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NOTES

REASONING BY ANALOGY FROM STATUTE IN PENNSYLVANIA

In a recent book1 by Mr. Roscoe Pound, the author, in speaking of the position of statutory law in American jurisprudence, makes the following statement:2 "One difficulty, then, with which legislation has had to contend, and, indeed, still has to contend in the United States, is a feeling on the part of lawyers and courts that anything beyond some change of some detailed rule, based on judicial experience of the working of that rule and formulating the result, is out of place in the legal system; that it is an alien element to be held down strictly and not to be applied beyond its express language. This settled feeling is expressed in a doctrine that statutes in derogation of the common law are to be strictly construed—a doctrine which has persisted in the face of a century of legislative attempts to abrogate it3—and in the settled technique of our law which finds analogies only in the common law and refuses to take a statutory provision as a starting point for legal reasoning. We do not receive a statute fully into the body of the law, on a complete equality with judicially found precepts, so that like the latter the statutory precepts give both rules and principles to be developed by analogy. Hence new policies behind modern legislation fare hardly for a time until they are taken up gradually through judicial decision."

On the other hand, Mr. James McCauley Landis takes a somewhat broader view of this subject. Mr. Landis maintains4 that while it is to be admitted that in the later period of the common law in England, and in the earlier period in America, the reasoning pointed out above was widely favored, due largely to a reaction of the conservative members of the profession to a too liberal and hasty development of the law, this has not always been so. It is pointed out that English common law, when first formed, was taken very freely from legislative enactments, and that this system of the formation of the law was adopted to some extent in America, the author speaking of statutes in that period as being in reality "a nursing mother of the law." Mr. Landis states that because early statutes were rudely drawn in general terms, courts were compelled to treat them merely as statements by the legislature of examples which should be extended very widely to all situations in which similar matters were involved, and that this gave rise to the principle of statutory construction of regarding "the equity of the statute."

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1The Formative Era of American Law (1938).
2Ch. 2, p. 61.
4Statutes and the Sources of Law, Harvard Legal Essays, p. 213 (1934).
The learned writer concedes that this principle was virtually unanimously superseded by the doctrine of strict statutory construction at a later period, but points to many examples in which this doctrine was abandoned in favor of more liberal lines of reasoning. For instance, he mentions courts holding certain action, formerly lawful, to be tortious, on the basis of legislative declarations that such action shall constitute a criminal offense, and changes by the legislature in certain incidents of status being interpreted by the courts to change the status itself. In the latter class, he mentions particularly the change in status of married woman wrought by the married women’s property acts,\(^5\) the changes in bastardy law relative to inheritance and actions for wrongful death, and changes in legal policy as to responsibility of trade unions for the torts of their members. Mr. Landis concludes with a recommendation of further extension of this policy.

It is the purpose here to determine the attitude of the Pennsylvania courts on this question of statutory construction. Much light has been thrown upon the subject by recurring references in recent cases involving statutory construction to a principle which might be termed “reasoning by analogy from statute.” This line of thought seems to embody the elements of holding that a statute, obviously and admittedly not applicable by its terms to a particular situation, nevertheless declares what the policy of the Commonwealth shall be with respect to such situations. As a result, by analogy, the courts reason, the provisions of the enactment should govern their decisions in such instances. The novelty of such reasoning lends distinctiveness and importance to the question under consideration.

**The Common Law Rule**

Most authorities on jurisprudence and statutory interpretation seem to be agreed that it has been a cardinal rule in interpretation of legislative acts that statutes in derogation of the common law shall be construed strictly. Thus, it has been said: “Statutes are not presumed to make any change in the rules and principles of the common law beyond what is expressed in their provisions, or fairly implied in them, in order to give them full operation; rules of the common law are not to be changed by doubtful implication.”\(^6\)

And again: “It is a rule generally observed (except where prohibited by statute) that acts of the legislature made in derogation of the common law will not be extended by construction; that is, the legislature will not be presumed to intend innovations upon the common law, and its enactments will not be extended, in directions contrary to the common law, further than is indicated by the express

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\(^5\)As instances of the extreme lengths to which courts have gone in this field, there is cited the holding that the Nineteenth Amendment to the United States Constitution rebutted the presumption that married woman who committed torts or crimes in the presence of their husbands did so under their compulsion, and a case holding that the grant of woman suffrage implied that women were as economically capable as men to wrest a living wage.

