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"constructive desertion" will be used because of the statement of the Superior Court which we have quoted from *Hartner v. Hartner.*[29] All the signposts indicate that constructive desertion will continue as a part of Pennsylvania law, but that it will be known simply as "wilful and malicious desertion."

E. M. Buchen.

PRESENT STATUS OF THE PAROL EVIDENCE RULE IN PENNSYLVANIA

This note is limited to a general discussion of the present parol evidence rule as contrasted with previous decisions in which the rule was enlarged by the addition of the so-called "contemporaneous parol agreement" exception. The rule has so many specific applications and exceptions that it would be impossible to deal with all of them here, and consequently only the general rule and the aforesaid one main exception will be considered.

The general common law rule as stated in *Corpus Juris*[1] is:

"When any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such document can not be contradicted, altered, added to, or varied by parol or extrinsic evidence."

Another expression of the rule as applied by the Pennsylvania courts is:

"The writing thus becomes the expression of the final result of the negotiations between the parties and is the best and only evidence of the transaction, all preliminary agreements and conversations being presumed to have been merged in such writing, and parol evidence to contradict or vary its terms is therefore inadmissible."[2]

Although the old common law rule was very strict as is shown by the statement of the law from *Corpus Juris*, and was practically the same as the present Pennsylvania view, the earlier Pennsylvania courts were much more liberal in allowing the admission of parol evidence. There was no necessity

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practical significance is in the situation where the wife leaves the home because of the cruel and barbarous treatment of her husband. If she asks for a divorce on the ground of desertion, the husband might show as a valid defence that he had made an offer to take her back; *Kumiker v. Kumiker,* 94 Pa. Super. Ct. 257. On the other hand, if she brought suit on the ground of cruelty, the offer to take her back would not be a defence.

[29]Cited Supra in Note 8.

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[1]22 Corpus Juris 1070.

[2]Henry, Penna. Trial Evidence, p. 381.

to allege fraud, accident, or mistake in the procuring of the contract, and even though the earlier courts quoted the general rule with approval, they added another exception where parol evidence could be introduced to contradict a writing. This exception is commonly spoken of as the "contemporaneous parol agreement" exception. One of the theories back of it is that although there was no fraud in the procuring of the contract, there was fraud which occurred subsequently—that is, when the parol agreement was broken. Some courts, however, ignored the necessity for any type of fraud, and merely stated the exception to be that if there was a parol agreement between the parties which induced the making of a contract, it could be shown even though it contradicted the written instrument.

As is stated by the court in *Speier v. Michelson*[3]: "The Parol Evidence Rule was steadily widened so that almost any promise was sufficient to invade the security of a written contract."

A typical example of this liberal application of the Parol Evidence Rule is *Gandy v. Weckerly*.[4] The facts in this case were that the defendant gave the plaintiff a promissory note for $1250. Plaintiff sued on the note, and defendant alleged a parol agreement between him and plaintiff whereby plaintiff had promised that defendant would not be called upon to pay the note. Defendant then alleged that he was induced to make the note because of this agreement. The court quoted with approval from *Greenawalt v. Kohne*[5]:

"Where at the execution of a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissible although it may vary and materially change the terms of the contract."

"Parol evidence is admissible to alter, vary, or contradict a written instrument where such evidence is an oral agreement contemporaneous with the execution of the writing and on the faith of which the instrument was executed."

This doctrine has been enunciated by many cases[6] among them *Keough v. Leslie*.[7] In this case plaintiff sued on a book account for "paper patterns." Defendant alleged as a defense a parol agreement whereby plaintiff's agent had said he need only be liable for those he actually sold. The court held that this defense was sufficient, and that evidence of the parol agreement was

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[3]303 Pa. 66 (1931).

[4]220 Pa. 285 (1908).

[5]85 Pa. 369 (1877).

[6]Phillips v. Meily, 106 Pa. 536 (1884); Thomas & Sons v. Loose, Seaman & Co., 114 Pa. 35 (1886); Cullmans v. Lindsay, 114 Pa. 166 (1886); Martin v. Fridenberg, 169 Pa. 447 (1895); Fidelity & Casualty Co. v. Harder, 212 Pa. 96 (1905); Phillips Gas & Oil Co. v. Pittsburgh Plate Glass Co., 213 Pa. 183 (1906); Croyle v. Cambria Land & Improvement Co., 233 Pa. 310 (1912); Potter v. Grimm, 248 Pa. 440 (1915); Humbert v. Meyers, 279 Pa. 171 (1924).

[7]92 Pa. 424 (1880).

admissible.

The first case to break away from the old and more liberal view was *Second National Bank of Reading v. Yeager*,[8] but the first decision which really recognized the new and strict rule—that only fraud, accident, or mistake in the procuring of the written instrument may be shown by parol evidence to contradict the writing—was *Gianni v. Russell*.[9] In this case Mr. Justice Schaffer quotes with approval from *Martin v. Berens*[10]:

"Where parties without any fraud or mistake have deliberately put their engagements in writing the law declares the writing to be not only the best but the only evidence of their agreement."

In the *Gianni* case there was a lease in which the lessee was "to use the premises only for the sale of fruit, candy," etc., and he was not "to sell tobacco in any form." The lessee offered to show by parol evidence that he had entered into this contract by reason of a parol agreement between himself and the lessor that he (lessee) was to have an exclusive right to sell drinks in the building, and that as a result of this concession he had promised that he would not sell any tobacco. The court repudiated the liberal application of the Parol Evidence Rule and held that such evidence of the contemporaneous parol agreement was inadmissible.

