Dickinson Law Review - Volume 30, Issue 9

Dickinson Law Review

Vol. XXX June, 1926 No. 9

Subscription Price, $1.50 Per Year

GIFTS

In the recent case of Boyd vs. Kilmer, 285 Pa. 533, 538, it is said: "We recognize the rule as stated in Darlington's Est., 157 Pa. 624; Matthaei vs. Prownall, 235 Pa. 460, and Corrigan vs. Conway, 269 Pa. 373, that where a conveyance of the greater part of the grantor's estate is made to one occupying a confidential relation it is not necessary to establish actual fraud as a ground of reconveyance, in absence of express proof on part of grantee that the transaction was fair and equitable, a court of equity will treat the case as one of constructive fraud, and the only way to establish the fairness of the transaction is by grantee clearly showing the value of grantor's property, that the inadequacy of the consideration has been called to his attention and that he received the benefit of intelligent advice."

It is proposed to trace the application of this doctrine through the earlier Pennsylvania cases.

The case from which the foregoing is quoted involved a grant of the entire estate of the grantor in return for a

very inadequate consideration but the grantee was a neighbor who did not occupy a confidential relation to the grantor; the inadequacy of the consideration was called to the attention of the grantor; and he not only received the benefit of intelligent advice but he was determined to carry out the plan which he himself originated. Further, he was of sound mind and well aware of what he was doing and his purpose was to prevent relatives of his divorced wife from getting any of his property after his death. The transfer was accordingly sustained by the court.

In Darlington's Est., 147 Pa. 624, a note for $7,000 was avoided because given to a nephew, who, at the time, was the attorney-in-fact of the maker, and the latter was very feeble and infirm when he signed the note, being eighty-four years of age. It was claimed the note was given for maintenance for life but no formal agreement was executed by the payee assuming such an obligation. The relationship was held to be a confidential one, the Court saying: "The confidential relation is not at all confined to any specific association of the parties to it. While its more frequent illustrations are between persons who are related as trustee and cestui que trust, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and, generally, all persons who are associated by any relation of trust and confidence." The Court followed Yardley vs. Cuthbertson, 108 Pa. 395, in which it was held that the scrivener of a will assumed such a relation and could take no considerable interest as a legatee without making a full disclosure to the testator of the proportion of the estate he was bequeathing him, and "proving by affirmative testimony that the legacy was the free, voluntary and intelligent act of the testator and unaffected by any undue influence of the scrivener." * * * "It is a rule of equity and of very ancient origin. In its ordinary statement the fact of mental weakness in the

grantor does not appear, and it is not at all necessary to the application of the rule in a given case. Many, if not most, of the judicial illustrations of its application, are devoid of this element."

The doctrine is eloquently justified in its application to lawyers who prepare papers for their clients, in which they name themselves as fiduciaries, in Greenfield's Est., 14 Pa. 489. A provision in a trust deed allowing excessive compensation to the trustees was stricken down. This was done without the least evidence of fraud or undue influence and although the grantor was entirely competent mentally.

In Darlington's Ap., 86 Pa. 512, a deed from a wife to her husband, reserving a life estate for herself, was set aside at the instance of a son more than thirty years after it was made, and this without any proof of fraud, imposition, undue influence or mistake and the wife was mentally competent.

The general rule was declared to be that the confidential relation amounts to a disqualification from acquiring gratuities. The donee has the burden of establishing "perfect fairness, adequacy and equity." If no such proof is established, courts of equity treat the case as one of constructive fraud."

The following is from Justice Trunkey's opinion in the last named case. "It is equally unnecessary to show by authority that the most dominant influence of all relations is that of the husband over his wife. From the proud and untutored savage to the cultured and refined Anglo-American, the wife is affectionately anxious to please her husband. This is first in her heart, whether she be in the menial service of a rude hut, or in daily toil for support of her family, or in charge of an elegant mansion. When he commands, she obeys; when he persuades, she yields; when he gently hints a wish, she grants. When treated almost as a servant—when governed and corrected as a child, as did

