courts in such magisterial districts in which they respectively exercised jurisdiction as such magistrates aforesaid,

Held, that the Order in Council, in so far as it purported to appoint by a class description and moreover one of an ambulatory nature, was bad as an attempted exercise of the power conferred by s. 19 (1) of the *Child Welfare Act*.

Section 20 (a) of the *Child Welfare Act* provides that a children's court " shall exercise exclusive jurisdiction in respect of all offences alleged to have been committed by or against children . . . ".

Held, that the expression " offences alleged to have been committed against children " refers to offences against laws designed, by criminal sanction, to give protection to individuals, being children within the meaning of the Act, against wrongful acts tending to their physical harm or moral injury.

The crime of incest under s. 197 of the *Criminal Code* (W.A.) being created not for the protection of either participant in it but being based upon consanguinity and directed to the evil of sexual relations between persons thus connected in certain degrees is not within the class of offences referred to in s. 20 (a) and accordingly there is no jurisdiction in a children's court under such section to deal summarily with a charge of incest alleged to have been committed against a child.

Decisions of the Supreme Court of Western Australia (Full Court and *Virtue* J.), reversed.

APPLICATIONS for special leave to appeal from the Supreme Court of Western Australia.

John George Behsman was on 1st March 1957 charged before the children's court at Merredin in the State of Western Australia with having in or about the month of February 1956 committed the crime of incest with his daughter Yvonne, a child within the meaning of the *Child Welfare Act* 1947-1955 (W.A.). He pleaded not guilty and on his behalf objection was made to the jurisdiction of the magistrate constituting the court to deal with the charge summarily. The magistrate overruled the objection but adjourned the hearing to enable the accused to apply to the Supreme Court for a writ of prohibition. The application for the writ was dismissed by a judgment of the Full Court of the Supreme Court on 19th March 1957.

On 28th March 1957 Behsman was again brought before the children's court at Merredin, on this occasion presided over by another magistrate. After a full hearing the accused was convicted of the crime of incest and sentenced to five years' imprisonment with hard labour. He appealed to the Supreme Court against the conviction and the sentence. The appeal was heard by *Virtue* J. and on 29th May 1957 dismissed.

Behsman applied to the High Court (1) for special leave to appeal against the judgment of the Full Court of the Supreme Court of Western Australia dismissing the application for a writ of prohibition, and (ii) for special leave to appeal against the judgment of *Virtue* J.

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dismissing the appeal against conviction. The two applications were heard together.

C. B. Gibson, for the applicant.

G. J. Ruse, for the respondent.

Cur. adv. vult.

NOV. 22.

THE COURT delivered the following written judgment :—

These are appeals from two orders respectively of the Supreme Court of Western Australia. One order discharged an order nisi for a writ of prohibition. The order nisi was for a writ directed to the magistrate holding the children's court for the magisterial district of Avon. By the other order a conviction by the children's court and sentence under s. 197 of the *Criminal Code* (W.A.) was confirmed and the appeal therefrom dismissed. Section 197 defines the crime of incest by a man. The material parts provide that any person who carnally knows a woman or girl who is, to his knowledge, his mother or daughter or other lineal ancestress or descendant, or his sister or half-sister, is guilty of a crime and is liable to imprisonment with hard labour for life. The section contains a paragraph making consent immaterial and another providing that the wife of the accused shall be a competent and compellable witness.

The appellant, John George Behsman, farmer of Walgoolan in the State of Western Australia, was by a complaint dated 4th December 1956 charged before the children's court at Merredin in the Avon magisterial district of that State with committing in or about the month of February 1956 the crime of incest with his daughter Yvonne who, having been born on 23rd August 1939, was then a child within the meaning of the *Child Welfare Act* 1947-1955 (W.A.). By s. 20 (a) of that Act it is provided that a children's court shall exercise exclusive jurisdiction in respect of all offences alleged to have been committed by or against children. The words " or against " were inserted by Act No. 45 of 1955 (W.A.). Children's courts are special courts established by Order in Council and constituted by a special magistrate and such other persons as the Governor in Council may appoint : see s. 19. The children's courts exercise a summary jurisdiction and accordingly to be charged before one with the crime of incest meant that, notwithstanding that under the code it is an indictable offence, the appellant was deprived of trial by jury.

