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The Criminal Law In Civil Cases

The criminal law has fallen into disrepute. Its administration and its content are considered so vicious that there are many persons who believe that to practice criminal law is necessarily reprehensible and that even the study of criminal law should be sedulously avoided.[1] The practice in the criminal courts is, with a few notable and praiseworthy exceptions, left to lawyers of lesser sensibilities, and the criminal law has become an outlaw field which the most learned and respectable lawyers carefully shun.[2]

The attitude of the bench and bar toward the criminal law has become one of juristic pessimism, and the

[1]Prof. Barnes, in his recent book, "The Repression of Crime," says, "Our legal system for ascertaining guilt and dealing with the criminal is founded entirely upon medieval metaphysical and theological presuppositions which antedate modern biological, psychological, and social science."

[2]Battling the Criminal, Child, p. 217.

hope that its evils would be corrected by those who are engaged in its study and practice has long since been abandoned. As a consequence, the opinion generally prevails that the business men and laborers of the country will have to overhaul the criminal law, and, in some manner not clearly defined, effectively remedy its evils.

The idea is a familiar one. At various times in the history of our law, the idea that there is a lay competency to achieve effective reforms in the law by a legislative formulation of popular opinion has prevailed; and attempts to carry this idea into execution have almost always been followed by harmful consequences. It is sufficient to recall the clamor for lay judges shortly after the Revolution, the reform in the law of procedure beginning in 1850, and the recent agitation for popular review of judicial decisions.[3]

In other departments of human endeavor it is generally conceded that reforms should be undertaken by those "who know the problems to be met, know the materials with which they are to be met, know the art of the craft which will apply the materials, and know something at least of the experience of the past out of which those materials have been wrought."[4] But to most persons it does not appear to be the least radical, visionary, or absurd to suggest that judicial and legal experience and the lessons and warnings of legal history, and the results of legal science, may be scrapped, and the adjustment of the criminal law

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[3]The Task of the American Lawyer, Pound.

"[4]Even if we had the chance none of us would think of rushing into a well equipped chemical laboratory and starting off on an experiment without any past training or present instruction. Not only the danger of such action, but its futility as a means of discovery and its crass dullness would hinder us from it. We wish to acquire at least a preliminary knowledge of what has already been done in this field in order to avoid waste and peril, and to obtain a good start for ourselves. We should do well to show as much good sense in other matters—especially where human growth and development are involved." Light My Candle, Henry Van Dyke, p. 45.

to human conduct and relations entrusted to those who have no experience or training in this field.

If, however, lawyers persist in their present attitude of indifference and their unwillingness to undertake the reform of the criminal law, we must expect the public to proceed blindly to do the best they can. This and the resultant evils can be avoided only by a more widespread and intensive study of the criminal law by the members of the bar. The attention of lawyers must be directed to a study of what the criminal law is, how it works, where it does not work and why, and how it may be made to work. The criminal law must be made a field in which the lawyer and the gentleman—in the American sense of that word—can feel at home.[5]

Lawyers are not altruists. They are perhaps more selfish than the members of other trades, for, under the pretense of serving the public welfare by improving their calling, they are endeavoring to protect their own incompetence by adopting arbitrary and unreasonable requirements for admission to the bar.[6] A more widespread and intensive study of the criminal law by lawyers—which must be the first step in any beneficial reform—will be undertaken only when some materialistic motive for such study can be discovered. Such a motive exists in the fact that a knowledge of the criminal law is frequently of great importance in the solution of civil cases. The following instances will demonstrate this fact.

CONTRACTS

A contract is a promise, or set of promises, to which the law attaches legal obligation. The law does not or-

[5]The Cleveland Survey, Betterman.

[6]It is especially significant that this endeavor is fostered by associations of which the lawyers who do the great legal work of the country are not members, and that the protagonists of these requirements are dilletante doctrinaires, who, having failed in the practice of their profession, attempt to attain a cheap notoriety by identifying themselves with movements which are masquerading as "uplift" or "reform."

dinarily attach legal obligation to a promise to commit an act which is a crime, and therefore such a promise is not a contract.[7] This is the rule whether the act is made criminal by common law or statute.[8] It is not based upon the impropriety of compelling a person who has made such a promise to pay damages, which in itself would generally be a desirable thing, but upon the fact that the person to whom the promise is made is regarded as a wrongdoer, and to such a person the law denies relief. Though subject to some exceptions and qualifications,[9] it has been applied in a great variety of cases.[10] Its proper application in these contract cases depended upon a knowledge of the rules of the criminal law.

The law sometimes declares that the making of certain promises with a view to establishing contractual relations is criminal, and provides a punishment therefor.[11] The courts have not confined their action to imposing the penalty which such laws expressly impose upon those who violate their provisions, but have declared that promises made in violation of such laws are not contracts. A knowledge of these criminal laws is thus essential to the proper decision of many contract cases.

The Sunday law furnishes an interesting illustration. It provides: "If any person shall do or perform any worldly employment or business * * * on Sunday * * * and be convicted thereof, every such person * * * shall * * * forfeit and pay four dollars * * *."[12] A violation of this statute constitutes a crime.[13]

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[7]13 C. J. 492; 3 P. & L. Dig. Dec. 447.

[8]Page on Contracts, sec. 863. But it has been held that if the promise does not contemplate the commission of a crime, the fact that it may furnish some incentive to commission thereof does not necessarily make it void. 6 R. C. L., p. 715; 19 Ann. Cas. 133.

[9]13 C. J., 492.

[10]13 C. J., 413.

[11]Williston on Contracts, sec. 1628, 1763.

[12]Act of April 22, 1794.

[13]C. vs. Wolfe, 3 S. & R. 48.

In construing this statute the courts have held that it makes criminal the making of "contracts" on Sunday, because the making of contracts is worldly business and employment, and from the criminality of the making of such "contracts" the courts have derived the voidness of such "contracts." They have accordingly announced that not only will they not aid in the enforcement of such promises, but that they will not aid the parties to recover what they have paid or sold in pursuance of such promises. They have thus increased the penalty for this crime out of all ratio to the turpitude of the acts committed in those cases in which the violation of the statute consists in the making of a "contract," and in so doing have perpetrated a gross fraud under the pretence of upholding the sanctity of a day. "It is somewhat odd to vindicate the law, 'Rememmber the Sabbath Day to keep it holy,' by enabling a man to defraud his fellow man."[14]

The Sunday law is a criminal statute, but the effect which the courts have ascribed to its violation has made it an important part of the law of contracts. Many contract cases have been decided by its application.[15]

At common law the fact that the perpetrator of a crime had settled with the victim was not a defense to a prosecution.[16] All promises made by the perpetrator in consideration of the victim's promise not to prosecute were void, and the making of such promises was itself a crime.[17]

An important change has been made in the law by statute. The ninth section of the code of criminal procedure provides that if certain crimes are settled by the victim and the perpetrator in a certain way, the victim shall thereby be relieved from criminal responsibility for the criminal act.[18] The effect of a settlement effected in the

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[14]Trickett, 17 D. L. R. 155.
[15]17 D. L. R. 155.
[16]Clark & Marshall, sec. 156.
[17]Clark on Contracts, p. 293.
[18]C. vs. Carr, 28 Super. 122; C. vs. Scott, 7 Super. 390.

cases and in the manner prescribed in the statute is not limited to that expressly set forth in the statute. A settlement so effected renders valid and enforceable promises and obligations given in effecting the settlement[19]. This statute, though ostensibly a statute relating to criminal procedure, has become, by reason of the interpretation which the courts have given it, an important part of the law of contracts.

