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Incontrovertible Physical Facts Rule in Pennsylvania

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that the act does not validate the conveyance because of the exact coincidence of grantors and grantees.

The result reached by the decision is desirable, avoiding as it does the adoption of a more cumbersome and expensive procedure to reach the same result. The court might better have justified its conclusion, however, by adopting the reasoning of the dissenting opinion in *In re Klatzl's Estate*[5] which later became the ruling of the court by adoption as the majority holding in *Boehringer v. Schmid*.[6] The New York court avoided the common law rule requiring distinct and separate grantors by saying that the grantor did not convey to himself as grantee but to a unity or entity which was composed of the consolidation of the grantor and another. In Michigan[7] the court decided that the result of a conveyance by the husband to himself and wife jointly was to create a tenancy in common, treating the grantor husband as having reserved to himself a one-half interest in the property. This result was not intended and should not be the result unless the intended result could not be reached.

The instant case is also novel in that it appears to be the first case interpreting the Uniform Interparty Act. It would seem that the act has not had an auspicious inaugural in the courts.

Harold S. Irwin

INCONTROVERTIBLE PHYSICAL FACTS RULE IN PENNSYLVANIA

The doctrine of "Incontrovertible Physical Facts", is one that has received much attention from the courts of Pennsylvania in the past few years. Although fore-

[5]110 N. E. 181 (N. Y. 1915).
[6]173 N. E. 220 (N. Y.).
[7]Wright v. Knapp, 150 N. W. 315 (Mich. 1915).

shadowed by the cases of *Carroll v. Pennsylvania R. R.*,[1] and *Lonzer v. Lehigh Valley R. R. Co.*,[2] it is but recently that the doctrine has become a favorite with both bench and bar. Consequently, its growth and present status are of more than passing importance.

In his excellent work, "Trial By Jury", the former Chief Justice, Mr. Robert Von Moschzisker, deals with the *Carroll*[3] and *Lonzer*[4] cases at length. The Chief Justice points out that those great judges, Gibson and Tilghman, took the position that the trial judge could not under any circumstances, be called upon to charge that either party had failed to establish his claim or defense.[5]

Such a position, so restrictive of the power of a trial court gradually broke down,[6] and with the decisions in the *Carroll* and *Lonzer* cases a basis was laid for the present "Incontrovertible Physical Facts" doctrine, wherein the pendulum swings far away from the rule advanced by Gibson and Tilghman.

Thus it becomes necessary to examine these two celebrated cases. In *Carroll v. Pennsylvania R. R.*,[7] the plaintiff had been struck at a crossing by a railroad train. The court denied him the right to have his claim for damages sent to the jury, and said that:

> "It is in vain for a man to say that he looked and listened, if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive."[8]

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[1]12 W. N. C. 348 (1882).

[2]196 Pa. 610, 613, 46 Atl. 937 (1900).

[3]Moschzisker, Trial by Jury, sections 319-321.

[4]Ibid., sections 298-319.

[5]Ibid., section 293, citing Jones v. Wildes, 8 S. & R. 150 and Zerger v. Sailer, 6 Binn. 24.

[6]Ibid., section 294.

[7]12 W. N. C. 348 (1882).

[8]Ibid., page 349. See also Schum v. Penna. R. R. 107 Pa. 8, 12, 13; Myers v. B. & O. R. R., 150 Pa. 386, 390, 24 Atl. 747 (1892); Berstein v. Penna. R. R., 252 Pa. 581, 585, 586, 97 Atl. 933 (1916); Barton v. Lehigh Valley Transit Company 283 Pa. 577, 580, 129 Atl. 585 (1925).

That rule of thumb, the "stop, look and listen" rule was involved in the *Carroll* case, and the decision was an application of it.

Mr. Justice Mitchell in *Lonzer v. Lehigh Railroad Company,*[9] said:

> "When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief; if they do so, it is the duty of the court to set the verdict aside****and where that is the case, the court may refuse to submit it at all and direct a verdict accordingly."