\(^6\)Endlich, Interpretation of Statutes, § 27.
terms of the law or by fair and reasonable implications from its nature or purpose or the language employed."7 Similar statements are to be found in practically every Pennsylvania case in which the question of statutory construction is involved.8

On analysis, it seems difficult to understand why this should be so. Why should the courts attempt to limit statutory changes insofar as it lies within their power to do so? The older authorities state that this judicial limitation has been exercised in order to protect the safeguards which the common law, as established by sages in times long past, has thrown around the rights, privileges and liberty of citizens.9 Whether or not this reason, if true, justifies such judicial restraint depends upon the philosophy with which jurisprudence is viewed.

The Modern Trend

Within the last several years in Pennsylvania, the restraint imposed by this rule has been found to be too burdensome, and not adapted to the needs of present day justice. There have been notable instances in which this rule has been rejected, expressly and completely, brought about through the instrumentalities of both the legislature and the courts. While legislative enactments, as such, do not lend force to the changes wrought by the courts themselves by reasoning by analogy from statute, it is thought that such enactments are of interest in determining the view of the legislature upon the whole field of statutory construction.

Legislative Changes

The recent Statutory Construction Act10 has completely abrogated this common law rule, with certain exceptions. Briefly and concisely, the act provides: "The rule that laws in derogation of the common law are to be strictly construed, shall have no application to the laws of this Commonwealth hereafter enacted." There are certain named classes of laws to which the act is not to apply, and which are to be strictly construed, following the principles laid down by the earlier cases.11

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7Black, Interpretation of Laws, § 113, and discussion thereunder.
9Black, op. cit., supra, n. 7.
11The same section further provides as follows: "All provisions of a law of the classes hereafter enumerated shall be strictly construed: (1) Penal provisions; (2) Retroactive provisions; (3) Provisions imposing taxes; (4) Provisions conferring the power of eminent domain; (5) Provisions exempting persons and property from taxation; (6) Provisions exempting property from the power of eminent domain; (7) Provisions decreasing the jurisdiction of a court of record; (8) Provisions enacted prior to the effective date of this law which are in derogation of the common law. All other provisions of a law shall be liberally construed to effect their objects and to promote justice."
There seem to have been no cases in which this feature of the act has thus far been applied, but the complete reversal of policy effected is obvious. It would appear that, outside of the named exceptions, in which cases it is universally conceded that strict construction is the better policy, there can no longer be any doubt that the courts will be compelled to liberally construe legislative enactments.

There are, however, two features which would make it possible to avoid the mandate appearing on the face of the statute. The first is the fact that the act, by its terms, does not apply to statutes enacted prior to its effective date. Because of the constitutional prohibition against retroactive legislation, no relief is provided from the restraint of strict construction of the great mass of prior statutes. It is to be hoped, however, that the courts will follow the obvious policy of the act with respect to previous enactments as they have with respect to other acts, in the manner to be mentioned below. The second doubtful feature is the fact that a statutory construction act is itself subject to construction. It is not probable that the courts would attempt to evade a policy so plainly stated and so beneficial in effect by judicial legerdemain, but such instances are not unknown.

**JUDICIAL CHANGES**

As has been pointed out, all the earlier cases in Pennsylvania have pursued the common law rule of strict statutory construction. Recently, however, there have been a number of cases in which the courts, realizing that this rule would not meet the demands of justice in the particular instances, have departed from that principle and have followed a more liberal course.

There was a foreshadowing of this development in some of the first cases ever decided in Pennsylvania, but the courts seem not to have noticed the possibility of developing the idea. The situation referred to is the Statute of Frauds relative to contracts for the sale of land.

The Act of 1772\(^\text{13}\) provided that _conveyances_ of real estate should be in writing or create estates at will only. This section was taken almost verbatim from the English statute. Instead, however, of the legislature also adopting the fourth section of the English statute, providing that _contracts_ for the sale of land should be in writing in order to be enforceable by action, as did nearly every other state in the Union, Pennsylvania entirely omitted this section from the statute.\(^\text{14}\) As a result, there is no statutory requirement in Pennsylvania that contracts for the sale of land be in writing.

How, then, have the courts come to require that such contracts nevertheless be in writing to be specifically enforceable? The reason given is that if the vendee

\(^{12}\)See n. 8, supra.

\(^{13}\)Act of March 21, 1772, 1 Sm. L. 389, § 1, 33 PS 1.