When the complaint against the appellant was brought on for hearing before the children's court he pleaded not guilty but it

was objected on his behalf that the magistrate constituting the court had no jurisdiction to proceed summarily, as he proposed to do, and dispose of the complaint. No doubt as a magistrate though not, according to the appellant, as a children's court, he might have proceeded with an inquiry to ascertain whether the evidence sufficed to place the appellant on his trial on indictment for incest. The magistrate overruled the objection but adjourned the hearing to enable the appellant to apply to the Supreme Court for a writ of prohibition. An order nisi for a writ of prohibition was obtained, returnable before the Full Court of the Supreme Court. That court discharged the order nisi on the grounds (1) that the crime charged was in the circumstances an offence alleged to have been committed against a child within the meaning of s. 20 (a) of the *Child Welfare Act* 1947-1955 and (2) that the children's court was right in proceeding to dispose of the charge summarily. The questions of law involved had been considered by a Full Court composed of all the judges of the Supreme Court in *Dowson* v. *McGrath* (1), a case decided upon the time limitation applicable in summary proceedings for offences prima facie indictable. Their Honours applied to the present case the views expressed in *Dowson* v. *McGrath* (1).

After the discharge of the order nisi for a writ of prohibition the appellant was again brought before the children's court at Merredin which on this occasion was constituted by a different magistrate. After a full hearing upon evidence the magistrate convicted the appellant of the crime of incest and sentenced him to five years' imprisonment with hard labour. He appealed from the conviction and sentence under s. 183 of the *Justices Act* 1902-1948. Very many grounds of appeal were taken, some of them being covered by the decision upon the order nisi for prohibition. The appeal was heard by *Virtue* J. and dismissed. From the order of *Virtue* J. and from the discharge of the order nisi the appellant sought special leave to appeal to this Court. We thought that some of the grounds disclosed entitled the appellant to special leave and those grounds were fully argued before us. Certain other grounds that were raised do not call for discussion.

Of the points urged in support of the appeals it is logical to consider first an attack that was made on the validity of the constitution of the children's court. The precise ground of this attack does not appear to have been put to the Supreme Court, at all events definitely, although an attack on the constitution of the court on somewhat different grounds was maintained.

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Under the *Child Welfare Act* 1947 (W.A.), s. 19 (1), the Governor is empowered by Order in Council to establish special courts to be called children's courts, and may appoint a special magistrate for any particular court or courts, and may by Order in Council from time to time determine the area in and for which each court shall exercise jurisdiction. The *Child Welfare Act* 1947 (W.A.) (No. 66 of 1947) is itself an Act to consolidate and amend the law relating to the making of better provision for the protection, control, maintenance and reformation of neglected and destitute children, and for other purposes connected therewith. The Acts which were consolidated and amended were the *Child Welfare Act* 1907-1941 (W.A.). The Act of 1907 was originally enacted as the *State Children Act* (No. 31 of 1907) but by the *State Children Act Amendment Act* (No. 22 of 1927) the title was changed to *Child Welfare Act*. Section 19 (1) of the *Child Welfare Act* 1907-1941 was in the same terms as s. 19 (1) of the present Act. It is to be assumed that by Order in Council under s. 19 (1) the Governor did establish special courts to be called children's courts. On that assumption it remained for the Governor in Council to appoint a special magistrate for any particular court or courts and by Order in Council to determine the area in and for which each court should exercise jurisdiction.