With these two cases, particularly the *Carroll* case, the groundwork for the doctrine of "incontrovertible physical facts" was fashioned.

It is with no surprise then, that in *Bornscheuer v. Traction Company,*[10] we find Mr. Justice Mitchell stating that:

> "The conclusion is irresistible that the witness was mistaken as to the distance between him and the car when he started to cross the track, and the jury should not have been allowed to believe him."

Mr. Justice Mitchell relied strongly upon the *Carroll* case.

Not until the learned opinion of Mr. Justice Walling in the much quoted case of *Lessig v. Reading Transit and Light Co.,*[11] however, do we find an actual mention of the doctrine

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[9]196 Pa. 610, 613, 46 Atl. 937 (1900).

[10]198 Pa. 332, 334, 47 Atl. 872 (1901).

[11]270 Pa. 299, 302, 303, 113 Atl. 381 (1921). For similar rules in other jurisdictions see: Sheppard v. Wichita Ice Co., 82 Kan. 509, 28 L. R. A. (NS) 648, 650, 180 Pac. 819 (1910); Hunter v. N. Y. Etc. Co., 116 N. Y. 615, 6 L. R. A. 246, 23 N. E. 9 (1889); Warnke v. Rope Co., 186 Mo. App. 30, 171 S. W. 643, 21 A. L. R. 144 (1914); Fox v. LeComte, 2 App. Div. 61, 37 N. Y. S. 316 (1896); aff'd on opinion below in 153 N. Y. 680, 48 N. E. 1104 (1896); Irvine v. Palmer Mfg. Co., 2 App. Div. 69, 37 N. Y. S. 322, re-argument denied in 3 App. Div. 395, 39 N. Y. S. 245 (1896); Kelly v. Jones 290 Ill. 375, 125 N. E. 334, 8 A. L. R. 792 (1919); B. & O. R. R. Co. v. O'Neill, 108 C. C. A. 115, 186

of "incontrovertible physical facts". In his elaborate and explanatory opinion Mr. Justice Walling states that:

> "As a general rule a suitor is entitled to have his case submitted to the jury on his own interested testimony although contradicted by disinterested witnesses, the remedy for a perverse verdict being a new trial; where, however,as here, the party's own testimony stands not only opposed to that of several disinterested witnesses, but is shown to be untrue by *incontrovertible physical facts* (italics ours), the case is different. It is vain for a man to say his auto was struck in the back when the only injury thereto is at the side near the front wheel, or to insist the collision was at one place when the broken glass and other unmistakable evidences thereof are at another. A court cannot accept as true that which the indisputable evidence demonstrates is false****(The court then discusses and relies on the *Carroll* and *Bornscheuer* cases)****. In the present case plaintiff's testimony cannot be accepted in face of the infallible physical facts. *Elliott* on *Evidence* (sec. 39) says: 'Even though it (an appellate court) may not be authorized to weigh evidence and pass upon the facts, it may and should so use its judicial notice as to bring about justice. Thus, there are often undisputed physical facts clearly shown in evidence, and, by applying to them a well-known law of nature, of mathematics, or the like, it is demonstrated beyond controversy that the verdict or finding is based upon what is untrue and cannot be true. In such cases it is very generally held that the appellate court should take judicial notice of the law of nature or mathematics or quality of matter, or whatever it may be that rules the case, and apply it as the trial court should have done'."

Mr. Justice Walling's able treatment of the "incontrovertible physical facts" doctrine in the *Lessig* case, supra, has been quoted and relied upon in numerous cases since in Pennsylvania. In the same year, in the case of *Hill v. P. R. T.*,[12] Mr. Justice Kephart relies upon and quotes from the

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Fed. 13 (1913); U. S. v. Sixty Barrels of Wine, 225 Fed. 846 (1915). See also 21 A L. R. 141, 142, and Elliot on Evidence, Section 39 and cases there collected.