our sturdy ancestors—or when confided in as a companion and equal, her will is subdued to her lord. True, there are exceptional women, whose nature is unaffected by marriage, who cannot yield or bend, and, as wives, would not be happy, save with effeminate husbands; but these are not so numerous as to cloud perception of the mental and moral differences of the sexes. The common-law rights and disabilities, consequent on marriage, grew out of these differences, and the husband's power and influence distinctly appear. 'By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is, therefore, called in our law-french a feme covert, foemina viro co-operta; is said to be covert-baron, or lord; and her condition during her marriage is called her coverture.' One of the reasons for suspension of her legal existence is said to be 'for her own security in guarding her against her husband's influence over her by disabling her from disposing for her own property.' The disabling to dispose of her own property, of course, related to her land, which she or her heir could hold and enjoy after the end of the husband's estate therein. By marriage, he becomes entitled to all his wife's personalty and the use of her lands. Under advancing culture and civilization, modern legislation has materially changed the common law respecting the rights and disabilities incident to the marriage relation. In Pennsylvania, the wife may hold and enjoy her own property, and easy modes are provided for her disposal of it. But the unity of person remains, resting on a foundation older than the common law, and the husband's influence over his wife, so strongly expressed by the common-law writers, will end only with the marriage relation itself. The unfeeling greed, that, in a less refined age, transferred all the wife's personal property

and the use of her real estate to her husband, is not entirely extinct. Many a husband, in all sincerity, believes the common-law rule better than the statute, for the former accords with his avarice."

That a nurse and attendant may acquire such an influence as will bring her within these rules was decided in Worrall's Ap., 110 Pa. 349.

In Darlington's Est., supra, it was said to be important that a will made but a short time before the note was given would be defeated, if the note was enforced. The payee was bound to show that the attention of the testator was called to this fact when he signed the note.

In Matthaei vs. Pownall, 235 Pa. 460, a deed to a physician of the grantor was set aside though the chancellor found that the grantor understood what he was doing, that he had offered the farm to others on the same terms and that he acted on his own desires. The absence of any mental weakness did not prevent the conclusion of constructive fraud, in the absence of clear proof that the value of the grantor's property and the inadequacy of the bargain had been honestly brought home to him, or that he had been given the opportunity of independent advice. The only attorney present was the one acting for the grantee. See Sarver vs. Sarver, 230 Pa. 60.

In Corrigan vs. Conway, 269 Pa. 373, a woman conveyed her entire estate to a younger brother, who had been transacting her business for her. The grantee employed the scrivener who prepared the deed. The grantor executed the deed only by her mark but it was acknowledged and recorded. The opinion of the court directing a reconveyance is reported in 27 Pa. Dist. R. 701, and it is largely quoted with approval by the Supreme Court. "The case presents what is called a constructive fraud, springing from the confidential relations existing between the parties; this peculiarity, withdrawing it from the operation of ordinary rules, throws upon the beneficiaries the duty

of showing expressly that the arrangement was fair and conscionable beyond the reach of suspicion. In requiring this, courts of equity act irrespective of any admixture of deceit, imposition, overreaching or other positive fraud. As has been often said, the principle stands independently of such elements of active mischief; it is founded upon a motive of general policy, and is designed to protect a party, so far as may be, against his own overweening confidence and self-delusion, the infirmities of a hasty judgment, and even the impulses of a too sanguine temperament." See also Unruh vs. Lukens, 166 Pa. 324, 330.

A gift from father to son is so natural an act that the presumption is in favor of its validity, and undue influence must be proven. But in Stewart's Est., 137 Pa. 175, Justice McCollum said: "In view of the relations existing between the alleged donor and donee respecting the former's property in Penna., and his great age and infirmity, it ought to clearly appear that a gift was intended by him, and that it was his voluntary and intelligent act." The assignment of the judgment, the subject of the alleged gift, was held to be "consistent with an understanding between the parties that the assignee should hold the judgment in trust for the assignor, and thus relieve the assignor of any care attending the control and collection if it." The assignor was in his eighty-eighth year. But the Court below said: "Undue influence may exist between persons in full health of body and strength of mind; it is only that the weakness of either tends to create a greater feeling of dependence, and is the more liable to imposition, and improvident impulses. But the prime inquiry in such cases always is as to whether a relation of confidence between the donor and donee existed at the time of the alleged gift. If it did, then the latter shall take nothing by the gift without satisfactory evidence that it was the clear intent of the donor to confer the benefit obtained, after having been fully advised with respect to the same, either

by the donee himself or by some other and indifferent party."

The presumptions in favor of gifts from parent to child and from husband to wife are limited to these relations and they do not apply to any collaterals, even to gifts from a brother to a sister. Such gifts stand on the same basis as gifts to strangers. Irvine vs. Minshull, 152 P. 1150; Salt v. Anderson, 180 P. 873; Atwell vs. Watkins, 36 S. W. 103. For example, in Bret's Adm'r. vs. Mildebrand, 29 Lanc. L. Rev. 138, a sister, who had declared that she was attending to her brother's business, though he was living with another brother and sister, prepared two checks to her own order and procured his execution and delivery of them to herself. This declaration was held to be sufficient to establish a confidential relation and place upon her the burden of proving that the gifts were not only righteous but "conscientious," (Smith vs. Loafman, 145 Pa. 628) and that the donor had "acted intelligently, deliberately, and with full information of the amount of his property, the effect upon his estate, the nature of the transaction, the effect thereof, and that no advantage was taken of the confidential relation." The fact that the payee drew the checks rendered the transaction "suspicious" and was alone sufficient to raise a presumption of fraud, particularly as the drawer was without the protection of a disinterested adviser.