The *Gazette* of 28th May 1943 contains a notification dated 11th May 1943 that his Excellency the Lieutenant-Governor in Council has been pleased under s. 19 of the *Child Welfare Act* 1907-1927 (apparently a mistake for 1941) to appoint the magistrates for the time being and from time to time respectively assigned to the magisterial districts enumerated thereunder to be special magistrates for the purposes of the said Act for the courts in such magisterial districts in which they respectively exercise jurisdiction as such magistrates aforesaid. There then follows a list of magisterial districts. Strangely enough the Order in Council does not describe the courts as children's courts. But as it is expressed as done under s. 19 of the *Child Welfare Act*, plainly it refers to children's courts. The list of magisterial districts includes the Avon magisterial district, that to which Merredin belongs. It was by the children's court at Merredin that the appellant was convicted.

It is contended that the Order in Council is not a good exercise of the power conferred by s. 19 (1) of the *Child Welfare Act* 1907-1941 (W.A.), for the reason that there is no attempt to appoint any given special magistrate for any particular court. What is done is to express the appointment as special magistrates of such magistrates as for the time being or from time to time might then or

thereafter be assigned to certain magisterial districts. It is an attempt to make an appointment of whosoever shall at any time either then presently or in the future fill a given description, the description being a magistrate assigned to one of the specified magisterial districts. If the Order in Council notified by the *Gazette* were effectual the result would be that upon taking office as a magistrate and upon assignment to a magisterial district the person appointed a magistrate would automatically become a special magistrate appointed for the children's court of the specified magisterial district. It seems reasonably plain that this is no exercise of the power conferred by s. 19 (1). That provision contemplates the appointment of a particular person to be a special magistrate for a particular children's court or for particular children's courts. The language of s. 19 (1) is incapable of justifying an attempt to appoint by a class description and one moreover which is ambulatory. A good illustration is supplied by the present case. The gentleman who sat as the children's court at Merredin was simply an acting magistrate of certain local courts and an acting resident magistrate of the Avon magisterial district. In virtue of this he filled the description of the Order in Council as a magistrate for the time being assigned to the Avon magisterial district. Accordingly without more he was treated as appointed a special magistrate for among other children's courts a particular children's court, viz. that at Merredin. The fact was that he filled a long-standing class description. That cannot amount to an exercise of a power to " appoint a special magistrate for a particular court or courts ".

Some explanation is perhaps necessary of so much of the Order in Council as refers to assigning magistrates to the magisterial districts enumerated thereunder. Magisterial districts appear to have existed in Western Australia from an early time but by the *Magisterial Districts Act* 1886 (Act No. 17 of 1886) it was recited that doubts had arisen as to the legal constitution of such districts and whether the same could in all or any cases be judicially noticed. To remove these doubts the Act was passed. It enabled the Governor at any time by proclamation to declare any portion of Western Australia to be a magisterial district, to name new magisterial districts, to alter the boundaries of magisterial districts, to alter the name of a magisterial district and to cancel the proclamation of a magisterial district. There were further provisions relating to the publication of proclamations and the application of provisions in various statutes and instruments. By s. 24 of the *Justices Act*

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1902-1948 (W.A.) the Governor is authorised, subject to the provisions of the *Magisterial Districts Act* 1886, to appoint magisterial districts for the purposes of courts of petty sessions, and by s. 25 the districts theretofore appointed to be magisterial districts are to continue until altered. Section 11 of that Act empowers the Governor to appoint any person to be a police magistrate or a resident magistrate. By s. 33, a police or resident magistrate has authority as such throughout the State. The *Stipendiary Magistrates Act* 1930-1948 (W.A.) provides for the appointment of stipendiary magistrates. Section 5 (3) of that Act empowers the Governor to assign to any stipendiary magistrate, among other things, any magisterial district or districts for and in which he shall act. There appears to be no other express provision for the assignment of magistrates to magisterial districts. At all events we were referred to none, but we are informed that the power of the Governor in Council is the only power to appoint magistrates to magisterial districts.