DECEDENTS' ESTATES

The question whether a person who kills another may acquire and keep property to which the former would have been entitled by descent or will upon the death of the latter, if the death of the latter had been caused in any other way, has been before the courts with increasing frequency in recent years. In cases in which one person killed another in order to acquire the property of his victim, three different doctrines have been announced by the courts.

In some cases it has been held that the legal title to the property passes to the slayer, and that he may retain the property in spite of his crime.[20] These courts have refused to read, by a resort to legal gymnastics, disqualifications into the unambiguous words of the statutes of wills and the statutes of descent. Their decisions have been based upon the principle of the binding force of statutes and of wills, and upon the principle that civil courts should not add to the punishment of crime.[21]

By other courts it has been held that the legal title does not pass to slayer as heir or as legatee or devisee.[22]

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[19]Greer vs. Shade, 109 Pa. 180.

[20]Shellenberger vs. Ransom, 41 Neb. 631, reversing Shellenberger vs. Ransom, 31 Neb. 61; Owens vs. Owens, 100 N. C. 240; Deem vs. Milliken, 6 Ohio C. C. 357; Carpenter's Estate, 170 Pa. 203.

[21]The Nature of Judicial Profess, Cardozo, p. 40.

[22]McKinnon vs. Lundy, 24 S. C. R. 650; Riggs vs. Palmer, 115 N. Y. 506; Wall vs. Pfanschmeat, 265 Ill. 180; Perry vs. Strawbridge, 209 Mo. 621; Box vs. Larrier, 112 Tenn. 393; Estate of Hall, (1914) P. 1., 18; Estate of Creppen, (1911) P. 108, 115.

The principle that no man should profit from his own iniquity or take advantage of his own wrong is one of great generality whose roots are deeply fastened in universal sentiments of justice, and it gives rise to a strong public policy against allowing a murderer to enjoy the benefits of the property formerly held by his victim. To satisfy this policy these courts have held that the slayer cannot take the property by will or inherit it by law.

It is impossible to justify the reasoning of the courts in these cases. In case of inheritance, the court cannot rightfully say that the title does not descend, when a statute—the supreme law—says that it shall. In case of a will, if the legal title does not pass to the legatee or devisee, it must be because the will is revoked by the killing. But when the legislature has enacted that no will shall be revoked except in certain specific modes, by what right can a court declare a will revoked in some other mode.[23] Furthermore, in case of wills, the doctrine that the killing revokes the will could not be justified by presuming that the victim would not desire his slayer to take his property. A counter presumption would surely arise if the victim lingered after receiving his wound, and if he orally expressed his forgiveness of the slayer, the rule would be wholly inapplicable.

It has been contended that both of the foregoing doctrines are erroneous, and that the error in both lines of decisions has grown out of a failure to recognize and apply a fundamental distinction between law and equity. "The error is due to a failure to discriminate between legal and equitable relief. Both counsel and courts appear to have assumed that the only question before them was whether the criminal could take the title to the property of his victim—a purely common law question. One and all overlooked that beneficent principle by which equity acting in personam, compels one who by his misconduct has ac-

[23]Lectures on Legal History, Ames, p. 312.

quired a res at common law to hold the res as a constructive trustee for the person wronged, or, if he be dead, for his representatives."[24]

Accordingly, it has been held in a few cases that the legal title passes to the slayer but that equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the proper representatives of the deceased, exclusive of the slayer.[25] The principle was thus stated by Andrews, C. J.: "The relief which may be obtained against her (the murderess and devisee) is equitable and injunctive. The court in a proper action will, by forbidding the enforcement of a civil right, prevent her from enjoying the fruits of her inequity. It will not and cannot set aside the will. That is valid, but it will act upon the facts arising subsequent to its execution and deprive her of the use of the property."[26] The fact that there was no mention of this principle in similar cases which preceded Ellerson vs. Wescott is remarkable, because the distinction insisted upon has been repeatedly recognized and enforced in other classes of cases.

These decisions by holding that the legal title passes to the slayer preserve the consistency and render tribute to the logic of the law. They also neatly illustrate that constructive trusts are but formulas through which the conscience of equity finds expression,[27] and that such formulas are merely remedial devices by which a result conceived of as right and just is made to square with the principles and symmetry of the legal system.

To render it impossible for the slayer to enjoy the property of his victim, without disregarding the statutes

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[24]Lectures on Legal History, Ames, p. 314.

[25]Ellerson vs. Wescott, 148 N. Y. 154. See also remarks of Maclennon, J., in McKinnon vs. Lundy, 21 Ont. App. 567 and Fry, L. J., in Cleaver vs. Mutual Assn. (1892) 1 Q. B. 158.

[26]Ellerson vs. Wescott, supra.

[27]Beatty vs. Guggenheim Co., 225 N. Y. 386.

of descent or statutes of wills, as do courts of the second class, and without resorting to judicial subterfuges, as do courts of the third class, statutes have been passed in a number of states barring the slayer from acquiring rights in property by inheritance or will from his victim.[28]

The twenty-third section of the Intestate Act of 1917 provides: "No person who shall be finally adjudged guilty, either as principal or accessory, of murder of the first or second degree, shall be entitled to inherit or take any part of the real or personal estate of the person killed, as surviving spouse, heir, or next of kin to such person under the provisions of this act."[29]

It has been said that this section was framed to meet the situation presented in Carpenter's Estate,[30] but it seems to be much broader in its scope. In Carpenter's Estate the motive for the crime was to get possession of the estate of the decedent, but the statute does not require such a motive. It may well be argued that only a killing with a purpose of hastening the acquirement of property should deprive one of enjoying its benefits.[31] Perhaps, however, the difficulty of proving such a motive renders it expedient to extend the rule to all intentional killings.

The killing in Carpenter's Estate was intentional, and it may well be argued that a killing which is not intentional should not bar the slayer from taking the property,[32] but the statute applies to all killings which constitute murder. An unintentional killing may constitute murder in the first degree, and in all cases of murder in the second degree the killing is unintentional. The statute therefore covers many situations other than that presented in Carpenter's Estate.

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[28]30 Har. L. Rev. 624.

[29]The Wills Act of 1917 has a similar provision. See sec. 22.

[30]Report of Commissioners, p. 47.

[31]See Gollnek vs. Mengel, 112 Minn. 349; In re Wolf, 15 N. Y. S. 378.

[32]See remarks of Minor, J., in Scheurer vs. I. O. O. F., 35 Ill. App. 576.

The statute applies only where the killing amounts to murder. A killing which constitutes voluntary or involuntary manslaughter, or justifiable or excusable homicide is not with its terms. A proper understanding of this civil statute therefore requires a thorough knowledge of the criminal law of homicide.