In Longenecker vs. Church, 200 Pa. 567, a gift of bonds to a church in return for interest thereon for life and a covenant to keep in repair a cemetery lot was sustained. The donor was an elderly woman in her sound senses and the gift was suggested by a person not connected with the church and the gift did not seriously diminish the donor's estate. The opinion of the Court below was commended by the Supreme Court as exhaustive and satisfactory. It reviews the leading cases and points out that the improvidence of the gift itself often may be evidence of a want of understanding of the transaction and

that the donee is put upon the defensive whenever the evidence discloses "some indication of weakness of mind, undue influence, fraud, deception, confidential relation, or other element, to render the transaction at least suspicious." The effect of undue influence upon the rights of third parties who would benefit by it is also discussed. "One who knowingly profits by a wrong becomes particips criminis, however innocent he may have been in the first instance: Irwin vs. Keen, 3 Wharton, 347. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it. No one, be he near or remote, can justly found a claim or title on a voluntary instrument which is not the well understood act of the donor's mind: Russell's App. 75 Pa. 265; Gordon vs. McCarty, 3 Wharton, 407."

In Light vs. Light, 221 Pa. 136, a deed from an aunt to her niece was set aside and the case illustrates a number of circumstances which are influential in the decision of these cases, e. g., the education and business experience of the grantor or the lack of it; age, sex and the degree of bodily strength to resist pressure, reliance of grantor upon grantee in prior business transactions, etc. The defendant's conduct also illustrates many of the means which the law forbids to be used to attain such ends. Importunities, flattery, misstatements and threats of suicide were resorted to. An absolute transfer of title was procured, though a reservation of a life estate to the grantor had been agreed upon. No advice was given the grantor by counsel of her own choice. The deed was prepared by counsel for the grantee and no consideration was paid or counter-obligation assumed. The transfer was of the bulk of the grantor's estate and her other relatives were not consulted. These facts brought the case squarely within the rule of the leading cases of Stepp vs. Frampton and Hasel vs. Beilstein, 179 Pa. 284 and 560. In both these cases younger men ingratiated themselves into an intimacy

with old men, finally undertaking to advise them as to the disposition of their property and procuring gratuitous transfers of large portions of it to themselves. Both cases support the relevancy of proof of the character and disposition of the donor in money matters as bearing on the probability that the transaction was not fully understood and that imposition was practiced. Of course, the character of the donor as one easily influenced or the contrary is always an important element in these cases. Likewise, if the transfer will defeat the accomplishment of other intentions recently expressed, e. g. in a will lately executed, the doubt arises as to whether the effect of the act is fully undrstood and whether it is the free and voluntary act of the donor.

In Hutchins's Est., 17 D. R. 648, one who knew he had been named as prospective executor in the will of an aged woman alleged that in effect a parol revocation of the written will had been made and the bulk of the estate given to him in trust for certain others for life but ultimately for his own benefit. The claim was scathingly denounced by Judge Penrose and relief was granted though a final adjudication had to be opened to do it.

In Smith's Est., 237 Pa. 115, 118, Justice Stewart said: "We have said in Fross's App., 105 Pa. 258, that the evidence of a gift inter vivos must, after the death of the alleged donor, be clear and satisfactory; and in Wise's Est., 182 Pa. 168, that it is required to be clear and convincing. Numerous other cases might be cited to show that a mere preponderance of evidence will not suffice to sustain a gift where the question arises after the death of the alleged donor. The execution of the purpose to give, that is, by delivery, may be shown either by declarations or admissions of the alleged donor, or it may be gathered from his acts when accompanied by other indicia of a gift; but whether in one way or the other, or both, the evidence must disclose a clear and unmistakable intention on the

part of the donor at the time, to withdraw or surrender his dominion over the subject of the gift. Except as such intention is shown to accompany the act relied on, the delivery is incomplete." See also Turner's Est., 244 Pa. 568 at p. 572.