When one turns again from the foregoing statutory provisions to the proclamation notified in the *Gazette* of 11th May 1943 it will be seen that it purports to appoint magistrates who may for the time being be assigned to magisterial districts. In other words, the identification of the magistrates who are appointed special magistrates under s. 19 of the *Child Welfare Act* of 1907-1941 is left entirely to the subsequent assignment of a magistrate to a magisterial district. The Order in Council, consequently, expresses only a general intention that present and future members of a class the ascertainment of which depends on the past or future assignment of individual magistrates to magisterial districts shall all be appointed to each and every court in the list of magisterial districts enumerated. This cannot be considered an exercise of a power to appoint a special magistrate for any particular court or courts nor can it be considered a determination of the area in or for which a court shall exercise jurisdiction. That appears to be left to the definition of the magisterial district.

No further Order in Council seems to have been made after the enactment of the consolidation of 1947 but that would be immaterial, had the exercise of the power given by s. 19 of the Act 1907-1941 been good. For s. 15 of the *Interpretation Act* 1918-1948 provides that where an Act repeals and re-enacts with or without modification any provision of a former Act all proclamations, orders, etc. which at the commencement of the repealing Act are in existence, or in force or operation, under or for the purposes of such provisions, shall continue.

For the foregoing reasons, unfortunate as it may be, it is impossible to avoid the conclusion that the Order in Council is bad as an attempted exercise of the power conferred by s. 19 (1) of the *Child Welfare Act*. It is no doubt open to question whether such a point may properly be relied upon in support of an appeal under s. 183 of the *Justices Act* 1902-1948 ; for an appeal may be said to assume the due constitution of the court and to proceed on the footing that it is from an order which a properly constituted tribunal has purported to make. The decision of the Supreme Court of Victoria in *Ellis* v. *Bourke* (1) suggests that appeal is not the remedy. On the other hand, if in *Troy* v. *Wrigglesworth* (2) the decision of the majority is contrasted with the dissent of *Gavan Duffy* J. that decision will be seen to tend the other way. In *John Sanderson & Co.* v. *Crawford* (3) an order of a court of petty sessions was set aside on an order to review on the ground that the court making it was unlawfully constituted. There is no such difficulty in giving effect to the objection to the constitution of the children's court upon prohibition. Unfortunately, however, the point was not covered by any contention made before the Supreme Court upon the application for prohibition. These objections to the remedies invoked by the appellant were however not made on behalf of the informant respondent before us.

The defect in the constitution of the children's court must invalidate the conviction. Once it was pointed out, as it was by counsel for the appellant in this Court, it could not be passed by. We are clearly of opinion that the objection is fatal to the conviction. It is, no doubt, true that by means of one or other of the two remedies before us the appellant might have obtained relief in the Supreme Court. In somewhat similar circumstances the Court in *Presley* v. *Geraghty* (4) seems to have taken a rather simple course. But, for reasons which shall appear, there is a further ground which makes it proper to allow the appeal. Moreover, it must not be forgotten that the case was actually before a magistrate even if he purported to act as a special magistrate exercising the jurisdiction of a children's court. It was not altogether *coram non judice*. The magistrate might as such lawfully have remanded the appellant or, but for the word " exclusive " in s. 20 (a) of the *Child Welfare Act* and his opinion that the crime was " against " a child, he might have committed the appellant for trial. The actual point made before him for the appellant was that he had no power to dispose of the complaint summarily. After all it is from convictions by " justices " that s. 183 gives the appeal.

(1) (1889) 15 V.L.R. 163.
(2) (1919) 26 C.L.R. 305.
(3) (1915) V.L.R. 568.
(4) (1921) 29 C.L.R. 154.

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One way of stating the matter is that the order or conviction of the magistrate was made in excess of his powers because he had not been clothed with the authority of a children's court. On that footing appeal or prohibition might be an available remedy.