\(^{14}\)27 Corpus Juris 192; Bell v. Andrews, 4 Dall. 152 (1799); Ewing v. Tees, 1 Binn. 450 (1808); George v. Bartoner, 7 Watts 530 (1838); Lowry v. Mehaffy, 10 Watts 387 (1840); Wilson v. Clarke, 1 W. & S. 554 (1841); Moore v. Small, 19 Pa. 461 (1852); Tripp v. Bishop, 56 Pa. 424 (1867).
under such a contract were permitted to specifically enforce it, such a decree would have the effect of treating him as the owner in equity of the land, when the statute expressly provides that an oral conveyance shall create an estate which "shall have the force and effect of leases or estates at will only."\(^\text{15}\) In other words, since the statute prohibits oral conveyances by the parties, to permit a "court-made" conveyance by specific performance of an oral contract "would be to give greater effect to a promise than may be given to livery and seisin."\(^\text{16}\) On the other hand, to grant specific performance of an oral contract to sell land to the vendor would be "to ignore the lack of mutuality such a decision would create."\(^\text{17}\)

Upon analysis, the effect of such decisions seems obvious. Very patently, the Act of 1772, supra, made no reference whatsoever to contracts for the sale of land. But the courts, considering the effect of specific enforcement of oral contracts, very soundly held that the Act of 1772 declared it to be the policy of the Commonwealth that land should not be conveyed, in any manner whatsoever, unless there was written evidence of such a conveyance for the protection of land titles and for the protection of vendors who might be deprived of their land by perjured oral testimony. Stated differently, the courts, reasoning by analogy, applied the policy declared in the statute to contracts, when the terms of the statute were limited obviously to conveyances.

But the earlier courts did not view their decisions in exactly this light. No mention was made of "policy" or of "reasoning by analogy," upon which later decisions could be based. It was not until recently, therefore, that the Pennsylvania courts again discovered the beneficent effect of such a principle, and enunciated it clearly enough to be considered as a doctrine of statutory construction.

The case of *Commonwealth v. Great American Indemnity Company*\(^\text{18}\) is the first late case in which this line of reasoning has emerged with clarity. That was an action to recover the balance due on a construction bond. A construction company had contracted to erect a building for the Commonwealth, under a contract requiring an indemnity bond to be executed as security for performance by the contractor. The contract provided that the price should not become payable until the contractor should have "furnished satisfactory evidence that all labor, material, outstanding claims, and indebtedness of whatsoever nature arising out of the performance of the contract" had been paid, and the same provision was included in the condition of the bond executed by the defendant as surety. The intervenors in the case, as subcontractors, furnished work and material in the construction of the building for which they had not been paid in full, and the contractor later defaulted. The Commonwealth recovered from the defendant the amount of the loss sustained by the default.

\(^{15}\)Bender v. Bender, 94 Pa. Super. Ct. 419 (1861).
\(^{16}\)25 Dickinson L. Rev. 63, 65 (1920).
\(^{17}\)33 Dickinson L. Rev. 87, 89 (1929); Wilson v. Clarke, 1 W. & S. 554 (1841).
\(^{18}\)12 Pa. 183, 167 A. 793 (1933).
The intervenors presented their claims against the defendant for the amounts due them in the manner prescribed by the Act of 1931, which act, however, was not in force at the time the work was done. The defendant objected to the claims on the ground that the intervenors, not being parties to the bond, could not maintain an action thereon.

The court, in an opinion by Mr. Justice Simpson, affirming the judgment of the court below for the intervenors, held that the former doctrine adopted by the Pennsylvania courts should be considered overruled in favor of that adopted by the Restatement of the Law of Contracts, and by the great majority of states, to the effect that donee beneficiaries had the right to sue on such contracts, regardless of the fact that they had given no consideration for the promise.

In the course of the opinion, the court makes the following statement:

"Since the Restatement was adopted, Connecticut has joined with the other 44 states (in holding that such third party beneficiaries may sue in their own right) and those determinations are so equitable and just, and so certainly carry out the intention of the parties, as shown by the contract and bond, that we willingly join with our sister states in their conclusion on this subject, especially as the legislature by the Act of June 23, 1931, P. L. 1181 (supra), has now established our public policy in regard to the matter, by expressly providing for such a provision in all future bonds." In other words, the court, reasoning by analogy, applied the policy stated in a statute not yet in force to a situation occurring prior to its effective date.