A clear and unmistakable intention to make a gift is an essential requisite of a gift inter vivos. The donee is incompetent to prove this fact when he is the surviving party to the transaction, Kotz vs. Smith, 253 Pa. 346, and Cooper's Est., 263 Pa. 37. "Primarily, the donee must show an executed gift, not only because the original ownership is presumed to continue, but because the defense is an affirmative one which necessarily carries with it this duty. McConville vs. Ingham, 268 Pa. 507, 518; Yeager's Est., 273 Pa. 359, 362. To establish a gift inter vivos, two essential elements must be made to appear; an intention to make the donation then and there, and an actual or constructive delivery at the same time, of a nature sufficient to divest the giver of all dominion, and invest the recipient therewith: Reese vs. Phila. Trust Co., 218 Pa. 150; Ashman's Est., 223 Pa. 543; Yeager's Est., supra. Prior possession is sufficient to sustain detinue by the prior possessor against anyone who cannot show a superior right of posession. The burden of proof is upon one claiming to be the donee of property to establish all facts essential to such gift, Maxler vs. Hawk, 233 Pa. 316. Possession after the death of the alleged donor has little, if any weight, on the question of a gift, where the claimant had access to the property and effects of the alleged donor during his last sickness, or after his death. In such a case proof in support of the claim ought to be clear and satisfactory upon every point essential to title by gift, Scott vs. Reed, 153 Pa. 14. Even in the case of negotiable securities transferable by delivery the burden of proof that they were obtained bona fide is thrown on the party alleging it by very slight circumstances, Porter vs. Gunnison, 2 Grant, 297.

While generally the endorsement of a check to one in absolute form raises a presumption of a gift, where the act is that of an aged woman, and the endorsee is her grandchild, who spent most of her time with her grandmother, the transaction is presumed void, McConville vs. Ingham, supra.

A gift may easily be defeated merely because the donee lacks admissible evidence of the fact. Thus, in Reading Trust Co. vs. Thompson, 254 Pa. 333, the treasurer of a trust company was compelled to surrender a block of negotiable bonds because his own testimony was excluded and he was without other proof of the alleged gift. The claimant had charge of the vault where the alleged donor kept his bonds but in a private box of which he had the keys. The possibility that the bonds might have been left outside the box by accident or that the claimant might have been given them for some special purpose, imposed on the claimant the burden of showing that his possession was more than a mere custody or agency and that the alleged donor intended to divest himself of the property. Where the claimant can show there was no possibility of his wrongfully obtaining possession of a check drawn to his order, his possession of it will justify a conclusion of an executed gift, Campbell's Est., 274 Pa. 546.

Title to a stock certificate may be transferred by delivery merely without endorsement and the affixing of tax stamps, the provisions of the Uniform Stock Transfer Act of 1911, P. L. 126, being intended merely for the protection of the corporation, Connell's Est., 282 Pa. 555. The same is true of a certificate of deposit and non-negotiable securities generally, Schaffer vs. Hoke, 80 Super. 434. But since the delivery may easily have been merely for safekeeping, the claimant must meet the burden of proof of a gift by proof that is clear and satisfactory, Smith's Est., 237 Pa. 115; Sullivan vs. Hess, 241 Pa. 407, 410.

JOSEPH P. McKEEHAN.

MOOT COURT

COMMONWEALTH VS. TREVOR

Criminal Law and Procedure — Robbery — Evidence — Record of Former Conviction Admitted to Attack Credibility — Right to Question Defendant — Act of March 15, 1911, P. L. 20

STATEMENT OF FACTS

Indictment for robbery. Defendant testified denying guilt. The court allowed the presecution to prove by the record, a conviction of Trevor for larceny, for the purpose of diminishing his credibility as a witness. The only evidence of identity of the Trevor convicted with the Trevor now on trial was the similarity of the name (Samuel Trevor). The conviction was in the county where the present trial is.

Wiest, for Commonwealth.

Zakum, for Defendant.

OPINION OF THE COURT

Williams, J. The trial court permitted the Commonwealth to attack the defendant's credibility as a witness by introducing the record of a conviction for larceny of a person whose name is identical with that of the defendant. The conviction for larceny occurred in the county where the present trial is. The defendant assigns as error to this court the admission of the record of former conviction and also asserts that the present defendant has not been properly identified as the person named in the former conviction.

The common law prohibited a person who had been convicted of a felony or other infamous crime from testifying as a witness in any other proceeding. The fact of conviction could be established either by the record of conviction itself or by admissions of the person whose credibility was attacked. The common law rule still prevails unless changed by statutory enactments. Various statutes have been enacted which have largely abrogated the common law rule. A perusal of these statutes is necessary for the proper determination of this case.

The acts of May 21, 1885, P. L. 23 and of May 23, 1887, P. L. 158, permitted a person who had previously been convicted of a crime, to testify in his own behalf except where there has been a conviction of perjury or subordination of perjury. These acts merely made such persons competent witnesses. The common law rule as to the admission of records of former convictions remained unchanged.