[12]271 Pa 232, 114 Atl. 634 (1921).

Lessig case. The *Hill* case dealt with an automobile street car collision and the "incontrovertible physical facts" rule was applied to a question of comparative speed. To quote from the opinion:

> "It is useless for a person to say, with the auto going at a rate of eight miles an hour, the street car could travel three hundred feet while the auto was traveling ten or twelve feet. A mathematical calculation will demonstrate the impossibility of such an assertion on any theory of plaintiff's case as these facts are developed."[13]

We find Mr. Justice Kephart in the case of *Fuher v. Westmoreland Coal Co.*,[14] adequately stating the problem involved, in the following language:

> "We have frequently said in cases where the apparent weight of the evidence on a disputed fact was overwhelming, still, if there was countervailing evidence of it upon which the jury might make a finding, all the evidence must be for their consideration. The jury had the undoubted right to weigh the evidence and pass on the credibility of the witnesses, where plaintiff's evidence, standing alone, would justify the inferences necessary to support his claim. When the trial court passes on the weight of the evidence, giving judgment therefrom, it substitutes the judge for the jury as the tryer of facts. If the jury's verdict is against the weight of the evidence a new trial should be granted, and, when manifestly so, as often as the court, in all conscience, should deem it necessary. Under our jurisprudence this is the only corrective remedy for a perverse verdict.
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> "Exceptions to this rule have been made in cases where testimony stands opposed to physical facts admitted or the evidence thereof is of such conclusive and unimpeachable nature as to amount to an admission. While an appellate court may not be authorized to weigh evidence and pass upon disputed facts, it should use its judicial knowledge to bring about justice, and, where undisputed physical facts are clearly shown and it is demonstrated by the law of nature, by mathematics or the like, that a finding is untrue and cannot

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[13]Ibid., pp. 236, 237.

[14]272 Pa. 14, 166 Atl. 61 (1922).

> be true, the appellate court is justified in reversing the trial court: *Lessig v. Transit & Light Co., 270 Pa. 299, 302, 303; Hill v. P. R. T.,271 Pa. 232.*"

The instant case was held not to be governed by the "incontrovertible physical facts" rule.

An unusual application of the doctrine is found in the case of *Seiwell v. Director General,*[15] wherein the court rejected as incredible and contrary to human experience and the laws of nature, testimony that the suction of a rapidly passing train drew against it an automobile standing at rest with brakes on, on a grade below that of the tracks.

In *Horen v. Director General,*[16] Mr. Justice Schaffer applied the doctrine of "incontrovertible physical facts". It was held that a verdict for plaintiff will be reversed where it appears that defendant claims that plaintiff, a boy of ten, was injured while stealing a ride, while evidence, uncontradicted by plaintiffs, shows that he was picked up within a very few seconds after the injury, not on the railroad crossing, but thirty to forty-five feet from it on the right of way, without any evidence of injuries on his body other than a severance of his leg, and without marks on the track, showing that he had been dragged or marks on the engine showing blood, it being manifest that if he had been struck by the locomotive at the crossing, his body would have borne marks of serious injury on other parts of it.

An echo of the *Carroll* case, supra, is found in the following excerpt from the opinion in the case of *Hazlett v. Director General,*[17] a railroad crossing case:

> "It is in vain to say the traveler stopped, looked and listened if, in spite of what his eyes and ears must have told him, he walked or drove right in front of an approaching train and was immediately struck."

The court in the case of *Cubitt v. N. Y. Central R. R. Co.,*[18] states the doctrine in this manner:

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[15]273 Pa. 259, 116 Atl. 919, 21 A. L. R. 139 (1922).
[16]274 Pa. 244, 118 Atl. 22 (1922).
[17]274 Pa. 433, 118 Atl. 367 (1922).
[18]278 Pa. 366, 123 Atl. 308 (1924).