This decision is especially notable because of the fact that, as stated by Mr. Justice Kephart in his concurring opinion: "the decision in this case overrules Greene County v. Southern Surety Co., 292 Pa. 304. We stated in the Greene County case that so settled in the law of this Commonwealth was the rule therein mentioned that we are bound by the doctrine of stare decisis and must await legislative action to be free from it and come into accord with the more equitable, reasonable and prevailing view. The legislature by the Act of June 23, 1931, P. L. 1181, No. 321, § 1, 8 PS 146. The act provides: "In all cases where a surety bond shall be given to the Commonwealth ... to secure performance by a contractor of any public contract for the construction ... of any ... building ... or the supplying of any materials, which said bond shall include a condition for the payment of material furnished and labor supplied or performed in connection with such public work ... irrespective of whether such bond or any provisions therein shall have been required by statute ... every person ... who, whether as sub-contractor or otherwise, has furnished material or supplied or performed labor in connection with such public work ... and who has not been paid therefor, shall have the right to intervene and be made a party to any action instituted on such bond by the Commonwealth ... and have his ... rights and claims adjudicated in such action and judgement rendered thereon for any amount due him ... for such labor or materials, subject, however, to the priority of the claim and judgment of the Commonwealth ...:"

Act of June 23, 1931, P. L. 1181, No. 321, § 1, 8 PS 146. The act provides: "In all cases where a surety bond shall be given to the Commonwealth ... to secure performance by a contractor of any public contract for the construction ... of any ... building ... or the supplying of any materials, which said bond shall include a condition for the payment of material furnished and labor supplied or performed in connection with such public work ... irrespective of whether such bond or any provisions therein shall have been required by statute ... every person ... who, whether as sub-contractor or otherwise, has furnished material or supplied or performed labor in connection with such public work ... and who has not been paid therefor, shall have the right to intervene and be made a party to any action instituted on such bond by the Commonwealth ... and have his ... rights and claims adjudicated in such action and judgement rendered thereon for any amount due him ... for such labor or materials, subject, however, to the priority of the claim and judgment of the Commonwealth ...:"

19P. 192.
21Italics added.
22P. 201.
1931, P. L. 1181 (supra), has indicated that public policy favors permitting recovery by the third party beneficiary in such contracts."

The same year, *Williams v. Kozlowski* was decided, and this principle again appears. In that case, a wife brought an action in trespass to recover damages for the death of her husband. Defendant Kozlowski had so constructed his driveway over the sidewalk, with the knowledge and consent of defendant city of Pittsburgh, that the sidewalk was hazardous and difficult for pedestrians to pass over. Plaintiff's husband was fatally injured when he fell in crossing over the defective sidewalk. The plaintiff joined both the property owner, Kozlowski, and the city of Pittsburgh as defendants, alleging that both were negligent. Defendants contended that they had been improperly joined as defendants, because there was no allegation of joint negligence.

The Supreme Court affirmed the judgment of the court below for the plaintiff. In an opinion by Mr. Justice Maxey, after answering the argument that defendants had not been negligent, and that the deceased had been contributorily negligent in favor of the plaintiff, the court considers the question of the joinder of the defendants. It is said in the course of the opinion: "If the joint negligence is sufficiently pleaded, the procedure followed in this case was in conformity with the Act of June 29, 1923, P. L. 981. If it was not sufficiently pleaded, the suit against the two defendants is permissible under the Scire Facias Acts of 1929 and 1931. Those acts give statutory support to the policy of bringing onto the record as defendants in any action all persons alleged to be liable for the cause of action declared on, whether liable jointly or severally. It is true that these acts provide for the bringing onto the record of an added defendant or defendants only by the original defendant suing out a writ of scire facias to bring such additional defendant or defendants upon the record; but to bring the practice into complete harmony with these acts, we hold that there is now no legal policy which forbids the plaintiff's bringing all defendants upon the record whether they are liable jointly or severally. These acts expressly purport to be a departure in procedure from the common law rule which forbade the joining in one suit of persons committing torts which were not joint."

There are two notable features in this decision. The first is that the Acts of 1929 and 1931, supra, could not be extended by any stretch of the imagination to apply, by their terms, to the bringing in of additional defendants by the plaintiff.