The act of March 15, 1911, P. L. 20 which provides as follows: "Any person charged with any crime and called as a witness in his own behalf shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed or been charged with, or has been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation; unless he shall have at such trial personally or by his advocate, asked questions of a witness for the prosecution with the view to establish his own good character or reputation; or, he shall have testified against a co-defendant charged with the same defence" does not expressly forbid the admission of a record of former conviction. Is it proper for this court to extend the statute to the case at bar by implication? We are of the opinion that it is not. The legislature at the time of enacting the statute is presumed to know the existing law. The law at the time of the enactment of this statute permitted such a record to be shown. Commonwealth vs. Racco, 255 Pa. 113 . If it had been the intent of the legislature to exclude records of former convictions it could easily have done so by the express provision to that effect. This court is not warranted in giving the act such a broad interpretation. To do so would be tantamount to legislation, Commonwealth vs. Pezzzner, Appellant, 78 Super. 287; Commonwealth vs. John Doe, Appellant, 78 Super. 162; Commonwealth vs. Vis, 81 Super. 384.

The argument of counsel for the defendant that to permit such a record to be shown will force the jury to decide collateral issues is untenable. The record of conviction is conclusive of guilt of the person named in the record.

The only remaining question is whether there is sufficient proof that the defendant in the present case is the person named in the record of the former conviction. The action in the present case is in the same county as the previous conviction. The names are identical. We believe it to be quite improbable that there would exist in the same county two persons, bearing the same name and being charged with a crime of the same general nature. The defendant is in court and it is placing no undue burden upon him, if he is not the person named in the previous conviction to offer evidence to establish that fact, Commonwealth vs. John Doe, Appellant, spura. Judgment of the court below is affirmed.

OPINION OF SUPREME COURT

The act of March 15th, 1911, P. L. 20, forbids simply certain interrogations of the defendant who has become a witness. He cannot be questioned as to commission of other crimes, whether convicted of them or not. It does not prevent proof of other crime by the record of convictions, Commonwealth vs. Doe, 79 Super. 162.

The identity of name, with the other circumstances mentioned by the court below justify its conclusion that a conviction of the defendant for larceny might be considered by the jury as established by a conviction in same county, and near the same time of a Samuel Trevor for larceny. No effort was attempted by the defendant to question his identity with the defendant in the earlier case, of the same name.

We commend the opinion of the lower court for its precision and lucidity. The judgment is affirmed.

ARTER VS. HARRISON

Bailments — Shopkeepers — Article Found in Store — Duty of Storekeeper to Exercise Reasonable Care in Return

STATEMENT OF FACTS

Harrison keeps a dry goods store. Mrs. Arter visited the store with a view of making a purchase. She deposited the bag, in which was her purse, on the counter. After looking at some goods she decided to make no purchases and left the store forgetting to take up the bag. Meanwhile, another woman in the store, seeing the bag, told the clerk that she was the owner. The clerk made no sufficient inquiries, but satisfied himself that she was really the owner, without due testing. He might have found whether the contents of the bag could be described by the woman, but did not. He gave the bag to the claimant. Later the owner returned to the store and was told of what had happened to the bag. She brings this action of trespass for the loss of the bag and contents.

Householder, for Plaintiff.

James, for Defendant.

OPINION OF THE COURT

Hubley, J. The case rests entirely upon the relationship between a shopkeeper and a prospective customer. If the relationship is that of bailor and bailee in a mutual bailment the shopkeeper is required to use ordinary diligence and is responsible by law for ordinary neglect in the care of customers and their possessions. That such is the relationship in this case there is no doubt, the law on that question being well settled in Pennsylvania. Mr. Justice Heydrick, in the case of Woodruff vs. Painter & Eldridge, 150 Pa. 91, states the Pennsylvania rule clearly; holding that there is an implied contract arising when a shopkeeper invites a customer to come to his store and the customer accepts, the consideration being the shopkeeper's chance of profit by the patronage received. The duty then arises from this implied contract for the shopkeeper to use ordinary diligence in the caring for of articles habitually carried by a customer and laid aside while examining the goods displayed, even though no notice of the mislaying of the article has been brought to the attention of the shopkeeper or his servant; it being held in the case cited supra and in Bonnell vs. Stern, 112 N. Y. 539, that there is a constructive delivery to the storekeeper.

The defendant bases his case on four contentions which the court will answer in order to give our decision.

The defendant claims contributory negligence on the part of the plaintiff. With this we cannot agree. That there was negligence on the plaintiff's part in leaving her bag we agree, but there was certainly no negligence on her part in the disposal of it after the delivery to the shopkeeper, even though this delivery was by the plaintiff's negligence. The bag was then in his possession and its loss was entirely due to his lack of care in discovering the true owner.