Insanity of certain kinds will prevent a killing from being murder. A slayer who suffered from the requisite kind of insanity would not be barred by this statute from taking the property of his victim.[33] A proper understanding of the statute may thus require a knowledge of the law of criminal insanity.

DOMESTIC RELATIONS

Legislative divorces are forbidden in Pennsylvania, and the causes for judicial divorce are prescribed by statute. Courts have no power to grant divorces except upon the grounds prescribed.[34] Among the causes prescribed by statute is "adultery."

The term adultery has been variously defined.[35] At common law it was a tort but not a crime[36]. The tort was defined as carnal knowledge by a married woman with a man other than her husband.[37] This was also the definition of the Roman law,[38] but according to the canon or ecclesiastical law adultery was defined to be voluntary sexual intercourse by a married person with any other than the lawful spouse.[39] In divorce cases it is said, the English courts adopted the definition of the common law, and

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[33]See In re Estate of Mason, 31 Dom. L. R., 305; In re Houghton, (1915) 2 Ch. 173; Holdorn vs. A. O. U. W., 159 Ill. 619.

[34]Const. of Penna., Art III, sec 7; Aikens vs. Aikens, 57 Super. 424.

[35]C. vs. Kilwell, 1 Pitts. 255.

[36]C. vs. Lehr, 2 C. C. 341.

[37]C. vs. Lehr.

[38]Matchin vs. Matchin, 6 Pa. 336.

[39]C. vs. Kilwell.

held that a divorce for adultery could be obtained only by a husband.[40]

In Pennsylvania adultery was at an early date denounced as a crime, and the crime has been uniformly defined as sexual intercourse by a married person with any person not his or her wife or husband.[41]

The courts in divorce cases have adopted this definition, but they have refused to hold that a divorce for adultery will be granted only if the crime of adultery has been committed. Thus it has been held that a wife's insanity is not a defense to a libel for divorce, because of adultery, though it would be a defense to an indictment for adultery, and that adultery under the irresistable impulse of that morbid activity of the sexual propensity which is called nymphomania, or more recently erotic mania, is certainly ground for divorce.[42]

The rules of the criminal law that neither condonation nor entrapment nor the fact that the injured party was himself guilty of a wrong is a defense, have not been wholly adopted in civil cases for divorce because of adultery.[43]

EQUITY

In the early days of equity when the state was weak and unable thoroughly to enforce peace, the chancellors actually exercised criminal jurisdiction to repress violence and restrain the lawlessness of the great against the poor and helpless, but by the end of the fifteenth century the need for relief of this sort had ceased, and this jurisdiction had been practically abandoned.[44]

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[40]C. vs. Lehr, but see contra C. vs. Kilwell.

[41]Res. vs. Roberts, 2 Dall. 124; Helfrich vs. C., 33 Pa. 68; C. vs. Lehr; C. vs. Kilwell.

[42]Matchin vs. Matchin, 6 Pa. 332.

[43]See P. & L. Dig. Dec. vol. 1, p. 571; Jackson vs. Jackson, 49 Sup. 18.

[44]Clark on Equity, sec. 244.

It is now the rule that equity will not enjoin an act merely because it is a crime; nor will it refuse to enjoin an act merely because it is a crime, if there are other grounds for exercising jurisdiction.[45]

In determining whether an act shall be enjoined, its criminal character is not, however, entirely disregarded. The fact that an act is a crime makes equity cautious in granting an injunction against it, even where other grounds of equity jurisdiction exist, because of the preeminent appropriateness of trial by jury in criminal cases.[46]

A court of equity, as a general rule, will not enjoin criminal proceedings.[47] "Courts of equity * * * are without jurisdiction to enterfere by injunction with the administration of criminal justice."[48] The application of this principle is sometimes difficult and requires a precise knowledge of the nature of crime. Thus, where a statute provided that a violation of its provisions should constitute "a misdemeanor," and imposed a "penalty" "to be recovered by a suit in the name of the Commonwealth," it was held that equity had jurisdiction to enjoin a proceeding under this statute, because violation of this statute was not a crime and a proceeding under the statute was not a criminal proceeding.[49]

The maxim, "He who comes into equity must come with clean hands," is of ancient origin and broad application.[50] It precludes the granting of equitable relief to a party who has been guilty of criminal conduct in the transaction concerning which relief is sought.[51]

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[45]Clark on Equity, sec. 244; Klein vs. Club, 177 Pa. 224.

[46]Clark on Equity, sec. 245.

[47]Pomeroy's Equity, sec. 644.

[48]P. R. R. vs. Ewing, 241 Pa. 581.

[49]P. R. R. vs. Ewing, 241 Pa. 581. For explanation of principles underlying this decision, see Kenny's Crim. L., p. 1.

[50]21 C. J., p. 180.

[51]21 C. J., p. 191.

EVIDENCE

It is a rule of the common law that a witness cannot be compelled to answer a question if the answer would incriminate him. The rule is local in its origin, and has no counterpart in the other legal systems of the world. In the common law it is the relic of controversies and conculsions which have long since ceased, but in most states constitutional and statutory provisions have added to its sanction.[52]

A distinct privilege against disclosing facts of disgrace or infamy, irrespective of criminality, was created by the common law later than the privilege against self-crimination and independently of it. This privilege, in most jurisdictions, has fallen into disuse. It has been recognized in Pennsylvania in a few cases.[53]

The privilege against self-crimination extends to witnesses in civil cases. It often happens in civil cases that a main part of the issue concerns conduct which is also criminal. The privilege protects nevertheless. The mere fact that a civil liability inheres in the same act does not override the criminal liability, for it would not be possible to disclose the former without also disclosing the latter. This extension of the privilege frequently causes hardship to the parties in civil actions, but it is unquestioned.[54]

The facts protected from disclosure are distinctly facts involving criminal liability or its equivalent. Facts involving civil liability merely are entirely without the scope of the privilege.[55] A knowledge of the criminal law is therefore necessary for the proper application of this rule of evidence in civil cases.

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[52]Penna. Const. Art I, sec. 9; Act of May 23, 1887, P. L. 158.
[53]Henry on Trial Evidence, sec. 490.
[54]Hartsman vs. Kaufman, 97 Pa. 147.
[55]P. & L. Dig. Dec. vol. 23, p. 41720.

INSURANCE

The risks insured against in many present day policies of insurance are "larceny," "embezzlement," "burglary," etc. These are "terms of the criminal law and in no respect are they terms of contract law." The test by which to determine whether the beneficiary can recover upon such a policy is whether a criminal court would decide that one of the enumerated crimes had been committed.[56]

Policies of life and accident insurance frequently contain clauses, varying somewhat in terms, which declare in effect that the company shall not be liable at all, or liable only for a reduced amount if the death or injury of the insured occurs while he is engaged in a violation of law.[57] The exemption from liability stipulated for by these clauses is sometimes expressly restricted to violations of the criminal law, and even in absence of such express restriction it is held that such clauses apply only to violations of the criminal law.[58]

The application of such clauses requires an accurate knowledge of the rules of the criminal law prescribing the acts which are criminal and determining when a person may be said to be engaged in such acts.[59]

The difficulty of deciding what acts are criminal is illustrated by cases in which the insured has died as a result of an abortion to which she voluntarily submitted. In such a case it was held that there could be no recovery because "it cannot be questioned that a woman who solicits the commission of the offense and submits her body for its perpetration can be regarded as other than a participant in its commission and is therefore criminally responsible," and "viewed in that light the deceased comes directly with-

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[56]Reed vs. Fidelity & Casualty Co., 189 Pa. 596; Schonfeld vs. Royal Co., 76 Super. 299; 38 Cyc. 274.