A case which followed this applied the same rule. In *First National Bank of Hooversville v. Sagerson*[11] the action was on a promissory note. The maker of the note alleged a parol contemporaneous agreement whereby he was not to be held liable in any way upon the note. The court held:

"A breach of faith or of an agreement regarding the doing or refraining from doing something in the future is not fraud as that word is employed in the phrase 'fraud, accident, or mistake'."

And also: "if the integrity of written instruments is to be upheld . . . . appellee must show presence of some legal fraud, accident, or mistake before the defense he seeks to make (evidence of contemporaneous parol agreement) is available."

The facts in *Speier v. Michelson*[12] are very similar to the above case. The action was on a promissory note and defendant averred a parol agreement subjecting payment of the instrument to certain conditions. The court held that this was inadmissible under the strict interpretation of the Parol Evidence Rule.

The *Speier* case is a very important one in the development of the strict rule in this state for it states the present rule and also contrasts it with the old and more liberal view. The court in this case says:

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[8]268 Pa. 167 (1920).
[9]281 Pa. 320 (1924).
[10]67 Pa. 459 (1871).
[11]283 Pa. 406 (1925).
[12]303 Pa. 66 (1931).

"Any parol agreement that subjects the obligation on the instrument to any condition or contingency, whether in person, time, or amount, is ineffective, and the instrument is unconditional, unless fraud, accident, or mistake was the means through which the instrument was procured."

Another recent case which gives a good interpretation of the law is *Peoples-Pittsburgh Trust Co. v. B. P. Dunn Home-Site Co.*[13] It is held there that the writing must be the entire contract between the parties if parol evidence is to be excluded, and to determine this, if the writing shows a complete legal obligation in itself without uncertainty, it is presumed conclusively that the whole engagement of the parties was reduced to writing.

The doctrine of these cases has been followed by the courts of Pennsylvania in other decisions,[14] and this shows that now Pennsylvania has adopted the strict rule, and that there must be legal fraud, accident, or mistake in order to permit parol evidence to contradict, alter or vary written instruments.

There are several reasons advanced for the change in the rule. In the first place the old rule practically discounted the effect of a written contract. Consequently, a great deal of litigation which should never have arisen was dragged through the courts, because in many instances people tried to concoct some sort of verbal agreement so that they could avoid their obligations which had arisen under the writing. It was so easy to get out of a written contract that the value of putting a contract in writing was practically destroyed. Not only could unscrupulous persons take advantage of a rule which was ideally suited for their purposes of practising fraud on others with whom they had contracted, but even in the case of persons who were perfectly honest and sincere there was a great deal of litigation due to the admissibility of oral testimony. Now with the courts adopting the strict rule which gives proper weight to written instruments, this litigation is discouraged due to the refusal to admit this oral testimony. Another practical reason for the adoption of the strict rule is that it is the logical result of modern commercial requirements. In these days when there are so many contracts made every day the only practical way of settling any disputes arising therefrom is to limit the evidence to the four corners of the instrument. Otherwise, not only would the opportunities for fraud be unlimited, but also with the increased amount of business it would be impossible for any one person to remember all the circumstances which preceded the making of each written instrument.

To sum up, this note has attempted to point out the most important change which has taken place in Pennsylvania in the Parol Evidence Rule.

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[13]311 Pa. 315 (1933).

[14]Wagner v. Marcus, 288 Pa. 579 (1927); Myers v. Gibson, 304 Pa. 249 (1931); Title Holding Co. v. Black, 306 Pa. 352 (1932); Madison-Kipp Corp. v. Price Battery Corp., 311 Pa. 22 (1933); Architectural Tile Co. v. McSorley, 311 Pa. 299 (1933); Lake Erie Nursery & Seed Co. v. Edwards, 86 Pa. Super. Ct. 103 (1925).

and to show the reasons why the later cases have repudiated the old, liberal rule, and have now adopted the strict majority rule.

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NEGOTIABLE INSTRUMENTS—EFFECT OF INDORSEMENT IN TRUST FOR A THIRD PERSON

Under Section 36(3)[1] of the Negotiable Instruments Law, the indorsement of a note "To A in trust for B" is a restrictive indorsement which, by operation of Section 47,[2] terminates the negotiability of the note. Hence the effect of such an indorsement is that the restrictive indorsee is not a holder in due course but takes the note subject to all defenses good against the maker or indorser. Such was the holding in the case of *Gulbranson-Dickinson Company v. Hopkins*,[3] in which the facts were these: The Brenard Manufacturing Company agreed to deliver certain advertising matter to the defendant Hopkins, in consideration for which the latter delivered his promissory note to the Brenard company, payable to said company. The Brenard company, being indebted to the plaintiff Gulbranson-Dickinson Company, delivered this note to the latter, indorsed as follows: "Pay to the order of Iowa City State Bank for credit account of Gulbranson-Dickinson Company." Meanwhile, the Brenard company failed to deliver the advertising matter as per the original contract with the defendant maker, Hopkins. By statute, the Gulbranson company brought an action in its own name as restrictive indorsee against the maker. Held, the plaintiff was a restrictive indorsee under Section 36(3) of the Act; that, under Section 47, the act of indorsement terminated the negotiability of the note; that the plaintiff was therefore not a holder in due course, but took subject to defenses good against the payee Brenard company; that therefore failure of consideration by the Brenard company was a valid defense against the plaintiff.

That such was not the law prior to the Negotiable Instruments Law is indicated in the result obtained in the leading case of *Hook v. Pratt*,[4] decided

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[1]Section 36 of the Negotiable Instruments Law, Act of May 16, 1901, is as follows: "An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title of the indorsee in trust for, or to the use of, some other person.

But the mere absence of words implying power to negotiate does not make the indorsement restrictive."

[2]Section 47 is as follows: "An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed, or discharged by payment or otherwise."

[3]170 Wis. 326, 175 N. W. 93, (1919).

[4]78 N. Y. 371, (1879).