The claim that the defendant was a gratuitous bailee has been refuted above, the rule being well established that the relationship is that of a bailment for mutual benefit, MacKnight vs. Snellenburg & Co., 80 Super. 147.

To claim that the defendant used the reasonable care required by such a mutual bailment we cannot concur, and we think that we can fairly find that the property was negligently disposed of by the defendant, MacKnight vs. Snellenburg & Co., 80 Supra. 147.

The fourth claim of the defendant that the defendant cannot be held liable, because the act complained of was done by a clerk and not by the defendant himself, cannot be sustained. The property came into the possession of an employee of the shopkeeper and as such he is agent for his employer, who is responsible for his negli-

gence in the case of mislaid property of a customer; this view being held in the case cited above.

In view of the above cited decisions and the well established rules followed in Pennsylvania in similar cases, we must render our decision in favor of the plaintiff with judgment accordingly.

OPINION OF SUPREME COURT

Mrs. Arter, forgetfully left the bag in Harrison's store. It was found by the clerk, who, representing Harrison, was bound to take care of it until its owner reclaimed it. A woman alleged that the bag was hers. She was not tested, by proper inquiries as to contents, etc. The bag was improperly delivered to the woman. Later, Mrs. Arter, returns and inquires for the bag. It could not be, and was not delivered to her.

The jury could well find that the giving of the bag to the woman who claimed it, was a negligent act. It has caused the loss of it to Mrs. Arter. It does not appear that the name and residence of the claimant were secured, so that a recovery of the bag could be facilitated, should the claim be dishonest.

It should be the duty under the circumstances stated, of the merchant to safeguard the bag, left in a fit of thoughtlessness; and to preserve it from false claims until the owner returned, MacKnight vs. Snellenburg & Co., 80 Super. 147.

The judgment of the learned court below is affirmed.

LEWIS VS. CRAIGHEAD

Principal and Agent for Purchase of Real Estate—Profit by Agent—Breach of Duty by Agent — Equity Bill for Conveyance of Real Estate to Principal from Agent—Trustee ex-Maleficio

STATEMENT OF FACTS

Lewis employed Craighead to procure for him a conveyance of a certain piece of real estate for a sum not exceeding $100,000. Craighead interviewed the owner twice and the owner told him he would sell the property for $75,000 Craighead, concealing his agency, became the purchaser and a conveyance was made to him. But before this conveyance, Lewis, distrusting the fidelity of Craighead, had terminated his agency. By his bill in equity Lewis asked that Craig-

head be compelled to convey the property to him. The court decreed a conveyance on condition that Lewis simultaneously with the tender of the deed, pay to Craighead $75,000 the price paid for it.

J. Laird, for Plaintiff.

Lavery, for Defendant.

OPINION OF THE COURT

Meyer, J. The single question arising from the facts is whether or not Craighead had the right to purchase in his own name the property which he was employed to buy for Lewis. Every agency is subject to the legal limitation that it cannot be used for the benefit of the agent himself, Bergner vs. Bergner, 219 Pa. 113; Powers vs. Black, 159 Pa. 153; 31 Cyc. 1441; 21 R. C. L. 910, and where an agent so acts in bad faith as to acquire title to real estate, equity will declare a resulting trust in the land in favor of the principal and compel a conveyance to him, Trice vs. Comstock, 121 Fed. 620; Johnson vs. Haywood, 103 N. W. 1058; Witte vs. Storm, 139 S. W. 384. Such a trust falls within the exception to the Act of Apr. 22, 1856, P. L. 532 requiring declarations of trust to be evidenced by a writing this being a trust arising by "implication or construction of law."

The contract of agency between Lewis and Craighead to negotiate for the purchase of real estate is not a contract for the creation of an estate or interest in land, Boswell vs. Cunningham, 13 So. 354 and so does not fall within the requirement of a writing under the Act of Mar. 21, 1772, West 20192.

It appears that in the instant case the agency was terminated by Lewis before the actual conveyance was made, yet to declare this to change the rule would certainly shock the conscience of a court of equity. The essentials of the sale had been completed; that the actual conveyance had not been made is immaterial. Such a conveyance after the termination of the agency will be scrutinized thoroughly and a strong presumption of fraud and evasion will arise where such a beneficial interest in the land in question has been acquired by the agent so soon after the termination of the agency, 31 Cyc. 1450; 1 Am. & Eng. Enc. 378. The rule that the termination of the agency ends all duty on the part of the agent in respect to the property applies only when he has done nothing during the continuance of the relationship to lay a foundation for the future advantages, Morgan vs. Aldrich, 91 S. W. 1024. Mr. Justice Gibson in Bartholomew vs. Leech, 7 Watts 472, decided that: "there must be an unambiguous termination of the agency before the agent can acquire a personal interest in the subject of it."