> "If oral evidence is shown by proved physical facts to be untrue, the former must be disregarded: *Lessig v. Reading L. & T. Co., 270 Pa. 299; Chapman v. Clothier, 274 Pa. 394.* Likewise a presumed fact falls in the face of incontrovertible testimony to the contrary, given by witnesses, or derived from proof of the attending circumstances: *Hazlett v. Director General, 274 Pa. 433.* It is urged, however, that in all such cases the jury must pass on the question, and, when the credibility of witnesses is above involved, this statement of the legal rule is correct: *Holzheimer v. Lit Bros., 262 Pa. 150; Shaughnessy v. Director General, 274 Pa. 413.* But where the indisputable physical testimony, as indicated by actual measurements, maps, or photographs, negatives the existence of the fact ordinarily presumed, this is not true: *Hill v. P. R. T., 271 Pa. 232; Seiwell v. Hines, 273 Pa. 259.*"

Where, in the case of *Radziemenski v. B. & O. R. R. Co.*,[19] plaintiff's witnesses testified that decedent's view of defendant's railroad crossing was obstructed by watchman's house and a telegraph pole, but an accurate map showed that these objects could not have obstructed his view, the court said:

> "Yet we are not required to believe what physical facts demonstrate to be untrue, and when an infallible mathematical test is applied to the testimony of a witness and he is found to be mistaken in a material matter, it would be a travesty on justice to allow the jury to believe such testimony and permit them to render a verdict based thereon: *Lessig v. Reading Transit Co., 270 Pa. 299.*"

The present Chief Justice in *Mills v. Pennsylvania R. R.*[20] recognized the "incontrovertible physical facts" rule, but held that the facts of the railroad crossing collision case were such that the rule was not applicable, the case being one for the jury. An automobile had stopped six feet from the first rail of a double track railroad and the

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[19]283 Pa. 182, 128 Atl. 735 (1925). For a similar approval of the Lessig case, supra, see Maue v. Pittsburgh Rys. Co., 284 Pa. 599, 131 Atl. 475 (1925). See also Zandras v. Moffett, 286 Pa. 477, 133 Atl. 817, 47 A. L. R. 699 (1926).

[20]284 Pa. 605, 131 Atl. 494 (1925).

occupants had looked and listened. It was possible that the train appeared in sight after the stop and struck the car when it had almost cleared the second track. In view of these facts it was held that:

> "A precise timing of the relative movements of the truck and train and close calculation of time and space, at best only an approximation, make the margin of safety such a narrow one that a traveler should not be held accountable, as a matter of law, for the resulting accident."[21]

Thus where the question to be determined is one of speed and distance, if the mathematical calculation involved is a close one, the court will not apply the "incontrovertible physical facts" rule; however, where, as in the case of *Hill v. P. R. T.*, supra, there is considerable discrepancy between the mathematical calculation of speed and the testimony of the witnesses, the "incontrovertible physical facts" doctrine will prevail.

It is to be noted that the rule that evidence which contradicts "inconvertible physical facts" cannot alone be made a basis for sustaining a verdict, has no relevancy where the testimony of witnesses is needed in order to apply those facts to the issue in the case. The cases of *Scalet v. Bell Telephone Co.*,[22] and *Pfeffer v. Johnstown*,[23] exemplify such a situation.

In an action by a workman for personal injuries alleged to have been caused by the negligent operation of a hoist in the construction of a building, the court in *Mack v. U. S. Gypsum Co.*,[24] said:

> "Taking into consideration the physical facts which plaintiff describes, it was impossible for the accident to have occurred in the manner alleged."[25]

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[21]Ibid. p. 608.

[22]291 Pa. 451, 456, 140 Atl. 141 (1928).

[23]287 Pa. 370, 135 Atl. 127 (1926).

[24]288 Pa. 9, 135 Atl. 623 (1927).