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23 Italic added.
24 *Pa. 219, 169 A. 148 (1933).*
25 *P. 225.*
26 *Act of April 10, 1929, P. L. 479, § 1, 12 PS 141; Act of June 22, 1931, P. L. 663, § 2, 12 PS 141.*
27 The Act of 1929, supra, as amended by the Act of 1931, supra, provides: "Any defendant named in any action, may sue out, as of course, a writ of scire facias to bring upon the record, as an additional defendant, any other person alleged to be alone liable or liable over to him for the cause of action declared on . . . ." (Italic added.)
28 Italic added.
being expressly confined to such action by original defendants. The second is that, as the opinion points out, these acts were express departures from the rule of procedure of the common law, a situation in which the former rule of strict statutory construction would be particularly applicable. Despite these features, the court, by analogy, applied the policy declared by the legislature in the statutes to a situation not within the terms of the enactments.

The case of Nippon Ki-Ito Kaisha, Ltd., v. Ewing-Thomas Corporation is another instance in which this line of reasoning has been followed. There the plaintiff was a Japanese corporation, having its office in New York City. The defendant was a corporation of Pennsylvania, with its principal office in this Commonwealth. The plaintiff, by several written contracts, agreed to sell to the defendant, and the latter agreed to buy, a quantity of raw silk, of the character and at the prices specified in the contracts. Each of the contracts provided that "Every dispute, of whatever character, arising out of this contract, must be settled by arbitration in New York...." The plaintiff delivered all the silk provided for in the contracts, but the defendant refused to pay the full price therefor, claiming that the silk was of a quality inferior to that contracted for. The plaintiff denied this, and proposed to the defendant that the dispute should be arbitrated in New York, as provided in the contracts, but the defendant refused to agree.

The plaintiff filed a petition in the court of Common Pleas of Delaware County, in accordance with the provisions of the Arbitration Act of 1927, seeking an order on the defendant to show cause why the dispute should not be submitted to arbitration in the manner provided for in the contracts. The defendant filed a counter petition, claiming that the Arbitration Act did not apply to proceedings to compel parties to arbitrate in foreign jurisdictions.

In an opinion by Mr. Justice Simpson, the court reversed the judgment of the court below in favor of the defendant. It is pointed out that the defendant had expressly agreed to submit to arbitration in a foreign jurisdiction, and that it should not now be heard to complain when such agreement was sought to be enforced. In speaking of the effect of the Arbitration Act, the court states as follows: "In section 1 of the statute it is expressly declared that under a provision in any written contract, except a contract for personal services, 'agreements to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof... shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' The legislature has thus expressed the public policy of the Commonwealth to enforce, — save in the inapplicable instances therein expressed, — provisions for arbitration. . . . The court below should

2913 Pa. 442, 172 A. 286 (1934).
30Act of April 25, 1927, P. L. 381, 5 PS 161.
31P. 452.
have said to defendant that the constitutional public policy of the nation and the state alike require us to enforce such contracts, and not to aid in defeating them either in whole or in part, especially where, as here, the only antagonistic reasons given are based solely on imaginary fears and not upon facts."\(^{32}\)

The Arbitration Act of 1927 does not by its terms extend to agreements to arbitrate in foreign jurisdictions. Nevertheless, the court held that the public policy of the Commonwealth, as expressed by the legislature in the statute, by analogy should be applied to such contracts. The beneficial effects of such construction are obvious. But just as apparent is the abrogation of the common law rule of strict statutory construction.

The same line of reasoning by the court in *Guthrie's Estate*\(^{33}\) is not quite as clear, but a consideration of the effect of the decision leads to the same conclusion. In that case, a trust was created for certain beneficiaries for life, with remainder over on their death to others. The trust company named as trustee invested the fund in "straight" mortgages, i. e., mortgages which were separately allotted to the estate, and in another single mortgage in which a fractional interest was allotted to the estate, and other fractional interests were allotted to other estates. The investments were made in the name of the trust company only, and no mention was made of the trusteeship, although records of the interest of the estate were kept on the books of the company, and the beneficiaries were given notice of the type and manner of investments. The trust company filed its first and final account as trustee, which was confirmed by the court below in a decree nisi.

The remaindermen beneficiaries filed exceptions to the account and decree, claiming that the investments were improper because mortgage investments of this type were unauthorized, and because the investments were in the name of the trust company only. The lower court issued a final decree dismissing the exceptions and confirming the account. On appeal by the beneficiaries, the judgment was affirmed.