In Bachrach vs. Fleming, 269 Pa. 350, Mr Justice Schaffer said: "Where an agent has broken faith with his principal and has been

discharged from the business in which he was engaged, he may not, after the termination of the agency, reap the profits of the bad faith to his employer's disadvantage; whatever he acquired while acting in the agency flows to his principal." We conceive the facts of this case to be directly in point with those of the case at bar and the principles of law there applied to be expressly applicable to the instant case..

The ruling of the court below that Craighead should be reimbursed the price he paid for the land is sustained by the cases of Smith vs. Brotherline, 62 Pa. 461; Quinn vs. LeDuc, 51 Atl. 199.

We therefore find no error in the decision of the court below and it is affirmed.

OPINION OF SUPREME COURT

Lewis furnished the motive to Craighead, to learn at what price certain land could be bought from its owner. He had a commission for a series of acts that should eventuate in the acquisition of this land. After finding the price to be $75,000 Craighead decided that he would himself become the buyer. He paid the price and obtained a conveyance to himself. By such acts he, of course, surrendered all rights to a commission. He had contracted to assist in procuring a conveyance to Lewis. His procuring a conveyance to himself was a repudiation of his duty to buy for Lewis.

The question is what shall be the result in Craighead's right to retain the land? Shall the contract to procure from the owner a conveyance to Lewis be treated as convertible into a duty, if the land is procured by Craighead, on him to permit Lewis to have the land, if he chooses to pay the price to Craighead? Such seems to be the doctrine of Bachrack vs. Fleming, 269 Pa. 350, which is applied by the learned court below. The judgment is affirmed.

RAWLINS VS. STOKES

Equity — Suit for Specific Performance — Option — Time as Essence in Option

STATEMENT OF FACTS

On September 19, Stokes gave for ten dollars an option to Rawlins to buy a tract of land within two months. Rawlins was to indi-

cate within that time his decision to buy and was to pay the price, viz, $200, within one month after his notification to Stokes of his decision to buy.

Rawlins allowed six months to elapse before he decided to buy and tender the price. Stokes declared that the option was dead and that he would not sell. Rawlins brings this bill for specific performance of the option.

Sullivan, for Plaintiff.

Swaboski, for Defendant.

OPINION OF THE COURT

Turick, J. The plaintiff seeks to enforce an option with whose terms he has failed to comply. The option called for an acceptance in writing within two months from the date of the option. The plaintiff's acceptance occurred six months after the date of the option. We are of the opinion that the option expired at the end of the two months and the plaintiff's acceptance came too late. In Loughney vs. Quigley, 279 Pa. 396 the court held "where a lease and an option to purchase the demised premises is for two years beginning July 20, 1920, such lease and option expires on July 19, 1922." Applying this rule to the case at bar any acceptance by the plaintiff bearing a date later than November 18, would be ineffective.

The opinion required an acceptance in writing. The plaintiff's failure to so accept was fatal to his cause. An option must be accepted within the time and manner prescribed by the terms of the option. Until there is such an acceptance the option is only an unaccepted offer, which lapses upon the expiration of the time during which the option is to remain in force by the terms of the option, Henry vs. Black, 213 Pa. 620; McMillan vs. Philadelphia Co., 159 Pa. 143; Cardon's Estate, 278 Pa. 153.

Time is of the essence of an option. The failure of the plaintiff to accept within the specified time caused the option to lapse, Swank vs. Fretts, 209 Pa. 625; Rhodes vs. Good, 271 Pa 117; 36 Cyc. 711. It is true as contended by counsel for the plaintiff that the court in Sylvester vs. Born, 132 Pa. 467, declared that as a general rule time was not the essence of an option. The statements of the court were dicta and not essential to the determination of that decision, and consequently not binding upon this court.

The argument that specific performance lies in the discretion of the court and is not a matter of right has no force. It is true many courts have made such statements but if they mean anything other than the sound judicial discretion that a court is always required to use in reaching a conclusion, they are clearly erroneous. Such an ar-

gument might have had weight in the earlier stages of equity jurisprudence, but at the present time to be entitled to specific performance the plaintiff must show some established principle of law to support his right.

The bill of the plaintiff is dismissed with costs.

OPINION OF SUPREME COURT

The terse and well written opinion of the learned court below leaves little to be profitably said by us. Stokes has agreed conditionally to convey land. The conditions are (a) that Rawlins would communicate, within two months from Sept. 19th, his decision to buy, and (b) that he would pay $200, the price, within one month after his notification that he would buy.