[57]37 Cyc. 548.

[58]14 R. C. L. 1226; 3 Ann. Cas. 873; 14 M. A. L. 140.

[59]37 C. J. 548; Lawton vs. Travellers' Ins. Co., 30 D. R. 696.

in the clause of the policy."[60] Perhaps the plaintiff in this case would not have been denied a recovery if his counsel had known and vigorously asserted the rule that a woman who commits an abortion upon herself is not guilty of a crime.[61]

The death or injury must occur while the insured is engaged in the commission of the crime. In applying this rule it is necessary to consider the recent decisions which hold that one is engaged in the commission of a crime, even after the crime is technically complete, until he leaves the place where the crime is committed, and even after he has left this place and is fleeing to escape.[62]

SALES

A sale of goods has been defined as an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.[63] This definition is obviously merely a label to decribe a result and not a trustworthy formula indicating how that result is reached. Consequently much difficulty has been experienced in applying it.

A conflict of opinion exists, for example, upon the question whether the furnishing of food by an innkeeper to his guest constitutes a sale. The weight of authority supports the view that it is not a sale but a rendition of service.[64] An innkeeper, it is naively remarked in an early case, "does not sell but utters his provisions."[65] With equal naivete, it has been held in a recent case that the guest does not acquire or pay for the title to the food but only

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[60]Wells vs. Ins. Co., 191 Pa. 207. There were other grounds for denying a recovery. See McCreighton vs. American Union, 11 Sup. 332.

[61]C. vs. Weible, 45 Super. 207; C. vs. Bricker, 74 Super. 239.

[62]C. vs. Lawrence, 282 Pa. 128; C. vs. Doris, (Pa.) 135 A. 313.

[63]Uniform Sales Act, sec. 1.

[64]Beale on Innkeepers, sec. 169.

[65]Parker vs. Flint, 12 Mod. 254.

the right to satisfy his appetite by the process of destruction.[66]

The same rule has been applied, with doubtful propriety, to the furnishing of food by a restauranter.[67] In a restaurant a customer generally pays not for a meal but for a definite portion of food. Surely one who pays for and secures a piece of pie at an "Automat" secures title to it and may take it and carry it away without wrong.[68]

There are well considered cases in which it is held that such transactions constitute sales.[69] The question has most frequently arisen in cases in which the patron of an inn or restaurant has been served impure food, and has been made ill thereby, and has sued the proprietor relying upon an implied warranty of fitness.

It is a rule of the common law that where articles of food are sold by a dealer for immediate consumption, there is an implied warranty that the food is wholesome,[70] and the Uniform Sales Act has been held to express this common law rule.[71]

Applying this rule, it has been held that the proprietor of an inn or a restaurant is an insurer of the quality of his food, or, as it is usually stated, he impliedly warrants that the food which he serves is wholesome.[72] Even though the transaction is not a sale, every argument for implying a warranty in a sale of food is applicable with even greater force to the serving of food to a guest or a customer at an inn or restaurant. A sale is not the only transaction in which a warranty may be implied.

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[66]Merrill vs. Hudson, 88 Conn. 314, 54 L. N. S. 481.

[67]Merrill vs. Hudson, 88 Conn. 314, L. R. A. 1915 B. 481, Ann. Cas. 1916 D. 1917.

[68]See Valeri vs. Pullman Co., 218 Fed. 519.

[69]Friend vs. Childs Co., 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100.

[70]Williston on Sales, vol. 1, sec. 241.

[71]Friend vs. Childs Co. 231, Mass. 65, 120 N. E. 407, 5 A, L, R. 100; Merrill vs. Hudson, 88 Conn. 314, 91 A. 533, L. R. A. 1915 B. 481, Ann. Cas. 1916 D. 1917.

[72]Friend vs. Childs Co.

The weight of authority, however, supports the view that as an innkeeper or a restauranteur does not sell the food which he furnishes a patron, and there is therefore no implied warranty of quality, he is liable only if he knowingly or negligently furnishes deleterious food.[73]

The question, precisely in this form, has apparently never been presented to the courts of Pennsylvania. When it is presented, it will be useful to know that it has been held that a restauranteur who serves oleomargarine with a meal to a patron, violates a penal statute prohibiting the sale of oleomargarine.[74] In view of these decisions, it will be difficult to hold "that the transaction arising from a contract to serve a guest food to be eaten by him on the premises of the keeper of an eating house is not a sale."[75]

A vendor of goods who has no title to the goods can ordinarily transfer none to his vendee; but a vendor who has a voidable title can transfer a good title to a purchaser for value in good faith and without notice.[76]

The distinction is entirely devoid of ethical significance, but is important and difficult of application. In applying it, the courts have frequently resorted to the distinction which the criminal law makes between the crimes of larceny and false pretences. They have held that if the acquisition of goods by the vendor constituted larceny, he acquired no title and could transfer none; but if it constituted false pretences, he acquired a voidable title and could convey a good title to a bona fide purchaser.[77] This test has been employed in jurisdictions in which the distinction

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[73]Beale on Innkeepers, sec. 169; 22 Cyc. 1081; 16 A. & E. Encyc. 547; Williston on Sales, vol. 1, sec. 242 b.

[74]C. vs. Miller, 131 Pa. 118, 18 A. 938, 6 L. R. A. 633. See also C. vs. Hendley, 7 Sup. 356; C. vs. Weiss, 139 Pa. 247.

[75] Friend vs. Childs Co.

[76]Compare Uniform Sales Act, secs. 23 and 24.

[77]35 Cyc. 361, Yaks vs. Russell, 20 Ariz. 338, 180 Pac. 910, Bryant vs. Bank, 150 N. Y. S. 1010; Philips vs. McQuade, 220 N. Y. 232, 115 N. E. 441, L. R. A. 1918 B. 973.

between larceny and false pretences was avowedly abolished in criminal cases.[78]

The fact that the courts in deciding this question of civil law have resorted to one of the most subtle and unjustifiable distinctions of the criminal law is a striking illustration of the aphorism "Incidit in Scyllam, cupiens vetare Charybdim." It is not surprising that in its application the courts have made some erroneous decisions.[79]

TORTS

A distinction has long been taken between a tort and a crime, but the authorities differ as to what the distinction is.[80] It is now the better view that the distinction is extrinsic, and that there is no essential intrinsic distinction between a crime and a tort. "There are no certain and universal qualities which at once stamp an act with the character of a crime."[81]

It follows that the same act may be, and frequently is, both a crime and a tort,[82] and when this is so, a knowledge of the law with reference to the crime is, of course, useful in deciding questions relative to the tort.