[25]Ibid., p. 10. For an application of the same rule see: Lamp v. Pennsylvania R. R. Co., 305 Pa. 520, 158 Atl. 269 (1931), wherein the court applied the incontrovertible physical facts rule to a case where

A line of cases has enunciated the proposition that if the uncontradicted external facts show that deceased, killed at a grade crossing, did not stop, look and listen, the question is not one for the jury, and the indisputable physical conditions, indicated by measurements, maps or photographs, may be resorted to in determining the true situation.[26]

Although as a general rule a suitor is entitled to have his case submitted to the jury on his own interested testimony, although contradicted by disinterested witnesses; where the party's own testimony stands not only opposed to that of several disinterested witnesses, but also is shown to be untrue by incontrovertible physical facts, the case should not be submitted to the jury.[27]

In *Miller v. Pennsylvania R. R. Co.*,[28] the late Mr. Justice Sadler states:

> "At the point first mentioned, she (plaintiff) stated her ability to see for 125 feet, and at 10 feet from the

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a motorist was killed in a railroad crossing collision and at page 270 held that "testimony of plaintiff's witnesses contradictory of infallible physical facts cannot be accepted". In Folger v. Pittsburgh Rys. Co., 291 Pa. 205, 139 Atl. 858 (1927), it was held that in an action against a street railway company for damages for personal injuries suffered in a collision between a trolley car and plaintiff's automobile, a judgment for defendant N.O.V. is properly entered where it appears that it was physically impossible for the accident to have happened in the manner described by plaintiff and her witnesses. See also: Griffiths v. Lehigh Val. Transit Co., 292 Pa. 489, 493, 494, 141 Atl. 300 (1928); Amey v. Erb, 296 Pa. 561, 566, 146 Atl. 141 (1929); Carlo v. Bessemer & Lake Erie R. R. Co., 293 Pa. 343, 143 Atl. 3 (1928), 278 U. S. 622, 73 L. Ed. 543, 49 Sup. Ct. Rep. 25; Sharp v. P. R. T., 103 Pa. Super. Ct. 357 (1931), which follows rule of Lessig and Carroll cases in dealing with an automobile-street car collision; Hartig v. Ice Co., 290 Pa. 21, 137 Atl. 867 (1927).

[26]Grimes v. Pennsylvania R. R. Co., 289 Pa. 320, 137 Atl. 451, (1927); Weber v. P. & W. Va. Ry., 300 Pa. 351, 354, 150 Atl. 624 (1930); Perucca v. B. & O. R. Co., Contrell et ux v. Same, 35 F. (2d) 113, 114 (1929).

[27]Haskins v. Pennsylvania R. R. Co., 293 Pa. 537, 143 Atl. 192 (1928); Joseph v. P. & W. Va. Ry., 294 Pa. 315, 422, 144 Atl. 139 (1928); Lunzer v. P. & L. E. R. R., 296 Pa. 393, 398, 399, 145 Atl. 907 (1929).

[28]299 Pa. 63, 67, 149 Atl. 85 (1930).

track where the next obstruction was made, 300 feet, but saw no train on either occasion. In so declaring, she must be in error, for both photographs and actual measurements disclose that an unobstructed view to the south for 4,150 feet could have been had when she had reached the east line of the station, the second place where she looked. 'While it is not within the province of this court to decide disputed questions of fact, and we are bound to give the plaintiff the benefit of all favorable inferences which may be drawn from the testimony, yet we are not required to believe what physical facts demonstate to be untrue'."

Where, in *Snyder v. Penn Liberty Refining Co.*,[29] a truck struck the linoleum which a minor was carrying across a street, thereby injuring him, it was held that:

"The position of a moving object (such as a truck) that causes the injury, as shown by certain evidence, cannot be called an 'incontrovertible physical fact', when other evidence or inferences therefrom show the position of the object to be elsewhere at the time of the accident."