The two months have been prolonged into six months, before either act of the condition was done. When the two months expired, the option became extinct. Nothing was done to revive it, or to create a new option. The plaintiff has lost whatever right he had to make the purchase, Loughney vs. Quigley, 279 Pa. 396; McBride's Estate, 207 Pa. 350. The appeal is dismissed.

JAMES VS. X RAILROAD CO.

Lateral Support of Highways — Liability of Abutting Owner to Traveler on Highway — Statute of Limitations

STATEMENT OF FACTS

Along a highway the defendant R. R. Co. excavated the ground to the depth of fifteen feet and built its tracks. It left a space of six feet outside of the road. In the course of time the shoulder of the six feet had been gradually worn away and erosion had invaded the edge of the highway. The plaintiff while driving an automobile one night was forced by the passing vehicle to drive to the edge of the road and he was precipitated to the depth of 15 feet. His automobile was wrecked and he suffered serious personal injuries. He sues the X Railroad Company for having removed the lateral support and so causing the precipitation.

Rubenstein, for Plaintiff.

Schwartz, for Defendant.

OPINION OF THE COURT

Schechter, J. By the above stated facts we are not called upon to decide whether the defendant company had no right to so excavate, or whether it was done negligently. Both these facts, however, if proven satisfactorily, by the plaintiff would have some effect in measuring the extent of such recovery, 275 Pa. 467.

The counsel for the defendant claims that the state owns the road in fee simple, and so the defendant owes only a duty to the state. It is in fact immaterial in whom the title is vested and in what manner it was acquired. If the road is a public highway, which fact is not disputed, its existence, use and creation take all the attributes of a fee simple title necessary to sustain the purpose of the road's origination, and lateral support is one of these attributes, 275 Pa. 467.

The question is then raised that the plaintiff may not sue as a proper party. The primary purpose of a road is to supply an artery of transportation to any one of the general public who so desires to use it. As the plaintiff was a member of the general public and so had a right to use the road, he is the proper party to sue. A somewhat similar case arose in 86 Pa. 74. A person using the highway lawfully, fell into an excavation by the side of the road and the person causing this condition was held liable. This doctrine was later affirmed in the recent case of 270 Pa. 86 at page 90.

We are asked to extend the doctrine of Noonan vs. Pardee, 200 Pa. 474 to cover the facts in this case. The question in that case was whether the plaintiff's cause of action was barred by the Statute of Limitation. This case covered subjacent support and although somewhat akin to this case, there is a distinction. It is ruled in 200 Pa. 474 that an owner of an super-incumbent estate is bound to take notice when there is a meddilng with the subjacent support. In this case the parties have no such inter-related rights as would compel one party to know just what the other is doing, what its effect will be when completed, or whether in due course of time, it will result to his injury. So we hold that the Statute of Limitation does not begin to run until the right of action has accrued, 159 Pa. 27. In this case the cause of action arose when the plaintiff was injured. Judgment for the plaintiff.

OPINION OF SUPREME COURT

The case referred to by the learned court below which he has left nameless, but which is Pollock vs. R. R. Co., 275 Pa. 467, so fully covers the questions here raised, that discussion by us is superfluous.

When a highway is laid out, persons and corporations have no right to modify it, by elevatng, depressing, narrowing, etc. They have no right to interfere with the way, by lessening its safety. Here the R. R. excavated its way, but the excavation was so near to the highway as to facilitate its sliding over and down, and thereby, to make injury to vehicles and passengers likely.

The question whether the action was brought too late, finds its answer in the case cited supra. It escapes the difficulties inherent in Noonan vs. Pardee, 200 Pa. 474, by abandoning the notion that the right to sue began with the beginning of the excavation, and not with the accident by which the plaintiff suffered the harm. This plaintiff did not have property in the neighborhood of the scene of the accident. Perhaps he had never been in the locality before. It would be absurd to contend that every passenger along the road had a right of action against it, from the beginning of the excavation. The only visible ground of claim for damages is, not the state of the road, unsafe as it is, but the damage to man and vehicle, in consequence of this state.

The state or county or township might have taken action to correct the injury to the road; but individuals could not do so, because of the possibility of their being wayfarers and as such, undergoing injuries similar to those suffered by the plaintiff.

Possibly the state owned this road in fee. Perhaps it does not, but has only an easement in it, as trustee for people who want to use it. But, as we conceive, if the state owned it in fee, it would do so, for the benefit of individual travellers, and any right to indemnity, if they suffered an injury by interferences with the road, would be theirs and enforceable by an action brought by them.

The judgment of the court below is affirmed.