It is necessary to remember, however, that although most acts which constitute crimes are also torts, this is not true of all crimes. Of crimes which are not torts there are four classes: (1) Crimes which affect the state alone, e. g., treason or seditious libel; (2) Crimes which, though aimed at a private individual, are checked before any actual harm has been done to him, e. g., forgery; (3) Crimes which affect injuriously only the criminal himself, e. g., attempted suicide; (4) Crimes, which, for various reasons of policy have been held not to constitute torts, e. g., perjury.

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[78]Amos vs. Berstein, 212 N. Y. S. 518.

[79]See Amos vs. Berstein.

[80]Compare Blackstone's Commentaries, vol. 3, p. 2, Austin's Jurisprudence, p. 518, and Salmond's Jurisprudence, p. 72.

[81]Harris' Crim. L., p. 1. See especially Kenny's Crim. L., p. 3.

[82]Foster vs. C., 8 W. & S. 77.

It is also necessary to remember that the same act may constitute both a crime and a tort, but as a crime and as a tort it may have different names, as, for example, larceny and trespass, conversion and embezzlement; and that the same name may be used to describe both a crime and a tort of which, however, the elements are not the same, as, e. g., seduction, conspiracy, and libel.[83]

Libel and slander are not merely different names for the same wrong, committed in different ways, but are torts of very different historical origin.[84] As a consequence, the rules applicable to the two torts are not identical. A libel is actionable without proof of special damages, but slander is ordinarily actionable only when special damage is proved.[85] Slanderous communications imputing the commission of a crime constitute an exception to this rule. They are actionable per se, that is, without proof of special damages.[86]

The application of this exception requires an extensive knowledge of the rules of criminal law. Thus in an action for slander where the words alleged to have been spoken were that the plaintiff "had stolen corn out of Grubb's field," it was held that if the people who heard these words understood them to refer to standing corn, there could be no recovery because it was not larceny to take and immediately carry away standing corn.[87] And where the alleged slanderous words were "Sommer and wife stole $1,000 from the old man," it was held that the wife could not recover because the words imported a "stealing by a wife in her husband's presence which is impossible."[88] And where a defendant who had called the plaintiff a "thief" attempt-

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[83]Of course every trespass is not a larceny and every conversion is not embezzlement but conduct may amount to trespass and larceny, and conversion and embezzlement.

[84]Jenk's History of English Law, p. 144.

[85]Clark on Torts, p. 279.

[86]Clark on Torts, p. 274.

[87]Stitzell vs. Reynolds, 67 Pa. 54.

[88]Bash vs. Somner, 20 Pa. 162.

ed to justify his words by proving that the plaintiff had taken wild bees from a tree on the defendant's land, it was held that this did not constitute justification because the taking of wild bees did not constitute larceny.[89]

CONCLUSION

It is generally conceded that in England the criminal law is reasonably effective in preventing crime. This is attributed to the efficient manner in which the criminal law is administered. In England a criminal trial is quick, simple, and direct, and therefore the mal-administration of the criminal law is not a subject of national mortification.[90]

A comparison between the United States and England is most difficult because of the great difference in conditions, but keeping in mind this difficulty of accurate comparison between a country of such diversified sections as the United States and a compact country like England, and endeavoring to arrive at a general estimate, it must be conceded that the United States, as a whole, has much to learn from England.

In England no apparent distinction exists between civil and criminal practice, and barristers accept both kinds of cases indiscriminately. Perhaps then the chief lesson that the United States may learn from England is that the successful administration of the criminal law can be accomplished only when there are no longer any so-called "criminal lawyers." There will continue to be such lawyers as long as the more reputable lawyers abstain from the study and practice of the criminal law. The abrasion of the motives which lead to this abstention is the writer's thesis.

WALTER HARRISON HITCHLER

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[89]Wallis vs. Mease, 3 Binney 546.
[90]Philadelphia Lawyers in the London Courts, Leaming, p. 163.

MOOT COURT

THOR VS ODEN

Easements—Quasi-Easements—Ways—Intention—Vendor and Vendee — Trespass

STATEMENT OF FACTS

Thor owned a large tract of land situated on a public highway. His home was situated on the portion farthest removed from the highway. He commonly and usually used a particular way in passing to the highway although there was another but less convenient way to a less used and poorer highway. Thor then sold the portion on which the house was situated to Oden, retaining the rest. Nothing was said in the grant about the way. Oden used the convenient way and is sued in trespass by Thor. Oden claims the way by an implied grant.

J. Laird, for Plaintiff.
Shenkman, for Defendant.

Atkins, J. This is an action of trespass brought upon an oft-litigated cause of action ,namely, the exercise of a right of way by a grantee over the land of his grantor. The facts are not in dispute: that there is an express grant of a right of way is not alleged; that Oden has gone upon the land of Thor is not denied. Thor, in imitation of his mythical ancestor, is now launching the thunderbolts of the law at Oden. The latter's sole defense rests in the assertion of a right, arising from an implied grant of a right of way.

The cases on this particular phase of the law are numerous and conflicting, but in this state at least, they seem to be in accord and the rules covering the subject clear-cut and established by a long list of decisions. From these we derive the following conclusions:

Where an owner of a tract of land subjects a portion of it to a servitude for the benefit of another portion of the tract, he creates what the writers term a "quasi-easement." (So called in order to distinguish from a true easement which can exist only in different estates.) If he later conveys one of these portions, he thereby

grants or reserves (as the case may be), by implication of law, an easement or servitude in favor of the dominant portion; and the quasi-easement becomes a true easement created by implication. This doctrine of the creation of easements by implication is found in both the civil law and the common law, and is based on the principle that the purchaser is entitled to the land and its apparent appurtenances as they existed when he bought it.

But in order that such an easement may arise, certain features must be present. They are enumerated as follows, in the case of Grace Church vs. Dobbins, 153 Pa. 249: "Where an owner subjects part of his land to an open, visible, and continuous service in favor of another . . . ." It is in the definition and number of these requirements that the courts of the various jurisdictions differ. We shall confine our attention to the interpretations of these requirements, as laid down by the courts of this state.

An easement, to be "open and visible" or, as some writers term it, "apparent," need not be of such character that it must necessarily be seen, but this requirement is satisfied if it is one "which may be seen on a careful inspection." Kieffer vs. Imhoff, 26 Pa. 436.

In construing the word "continuous," the definition in all jurisdictions is purely arbitrary, very few courts insisting on a rigid compliance with the literal meaning of that term. The courts of this state are very liberal in the construction of this requirement. Suffice to say that the cases in this jurisdiction are seemingly unanimous in holding that a clearly defined road over the servient tenement indicates a continuous user. Kieffer vs. Imhoff, supra; Liquid Carbonic Co. vs. Wallace, 219 Pa. 457; Phillips vs. Phillips, 48 Pa. 178.