The court, in an opinion by Mr. Justice Drew, makes the following observation:\(^{34}\) "With regard to the mortgages of the participating type . . . we think the Act of 1925\(^{35}\) . . . provides sufficient warrant for the practice followed by the company. . . . It is plain that the legislature saw fit to permit an exception to the rule in the case of participation in a pool of a number of mortgages because such pools could not be successfully operated otherwise. It is equally plain that the

\(^{32}\)Italics added.


\(^{34}\)P. 534.

\(^{35}\)Act of April 6, 1925, P. L. 152, 15 PS 2514. The act provides: "... said companies may assign to their various trust estates participation in a general trust fund of mortgages upon real estate securing bonds, in which case it shall be a sufficient compliance with the provisions of this section for the company to designate clearly on its records the bonds and mortgages composing such general trust fund, the names of the trust estates participating therein, and the amounts of the respective participations. . . ."
exception is no less necessary to the successful operation of participations in single mortgages, and that the legislative intention must therefore have been to include the latter within the exception.\textsuperscript{36}

In other words, the policy of the statute allowing investment in mortgage pools, or in a number of mortgages, was extended by analogy to permit investment in a participating mortgage, or in one mortgage in which a number of trust estates have a fractional interest.

In view of the liberality of the court in this respect, it is interesting to note its reasoning with respect to the straight mortgage in which the fund was invested. As to this mortgage, the court said:\textsuperscript{37} "It is argued here, as it was in Yost's Estate,\textsuperscript{38} that the Act of 1889\textsuperscript{39} . . . as amended by the Act of 1925, supra, likewise permits the practice followed by the company in carrying the straight mortgages. But it is quite clear that no such permission was intended. The act, as amended, expressly provides an exception to the common law rule in the case of participations. It must therefore be construed as excluding from the exception a case, such as that of the straight mortgage, which is not specifically mentioned: expressio unius est exclusio alterius. See Steckler v. Luty, 316 Pa. 440, 443, and cases there cited. A statute is not to be construed in derogation of the common law except to the extent expressly declared in its provisions: see Gratz v. Ins. Co. of North America, 282 Pa. 224, 234, and cases there cited. We adhere to that rule."\textsuperscript{40}

It seems difficult to reconcile this reversion to the common law rule of statutory construction in all its strictness, after the liberal reasoning of the court in the previous instance.

Mitinger's Estate\textsuperscript{41} is still another instance of the practice of the court in reasoning by analogy from statute. There, a testator died, bequeathing to his sister the sum of $60.00 per month, to be paid her out of the proceeds of a named property for her life or so long as she remained unmarried. The will, in its following provisions, stated that, for the support and maintenance of the sister, the testator charged the same property with the sum of $10,000, the interest on which was to be paid her monthly for her life or so long as she remained unmarried, and on her death the principal was to be paid to her heirs, which payment was to be in lieu of the first bequest of monthly payments first made in the will.

\textsuperscript{36} Italics added. Investment in participating mortgages, as distinguished from mortgage pools, is now permitted by the Banking Code of May 15, 1933, P. L. 624, art. XI, § 1108, as amended by the Act of July 2, 1935, P. L. 521, § 1, 7 PS 819.

\textsuperscript{37} P. 536.

\textsuperscript{38} 316 Pa. 463, 175 A. 383 (1934).

\textsuperscript{39} Act of May 9, 1889, P. L. 159, 15 PS 2481.

\textsuperscript{40} Italics added.

\textsuperscript{41} 132 Pa. Super. Ct. 475, 1 A. (2d) 572 (1938).
The sister later died, and the respondents acquired title to the property charged with the bequest.

The petitioners, heirs of the sister, filed a petition in the Orphans’ Court, praying that the respondents, the present owners of the property, be required to pay the amount of the charge to them. Respondents contended that, by virtue of the rule in Shelley’s Case, the sister became vested with a fee simple interest in the property, which interest passed to them under her will.

On appeal by the petitioners from the judgment below in favor of the respondents, the Superior Court reversed the judgment. In an opinion by Mr. Justice Parker, the court cited numerous cases holding that the rule in Shelley’s Case did not apply to personal property, which, the court held, was the character of the bequest to the sister. With respect to the matter we are now considering, the court stated as follows:42 “The legislature by the Act of July 15, 1935, P. L. 1013 (20 PS 229) radically modified the effect of the rule in Shelley’s Case. While that act is not directly applicable it indicates an intention on the part of the legislature to make a marked change in the law. Under such circumstances, we certainly would not extend the rule in Shelley’s Case beyond the clear import of previous decisions.”