It is desirable to turn now from the question of the constitution of the children's court to the jurisdiction of a children's court to deal summarily with the charge of incest as an offence alleged to have been committed against a child. The crime created by s. 197 of the *Criminal Code* is of course an indictable offence. In the present case the offence was dealt with summarily on the ground that the offence committed by the appellant was committed against a child. Section 4 of the *Child Welfare Act* 1947-1955 defines child to mean any boy or girl under the age of eighteen years. As has been stated already s. 20 (a) of the Act of 1947 provided that the children's court should exercise jurisdiction in respect of all offences alleged to have been committed by children. By s. 3 of Act No. 52 of 1950 this provision was amended to read " exercise exclusive jurisdiction ". Then by Act No. 45 of 1955 the words " or against " were inserted after the word " by " so that the section now provides that the children's court shall have exclusive jurisdiction in respect of all offences alleged to have been committed by or against children. It appears that when the *State Children Act* 1907 was enacted s. 19 provided that a children's court should exercise the powers and authorities which are possessed by resident magistrates or two or more justices under the *Justices Act* in respect of children and of offences committed by or *against* children. The words " by or against " stood in the Act apparently until the consolidation and amendment of 1947 when the words " or against " were dropped in the re-enactment of s. 20 (a). Why after a period of eight years they were restored does not appear. In the present case a considerable problem arises as to whether the offence is properly described as an offence against a child. In some degree the question depends on what the expression " offences alleged to have been committed . . . against children " means. In the present case the offence, the crime of incest, is by definition independent of the age of the parties to it. *Dowson* v. *McGrath* (1) was decided in respect of the same crime. In that particular case the party charged was held by the Supreme Court to be entitled to acquittal on the ground that the prosecution against him had not begun within six months after the offence had been committed. Four of their Honours treated s. 574 of the *Criminal Code* as applicable. That section as it then stood provided that a prosecution for

(1) (1956) 58 W.A.L.R. 27.

a simple offence or for an indictable offence in order to the summary conviction of the offender must unless otherwise expressly provided be begun within six months after the offence is committed. But since the decision the *Criminal Code Amendment Act* 1956 (W.A.) (No. 11 of 1956) has amended the provision by striking out the words " or for an indictable offence, in order to the summary conviction of the offender ". The amendment goes further. It adds a new sub-section to s. 574 of the *Criminal Code*, viz. sub-s. (3). Paragraph (b) of sub-s. (3) provides that except as otherwise provided by par. (c) of that sub-section, a prosecution for an offence may be commenced at any time. Paragraph (c) appears to relate to limitation periods specifically attached to particular offences. At all events it does not touch this case. Paragraph (a) of sub-s. (3) provides that in that sub-section " offence " means an indictable offence, whether committed before or after the coming into operation of the *Criminal Code Amendment Act* 1956 and punishable on summary conviction. Paragraph (d) excludes the operation of s. 51 of the *Justices Act* which had set a limitation of six months for the prosecution of a summary offence. In *Dowson's Case* (1) three of their Honours had relied also on s. 51 of the *Justices Act*. Upon the facts of the present case the offence was committed more than six months prior to the passing of the amending Act of 1956 namely prior to 11th October 1956, the date of assent. But there is no sufficient ground for implying any restriction on the generality of the definition, for the purposes of the sub-section, of the word " offence ". It covers offences committed before the commencement of the Act, however long before.

This means that there remains the very difficult question of the meaning and application of the expression " offences alleged to have been committed . . . against children ". It is a question upon which the judgments delivered in *Dowson's Case* (1) provide a great deal of assistance. As s. 20 (a) by this expression deprives accused persons of the right to trial by jury it should not receive a construction which gives it a wider application than its terms or the evident policy of the legislature demand. One possible interpretation is that it refers to offences which by definition relate to persons who are below some specified age not more than eighteen years. Examples may be found in ss. 183, 185, 187, 189 (1) (i) and 190 of the *Criminal Code* (W.A.). A second possible interpretation is that the expression refers to offences against laws which are designed, by criminal sanctions, to give protection to the individual against wrongful acts tending to his physical harm or moral injury, if in