Another feature strongly stressed by the courts, and brought out in the argument of both counsels, is that of necessity. As construed by the courts, this necessity means a reasonable and not an absolute necessity. It is sufficient if it is "essential to the proper enjoyment of the land." Phillips vs. Phillips, 48 Pa. 178 the court regards the word as meaning nothing more than convenient. In Liquid Carbonic Co. vs. Wallace, 219 Pa. 457, on facts strikingly analogous to the case at bar, an implied grant of a right of way over the grantor's land was upheld by the court, because access to the highway over the grantee's land could be had only by means of a road "hilly and inconvenient."

At this point we wish to call attention to the distinction between the requirement of necessity in order that an easement of right of way be implied, and the true way by necessity. Tiffany on Real Property, page 713, expresses the distinction as follows:

"Easements of necessity are to be distinguished from those last discussed (i. e. implied easements) by the fact that their exis-

tence is not dependent upon the previous existence of quasi-easements of an apparent and continuous character, but they are implied because otherwise the land could not be utilized." Might not a good deal of the confusion on this subject be due to a failure to note the difference between the two situations?

Applying the specific tests as construed by our courts, to the facts of the present case, we have no difficulty in arriving at the conclusion that a grant of a right of way over the land of Thor should be implied. Certainly a "common and usual" use of a particular mode of ingress and egress would result in a clearly defined roadway that satisfy the requirement of continuity. And the facts as stated aver that the road over the grantee's land was a "less convenient way to a less used and poorer highway"—a situation which, in the light of the Pennsylvania cases on this point, and particularly that of Liquid Carbonic Co. vs. Wallace, supra, would justify our holding this to be a necessary easement.

Plaintiff's counsel has called the attention of the court to the absence of stipuation in the deed, relative to such a right. We will refer to the case of Seibert vs. Levan, 8 Barr. 383, in which the court states:

"In the absence of express reservation or agreement on the subject, (he) takes the property subject to the easement." See also the cases of Cannon vs. Boyd, 73 Pa. 176, and Liquid Cargonic Company vs. Wallace, cited supra, all of which seem to disregard the undisclosed intentions or expectations of the parties, and to regard only that intent as can be gathered from the acts and circumstances of the parties in respect to what is visible and apparent.

We therefore decide that a right of way did exist in the defendant, by virtue of an implied grant, and that the plaintiff cannot recover in this action for acts done by the defendant in the exercise of this right.

OPINION OF SUPREME COURT

The learned court below has correctly disposed of the issue presented. The Pennsylvania courts have been very liberal in their passing of quasi-easements by implied grant. This is particularly so in their construction of continuousness of such an easement. The authorities are numerous for holding that a well defined road is continuous and will pass as an implied grant even though not necessary to the enjoyment of the land granted. Such a case is Liquid Carbonic Co. vs. Wallace, 219 Pa. 457 which stands unreversed and unquestioned.

The able opinion of the learned court below and his judgment founded thereon is affirmed.

A VS C

Real Property—Wills—"Heirs"—Words of Limitation—Fee Tail Estates Under Act of 1917, P. L. 403, Sec. 13.

STATEMENT OF FACTS

X died on January 1, 1926, and by his will gave all his real estate to A and his heirs but on failure of issue, "and by this I mean indefinite failure of issue," then over to B and his heirs in fee. A contracted to sell the fee of a property gotten by this devise, to C. C refused to accept the conveyance claiming that it could not convey a fee. A sues C for the purchase price.

Gerofsky, for Plaintiff.

Cassone, for Defendant.

OPINION OF THE COURT

Williams, J. The sole question presented by the case at bar is whether the will in question is to be construed to mean a definite or an indefinite failure of issue? Section one of the Act of July 9, 1897, P. L. 213 provides as follows: "That in any gift, grant, devise or bequest of real or personal estate, the words 'Die without issue' or, 'Die without leaving issue' or 'Have no issue' or any other words which may import either a want or failure of issue of any person in his life time or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue, unless a contrary intention shall appear by the deed, will or other instrument in which such gift, grant, devise or bequest is made or contained." This provision as to devises is reenacted in the Wills Act of 1917, Sec. 14, P. L. 403. This act changes the common law rule in Pennsylvania, the common law always construing such words to mean an indefinite failure of issue. Smith vs. Piper, 231 Pa. 378. It is necessary to note that the act does not set an absolute rule of construction but declares such phrases shall be interpreted to mean a definite failure of issue unless a contrary intent appears in the instrument using such words. The act creates a statutory presumption in favor of a definite failure of issue and unless this court can find something in the will to indicate a contrary intent on the part of the testator, this presumption must prevail.

In English's Estate, 270 Pa. 1 the court speaking of this act says: "By something else in the instrument is meant something in addition to the words under investigation; that is to say, some context or explanation, supplementing the words in question, which

shows that the testator meant an indefinite failure of issue." In the present will the devise is "To A and his heirs but on failure of issue," if the will had stopped there, the statutory presumption would undoubtedly be applicable, but the testator goes further and explains what he means by the words "But on failure of issue" by expressly declaring "And by this I mean indefinite failure of issue." We fail to see how the testator could have more clearly explained his intention as to the definite or indefinite failure of issue, than by an express declaration that he means an indefinite failure of issue. We hold that the act of July 9, 1897, supra, has no application to the present case, the statutory presumption being rebutted by the contrary intent of the testator clearly appearing in the instrument creating the estate.

Having concluded that the words of the will must be construed to mean a devise to A and his heirs, and upon an indefinite failure of issue, then over to B in fee, the next question is what quantum of estate did A take in the land? The authorities are uniform in holding that he took an estate in fee tail, that the executory limitation over to B is void as violating the rule against perpetuities unless it can take effect as a vested remainder. Eichelberger vs. Barnitz, 9 Watts 447, Graham vs. Abbott, 208 Pa. 68. A's estate being a fee tail it is converted into a fee simple by operation of Section thirteen of the Wills Act of 1917, supra, which provides as follows: "Whenever by any devise an estate in fee tail would be created, according to the common law of this state, such devise shall be taken and construed to pass an estate in fee simple, and as such, shall be inherited and freely alienable." A having a fee simple title has a good and marketable title which C by his contract is bound to accept, and A is entitled to recover the purchase price.

The court desires to point out that even though this will could be construed as meaning a definite failure of issue, the decision would remain unchanged. In Patterson vs. Reed, 260 Pa. 319, the court pronounced the rule that if the words used in the will be construed to mean a definite and not an indefinite failure of issue and the estate given is absolute subject to a limitation over upon failure of issue, the words will be construed as referring to death without issue in the life time of the testator if the gift is immediate or if not immediate, during the continuance of the intermediate estate, and if devisee survives the testator, his interest becomes absolute. . . . If however he does not so survive, the limitation over takes effect as an executory devise. In the present case the gift is immediate, A has survived X, the testator, the gift being to A and his heirs, is absolute. The case falling within the above stated rule the devise to A is absolute.

Under either view of the case the estate vested in A is absolute and he is entitled to recover the purchase price of the land.