The rule of the *Snyder* case, supra, was applied to a moving street car in *Schaeffer v. Reading Transit Company*.[30] In delivering the opinion of the court Mr. Justice Kephart states:

"Appellant insists that the 'incontrovertible physical facts' rule must govern this case. It attempts to invoke this rule to show that the trolley car was not 250 feet away when appellee turned in. We said, in *Snyder v. Penn Liberty Refining Co., 302 Pa. 320,* 'The position of a moving object that causes the injury, as shown by certain evidence, cannot be called an incontrovertible physical fact when****other evidence shows the position of the object to be elsewhere at the time of the accident.' The facts which appellant contends are fixed are only estimates. Appellee may have been going faster than he thought or appellant may have been going slower. Moreover, appellant fails to work into the mathematical test its duty to reduce its speed

[29]302 Pa. 320, 322, 323, 153 Atl. 549 (1930). See also Hegarty et ux v. Berger, 304 Pa. 221, 226, 227, 155 Atl. 484 (1931).

[30]302 Pa. 220, 153 Atl. 323 (1931).

when appellee went on the tracks. The 'incontrovertible physical facts' rule has no application."

In the case of *Hegarty et ux. v. Berger*,[31] which was an action by pedestrians against the driver of an automobile which forced a second automobile onto a pavement as a result of a right hand collision, thereby injuring plaintiffs, the court held:

> "There is no merit in appellant's contention that plaintiffs' case is disproved by the incontrovertible physical facts. The record presents no such facts. They are never established by oral evidence as to the position, speed, etc., of movable objects: *Schaeffer v. Reading Transit Co., 302 Pa. 320; Snyder v.Penn Liberty Refining Co., 302 Pa. 320; Scalet v. Bell Telephone Co., 291 Pa. 451.* It was far from physically impossible that the accident happened as described by plaintiffs' witnesses."

Where there was a collision at an intersection between a street car and an automobile, and indisputable evidence showed that the testimony of the driver of the automobile in which plaintiff was a passenger as to the distance between the automobile and the street car was intentionally or mistakenly false, it was held in *Lits v. P. R. T. Co.*,[32] that it was the duty of the trial court to instruct the jury to disregard it.

Fontaine et ux v. Pittsburgh, Mars & Butler Ry. Company,[33] dealt with a collision between an automobile and a street car. The plaintiff claimed he had been blinded by the bright headlight on the street car. After reviewing physical facts relating to the street car's position and the roadway alongside which was inside of a curve and the outside of which was the street car track, and since the street car and automobile were traveling in opposite directions, the Superior Court ruled that in such a case, the rays of the headlight moved forward in a straight course outside of the curve and if plaintiffs had continued to travel

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[31] 304 Pa. 221, 155 Atl. 436 (1931).
[32] 97 Pa. Super. Ct. 344 (1929).
[33] 91 Pa. Super. Ct. 95 (1927).

on the paved surface of the road on the inside of the curve they could not have been blinded by the glare of the headlight.

In the case of *Zimmer v. Clark*,[34] wherein a child who was struck by defendant's car at a street crossing sued for personal injuries, evidence of the position of defendant's automobile when it struck the child was held not to be of such character as to justify the application of the "incontrovertible physical facts" rule where the evidence was conflicting, such rule not applying where the position or speed of the moving object is dependent on oral testimony.

Chief Justice Frazer in *Vlasich v. B. & O. Co.*,[35] held that where plaintiff's decedent was killed when struck by a train after alighting from his automobile which had stalled upon a grade crossing, it was error for the lower court to enter judgment for defendant N.O.V., on the basis of alleged infallible mathematical calculation, where it did not clearly appear from the evidence for what length of time the automobile was stalled upon the tracks, and possibly it was stopped sufficiently long for the train to have come into view after decedent started to make the crossing.

An excerpt from the case of *Kemske v. City of Philadelphia*,[36] states the following:

> "If the plaintiff's case rested on the testimony of the first witness and it went to a jury, a verdict for the plaintiff would have to be set aside because of the 'incontrovertible physical facts' which show that the accident could not have taken place the way he testified it did; that is to say, a three and a half ton girder,

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[34]103 Pa. Super. Ct. 145, 146 (1931).