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any given case that person is in fact not more than eighteen years of age. A third possible view of the expression is that it covers any acts involving a person not over eighteen if those acts are criminal and if in the particular circumstances they tend to the prejudice of that person. These by no means exhaust the possible meanings of the expressions. The difficulty in the case of incest is that it is not a crime created for the protection of either party to it. Had Yvonne Behsman been over eighteen she would have been guilty herself of the crime under s. 198 of the *Criminal Code*. It is a crime entirely based on consanguinity and the evil of sexual relations between persons thus connected in certain degrees. Under s. 197 a male of any age over fourteen years (see s. 29) and under s. 198 a female over eighteen may be guilty of the offence and in contemplation of those provisions neither can be said to offend "against" the other. The purpose of the re-introduction of the words "or against" would appear to be to confine to children's courts an inquiry into wrongful acts done to children when they involve offences against laws designed for the protection of the individual. It would be strange, to take an unusual crime by way of illustration, if the offence of concealing a title deed with intent to defraud were to be dealt with in the children's court if the owner were an infant (s. 381). If a thief takes clothes from a dwelling, some belonging to the householder, others belonging to his son who is not yet eighteen, surely it is not intended that as to the latter the thief is to be prosecuted in the children's court. The third of the foregoing suggested interpretations seems too wide. In given cases it is extremely difficult to say that acts which are not of their very nature offences "against" other parties are nevertheless actually done in the circumstances to the prejudice or detriment of some other party, be he under or over eighteen years. It happens that in the present case the difficulty does not exist on the facts. But that could not be said of a similar crime between a brother of seventeen and a sister of nineteen. The second of the interpretations stated above seems to conform best with the assumed policy of the legislature and with the rules of construction. No doubt difficulties may be found with this or that crime in saying whether really it is an offence against a law for the protection of the individual against wrongful acts tending to his physical harm or moral injury. Section 197 et seq. of the *Criminal Code* of Western Australia are simply based on the abhorrent evil of sexual relations between persons closely akin. Incest was not a crime at common law. *Blackstone* speaks of it (Book IV, ch. 4, pp. 64, 65) as having with adultery been made a capital crime in the period of the Commonwealth. But that did

not survive the Restoration. *Blackstone* continues "and these offences have been ever since left to the feeble coercion of the spiritual court according to the rules of the canon law". It was not until the *Punishment of Incest Act* 1908 that it became once more a crime in England. But in Australia there were earlier provisions dealing with it. In Victoria incest as such and by that name was not placed in the category of a crime. But by the *Crimes Act* 1891 (No. 1231), s. 8, it was made a felony punishable by imprisonment for life for a man to have carnal knowledge of his daughter or other lineal descendant or step-daughter over the age of ten years. Girls under that age were protected by other provisions of the law. If the girl was over eighteen years and consented she was liable to five years' imprisonment by s. 9. See now *Crimes Act* 1928 (Vict.), ss. 48 and 49. An enactment like s. 8 of the Victorian *Crimes Act* 1891 looks rather to the protection of daughters and step-daughters. It might well be considered to come within the category of a law for the protection of individuals against wrongful acts tending to moral harm. But clearly that is not the basis of the crime of incest in Western Australia. The Code deals with it not as between father and daughters but as between the prohibited degrees of consanguinity and affinity or certain of them and entirely on the basis of sexual morality. From this view it follows that the charge was not within s. 20 (a) of the *Child Welfare Act* 1947-1955.

The result is that the appeals should be allowed, the order of the Supreme Court dismissing the appeal to that Court from the conviction should be set aside and in lieu thereof the conviction and sentence quashed.

It seems unnecessary now to make an order for prohibition.

Applications for special leave to appeal granted. Order that the hearing of the applications be treated as the hearing of the appeals. Order that the appeals be allowed and that the orders of the Supreme Court be discharged.

In lieu of the order dismissing the appellant's appeal to the Supreme Court from his conviction and sentence order that the said appeal be allowed and the conviction and sentence quashed.

Solicitors for the applicant, *Gibson & Gibson.*

Solicitor for the respondents, *K. G. Walsh,* Crown Solicitor for Western Australia.

F. T. P. B.