OPINION OF SUPREME COURT

There can be no question that such a contrary intention is shown by the present will as will rebut the statutory presumption of a definite failure of issue. What estate then is taken by the first devisee where there is a limitation over to another on the indefinite failure of the issue of the devisee? The decided cases are unanimous in holding that the devisee takes a fee simple estate, the fee tail estate which he would take by the common law being enlarged into a fee simple by the Wills Act of 1917, Sec. 13. But is the fee simple subject to the executory interest in B to arise on failure of issue? If it is A has not the title which he contracted to convey. But the interest of B not being a vested interest may not vest for 100 or 200 years and is clearly void under the rule against perpetuities. This interest being void, A has an absolute fee simple and his action for the purchase price must be upheld. Cf. Arnold vs. Muh. College, 277 Pa. 321, and Christy's Estate, 245 Pa. 529.

Judgment of the learned court below is affirmed.

BOSS VS KARNS AND MAY

Mortgage—Real Estate—Fixtures—Ovens—Lien of Mortgage—After Acquired Property—Vendor and Vendee

STATEMENT OF FACTS

Certain ovens were sold to May with an agreement in the form of a chattel mortgage, that they should remain the property of the seller and should be regarded as personal property, and subject to retaking by the seller regardless of their annexation to the realty of May. This agreement was recorded. Previous to the purchase of the ovens and while the brick covers were in place but empty, May had mortgaged the land for $2000, the market value of the property in its condition when mortgaged and the value of the property at the time this action is brought. May annexed the ovens and it would now require a demolition of the brick covers to take them out. May has broken his contract with Boss, the seller, by failing to pay for them. This is an action by Boss, the plaintiff, to recover the ovens.

H. M. Miller, for Plaintiff.

Oshansky, for Defendant.

Under either view of the case the estate vested in A is absolute and he is entitled to recover the purchase price of the land.

OPINION OF SUPREME COURT

There can be no question that such a contrary intention is shown by the present will as will rebut the statutory presumption of a definite failure of issue. What estate then is taken by the first devisee where there is a limitation over to another on the indefinite failure of the issue of the devisee? The decided cases are unanimous in holding that the devisee takes a fee simple estate, the fee tail estate which he would take by the common law being enlarged into a fee simple by the Wills Act of 1917, Sec. 13. But is the fee simple subject to the executory interest in B to arise on failure of issue? If it is A has not the title which he contracted to convey. But the interest of B not being a vested interest may not vest for 100 or 200 years and is clearly void under the rule against perpetuities. This interest being void, A has an absolute fee simple and his action for the purchase price must be upheld. Cf. Arnold vs. Muh. College, 277 Pa. 321, and Christy's Estate, 245 Pa. 529.

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H. M. Miller, for Plaintiff.

Oshansky, for Defendant.

OPINION OF THE COURT

Halpern, J. The land of May was mortgaged for $2000.00 the market value of the land. May purchased an oven from the plaintiff for which the defendant May executed a chattel mortgage. The plaintiff seeks to recover back the ovens because of non-payment of the purchase price.

The first question which thus presents itself to the court is whether or not the ovens after being attached to the realty were real or personal property. In determining this fact it is necessary to go to the intention of the parties. From the facts the court believes it was the intention of the parties that the property remain personalty. The defendant by executing a chattel mortgage clearly showed that the property in question was to remain personalty. A chattel mortgage is given only on chattels as the name clearly shows. In the case of National Bank of Catasaqua vs. North, 160 Pa. 303, the court reiterated the statement of Justice Knowlton in Hopewell Mills vs. The Saving Bank, 150 Mass. 519. The eminent Jurist stated that it is the intention of the parties that primarily governs.

The next question is as to the interest of the defendant, Karns. Karns no doubt has an interest in the property which if it were demolished would impair his security. The defendant contends that to remove the ovens would result in the demolition of his security, claiming that the plaintiff cannot recover, stating as the rule, "Where a chattel mortgagee took his mortgage knowing that the goods were to be annexed to the realty, he will be protected in so far as the detachment will not diminish the security held by the prior mortgagee." 11 C. J. 445.

The defendant also contends that this is a conditional sale and the plaintiff cannot recover. The conditional sales act of May 1925, P. L. 722, Sec. 3 provides: "As against a prior mortgagee or other incumbrance of the realty who has not assented to the reservation of the property in the chattels, if any of the chattels are so attached to the realty as not to be severable without material injury to the freehold unless such injury although material be such as can be completely repaired and seller before retaking such chattels furnishes such prior mortgagee a good and sufficient bond conditioned for the immediate making of such repairs."

By the act of 1901, 4 Purd. 4138, before any writ of replevin may be issued it is necessary that the plaintiff shall execute a bond for the use of the parties interested with security double the amount of the property involved.

We think that the plaintiff by being able to maintain this action of replevin in the court below has sufficiently complied with the replevin act and has filed a good and sufficient bond as required by

the conditional sales act of May, 1925, and should be allowed to recover.

Judgment for the Plaintiff.

OPINION OF SUPREME COURT

From the facts as given we may not presume that the Conditional Sales Act of May 14, 1925, P L.. 722 is applicable. Although slightly ambigious, the facts state that there was a "chattel mortgage" given and not a conditional sale with reservation of title. Also to make this applicable we would have to presume the filing of the contract and that notice had been given of the intention to retake by the seller. We conclude therefore that the cited act is inapplicable

Even if the act were applicable the plaintiff could not recover here. He must affirmatively show that his cause of action is complete before bringing the action. This does not appear. The bond which is to protect the prior mortgagee must be given or tendered before suit. The plaintiff may not force the mortgagee into the expense of a suit to protect his interest and after action is begun and the case at trial, offer the protesting bond. The learned court below seems to have confused the bond which must be filed by the retaker in replevin and the bond in question. They are not the same, may not be in like amount and are for totally different purposes.

The court has argued from the fact that replevin was allowed in a court below. But the facts are so framed as to show that his was the court of original jurisdiction in this case. Such an argument on a false basis is untenable.

The issue is—may the seller retake the chattel when by doing so he materially decreases the security of the mortgagee. After the retaking of the oven the property will be of substantially less value than when the mortgage was given. As between the parties to the agreement the oven remained personalty but as to the mortgagee, it became realty and subject to the lien of his prior mortgage. This action of replevin must fail as against the superior rights of the mortgagee.

Authority for this holding is seen in Bullock E. M. Co. vs. Traction Co., 231 Pa. 129 and cases therein cited. This case has been followed in Gen. Elec. Co. vs. Richardson, 233 Fed. 84. That such a situation as this may be avoided by the seller of the chattel by following the Conditional Sales Act is of interest but not controlling as has been shown above.

The judgment of the learned court below is reversed and judgment is here entered for the defendant Karns.

JONES VS. SMITH

Contracts—Written—Omitted Provisions—Time of the Essence —Proof—Parol Evidence Admissable.

STATEMENT OF FACTS

Smith ordered from Jones 200 footballs by two written orders both containing the words, "all agreements must be in writing, no verbal agreements recognized." There was nothing in the orders showing the time of delivery. Jones sent the footballs two months after the receipt of the orders and Smith refused to accept them. When sued for the price, Smith offered to show by oral evidence and letters that he had given the contract only on an agreement that delivery was to be made in two weeks. The court refused the evidence. Verdict for Jones, and Smith appealed.