[35]March Term, 1932, No. 44, Pa. Supreme Ct. (C. P. Allegheny County, April Term, 1930, No. 939—reversed).

[36]13 D. & C. (Pa. 1929). In Godshal v. Dietrich, 13 D. & C. 452 (1929), it was held that where in a suit for damages arising out of a collision between two motor cars at an intersection, the verdict of the jury is in favor of the plaintiff, but the mathematical test applied to the plaintiff's testimony as to the speed of both cars prior to the collision, makes it appear that testimony is so untrustworthy as to be insufficient to support the verdict, a new trial will be granted.

> blocked and lashed down to a truck, could not be completely torn away from its fastenings and thrown off the truck because a wheel of the truck went into a one-foot depression in a road while the truck was proceeding at a slow rate of speed. Courts are not required to believe that which is contrary to human experience and the laws of nature, or that which they know to be incredible."

In *Young v. Gill*,[37] the Pennsylvania Superior Court held that the trial court should instruct jury to disregard testimony that automobile hit truck, proved to be false by photographs showing that truck must have run into the side of the automobile.

From the cases as outlined, the following might be laid down:

> (1) The doctrine of "incontrovertible physical facts", that the courts cannot accept as true that which a well known law of nature, of mathematics, or the like, demonstrate beyond controversy to be untrue, is applied considerably in Pennsylvania.
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> (2) Where the question to be determined is one of speed and distance, if the mathematical calculation involved is a close one, the courts will not apply the rule.
>
> (3) Where a party's own testimony stands not only opposed to that of several disinterested witnesses, but also is shown to be untrue by incontrovertible physical facts, the case should not be submitted to the jury.

The query still remains, however, as to what is an incontrovertible fact. In the field of mathematics the doctrine can be applied with some degree of assurance, but where reliance is placed on a photograph there is considerable question. The recent Olympic Games demonstrated how the sight of eye and camera can vary. The same uncertainty applies to our accepted laws of physics.

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[37] 103 Pa. Super. Ct. 467, 157 Atl. 348 (1931), as to a clear view calculation see Haller v. P. R., 306 Pa. 98, 106 (1932).

It is for these reasons that incontrovertible physical facts should be supported by some means of credible evidence as pointed out in (3) above.

Nicholas Unkovic

VALIDITY OF CONTRACTS LIMITING LIABILITY FOR NEGLIGENCE AS BETWEEN PRIVATE INDIVIDUALS

The decisions of Pennsylvania as to contracts generally which limit liability for negligence are apparently much in conflict. The law is well settled that carriers and innkeepers cannot so contract.[1] The reason is sound. These are businesses so affected with a public interest that the protection of public safety and of public property demand this safeguard. The individual does not deal with them on a basis of equality. Use of them is oftentimes a necessity. Consequently, he cannot afford to haggle. He prefers rather to accept any terms, often indeed (especially where the contract is created by notice) without knowing what contract he does make.

Where railroads have contracted, however, not in their character as common carriers but as individuals, a different conclusion has been reached. Thus, contracts by a railroad not to be held liable for fires negligently caused on premises leased to individuals along the right of way or along purely private sidings, have been upheld,[2] on the ground that "the railroad owes no duty to the public in connection therewith".[3]

A similar result was reached where mining companies contracted not to be held liable for collapse of surface sup-

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[1]Grogan v. Express Co., 114 Pa. 523 (1887); Express Co. v. Sands, 55 Pa. 140 (1867); Hoyt v. Clinton Hotel Co., 35 Pa. Super Ct. 97 (1907).

[2]Rundall & Co. v. R. R. Co., 254 Pa. 529 (1916); Stoneboro v. R. R. Co., 238 Pa. 289 (1912).

[3]Stoneboro v. R. R. Co., 238 Pa. 289 (1912).