OPINION OF THE COURT

Belin, J. The question before the sourt is simply this: Did the lower court err in refusing to allow Smith to show by oral evidence and letters that he had given the contract only upon an agreement that delivery was to be made in two weeks?

Where a contract for the sale of goods complete on its face is silent as to the time for delivery, then delivery is to be made within a reasonable time. Ehinger vs. Baizley Iron Works, 248 Pa. 309. The Sales Act of 1915 P. L. 543, Section 43, Art. 2 provides as follows: "Where by a contract to sell or sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time." This is a rule of law and cannot be varied, contradicted or evaded, by extrinsic evidence or an oral understanding or agreement between the parties, that delivery was to be made in a certain specified time. Driver vs. Ford, 90 Ill. 595. Coon vs. Spalding, 47 Mich. 162. Atwood vs. Cobb, 16 Pick. Mass. 227.

Smith could not have introduced the evidence for the purpose of showing a specific time for delivery as stated above, but he could introduce the evidence for the purpose of showing what a reasonable time for delivery would be.

Since the law implies delivery to be within a reasonable time, by weight of authority this implication is one of mixed fact and law, as bearing thereon and tending to establish what is a reasonable time, extrinsic evidence of all surrounding facts and circumstances includ-

ing parol agreements between the parties as to specific time of delivery is admissable. Cocker vs. Franklin Hemp Co., 2 Sunm. 530 Fed. Case No. 2932.

This specific question of evidence was decided in Meyerscord Co. vs. Stern, 80 Superior Court 413. The court in this case held the oral agreement and letters were admissable to show a reasonable time for delivery, in spite of the provision of the order declaring that verbal agreements are not to be allowed; but no authorities were cited in the case to sustain their view.

We reverse the opinion of the lower court.

OPINION OF SUPREME COURT

The case is not without its difficulties but has been correctly decided. The binding force of Meyerscord Co. vs. Stern, 80 Super. 413, has not been derogated from nor weakened. No case can be shown in Pa. holding otherwise; merely general statements applied in differing situations, which might have induced the court to hold otherwise. But it would be difficult to receive this evidence in the face of the statement in Brewing Co. vs. Rusch, 272 Pa. 181, at p. 186, "it is competent to show a writing was executed on the faith of a parol promise, although the latter may change the terms of the former." Here there is not even a change in terms, merely the explanation of a term implied by law. A statement of the liberal Pa. holding may be seen in Wigmore's Evidence (2nd Ed) p. 311.

Another ground for upholding the admission is that the facts state that "letters" were used to show the agreement. This is not contrary to the express agreement of the parties which did not express that the whole agreement of the parties was in the one writing. Had this been so the result might have been otherwise.

The judgment of the learned court below permitting the reception of the oral and "letter" evidence is affirmed.

BOOK REVIEWS

Problems in Law for Law School and Bar Examination Review. Edited by Henry Winthrop Ballantine. Published by West Publishing Co., St. Paul, Minn.

In 1915 the editor of this book prepared his problems in the Law of Contracts. Both books are collections of concrete problems the solution of which requires a knowledge of the most important fundamental principles which bar examiners and law teachers are in the habit of stressing. The books differ in an important respect. The earlier book gives no answers. It refers the student to the sources of the law. To get the answer, the reader must read the authorities cited. He can use it only in a well equipped library. The present offering gives these same full citations of sources but it also gives the answer with reasons. What is lost in the development of the ability of the student to work out his own conclusions, is gained in the utility of the book to many who do not have the time to perform all this labor in addition to their regular law school work. The questions and answers have been prepared by teachers in the leading law schools. Twenty-six teachers have contributed one or more subjects. The book is much more than a cramming device. It is much the best book of its type that has appeared. The questions challenge the thinking power of students and test their ability to apply the principles they have learned. Reference is frequently made to law review articles for those whose interest seeks an exhaustive discussion. The book can be cordially recommended to both teachers and students.

Brief Making and the Use of Law Books, 5th Ed. Edited by Roger W. Cooley, with specimen pages compiled by Lafayette S. Mercer. Published by West Publishing Co., St. Paul, Minn.

The first edition of this book was a small volume published in 1905. It aims to enable the lawyer and student to take full advantage of the tools of his profession. It explains the scope, plan and arrangement of the different types of law books. Many lawyers can find the law with facility in text books and in books of the encyclopedic type but waste a lot of time in the use of the Century Digest and its supplements or in the use of the various series of annotated cases. Many lawyers do not get full value from Shepard's Citations. This book is the only one we know of which enables the reader to actually inspect typical pages from all the different portions of all types of law books and so, without getting out of his chair, to follow the explanations of the editor as to how to secure the maximum utility from the books he has been able to put in his library. With this knowledge one may make a relatively exhaustive search for the law with a limited library and he may attain results much more satisfactory than his competitor with much better library facilities but with an inadequate understanding as to how to use what is at his hand. The more limited one's library, the more im-

portant it is to study this book. The time spent in such study will be saved many times over before the first year's practice has passed. Part III is devoted to the use of decisions and statutes, their weight as authority, how to distinguish doctrine and dicta, how to construe statutes. Part IV is a discussion of how to prepare a trial brief and Part V does the same for the brief on appeal.

The book is eminently practical and well done and cannot be commended too highly to all young lawyers and to most old ones too.

Handbook of the Law of Equity Pleading and Practice, by Walter C. Clepham. West Publishing Co., St. Paul, Minn.

The author is a professor of law in George Washington University and is well known as the author of an excellent book on the Organization and Management of Business Corporations. The book is an elementary treatise with the usual features of the Hornbook Series, succinct statements in black-letter type followed by a commentary thereon supported by notes citing the authorities. The very radical departures in the federal courts as the result of the adoption of the Federal Equity Rules of 1912 from the system of equity pleading and practice in vogue necessitated a new treatment of the subject. These rules are printed in an appendix together with about one hundred pages of forms. There is no table of cases. There is a chapter on "Equitable Defenses in Actions at Law," but it is limited largely to a discussion of the federal cases. Reference is made to the 'peculiar practice in Pennsylvania," but no explanation of it is attempted. Since the equity rules adopted by the Supreme Court of Pennsylvania have the force of a statute, Cassidy vs. Knapp, 167 Pa. 305, 307, by virtue of our Act of June 16, 1836, sec. 13, P. L. 784, the Pennsylvania law student must concentrate his attention upon the Rules of Equity Practice adopted by the Supreme Court on May 30, 1924, and effective January 1, 1925.

The author devotes considerable space to the topics of discovery and pleas, which he acknowledges are of less importance today than formerly but he explains that, "This elaboration of seemingly unimportant matter is due to the fact that, without a thorough knowledge of the philosophy upon which these topics are founded, it is difficult, if not impossible, to understand the subject of equity pleading and practice at all, even as known to our modern federal tribunals." As a preparation for practice in the federal courts and to enable a student to understand the development of the modern system of equity pleading and practice, the book will prove very useful but much that is found even in the black-letter type could not be followed with safety by a Pennsylvania lawyer practicing in the state ocurts.