Thus, by analogy, the court applied the policy of a statute, which by its terms applied only to real property, to personal property, and held that the policy of the Commonwealth, as expressed in the statute, should control in the case of personal property as well.

In In Re United Security Trust Company the doctrine under consideration was very clearly defined. In that case, the United Security Trust Company had become insolvent, and the Secretary of Banking had taken possession of it pursuant to statute. At that time there was on deposit a sum of money to the credit of certain depositors. The clerk of the District Court also then held certain United States Treasury bonds, delivered to him by the Trust Company as security for the repayment of the deposits. The bonds were sold and the proceeds distributed pro rata to the depositors, leaving still remaining to their credit part of the original deposits. Two dividends were later declared and paid. In his account, the Secretary of Banking allowed dividends to these depositors only on the amount of the deposits remaining unpaid after crediting them with the proceeds realized by the sale of the collateral, and not on the full amount of the original deposits. The depositors had in the meantime assigned their claims to the complainants.

42P. 483.
43The act provides: “Grants or devises in trust, or otherwise, becoming effective hereafter, which shall express an intent to create an estate for life with remainder to the heirs of the life tenant, shall not operate to give such life tenant an estate in fee.” (Italics added.)
44Italics added.
45321 Pa. 276, 184 A. 106 (1936).
The complainants filed exceptions to the account, claiming that the assets should be distributed according to the "equity rule," so that they were entitled to dividends on the full amount of the debt, notwithstanding collateral security from which part payment might be received. The Secretary of Banking contended that the "bankruptcy rule" should be applied, and that the creditors were therefore entitled to dividends on only the original amount of the deposits, less the value of the collateral or what was realized on it. The lower court dismissed the exceptions, confirmed the account, and on appeal by the complainants to the Superior Court, the judgment was affirmed.

The Supreme Court affirmed both judgments below. In the opinion by Mr. Justice Linn, the court, after considering the statute under which the Secretary of Banking took possession of the insolvent corporation, states that: "The obvious purpose was to treat alike all creditors of a given class to provide for equality of distribution and we all agree that equality of distribution among creditors can only be attained by the application of the Bankruptcy Rule." The court admits that the equity rule had previously been applied in Pennsylvania in cases of assignments for the benefit of creditors, but points out that the bankruptcy rule was substituted by the Insolvency Act of 1901. It was also admitted that, as was held in Fulton's Estate, the equity rule was applied in cases involving insolvents' estates, but the court states that those decisions were erroneous, and disapproved them as contrary to the policy of the law declared by the Act of 1901, supra. Considering the third class of cases in which distribution of assets was involved, that of receiverships in equity, the court stated that, in accordance with equitable principles, the bankruptcy rule should also be applied in those instances.

In connection with the point under consideration, the court makes the following interesting observations: "While the Insolvency Act of 1901 (supra) dealt with assignments for the benefit of creditors, the legislature, in substituting the Bankruptcy Rule for the Equity Rule theretofore applied, made a radical change in the policy of the law. The court may declare the scope of the change affected by the statute. 'For although courts sometimes have been slow to extend the effect of statutes modifying the common law beyond the direct operation of the words, it is obvious that a statute may indicate a change in the policy of the law, although it expresses the change only in the specific cases most likely to occur to mind': Gooch v. Oregon Short Line R. R. Co., 258 U. S. 22, 24. We

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47 P. 281.
50 P. 284.
51 The act provides: "... any collateral security held by any creditor for his debt shall be valued by said tribunal, and if the security be retained by the creditor his dividend shall be on the difference between his claim and the value of his security so ascertained. . . ."
think, therefore, that desirable uniformity of administration will be attained by applying the Bankruptcy Rule in all cases of the distribution of the assets of insolvents whether living or dead, individual or corporate, and that as this court, since the Act of 1901 (supra) is not committed to the application of any other rule, the Bankruptcy rule should hereafter be considered of general application.”

That In Re United Security Trust Company has become a landmark in Pennsylvania law in the adoption of the bankruptcy rule as to distribution of assets appears from the very great number of cases which have followed it and cited it as such. All the more remarkable, therefore, is the fact that this result has been reached solely by the court reasoning by analogy from statute, and ignoring the former common law rule that statutes in derogation of the common law shall be strictly construed.

Finally, the Supreme Court of the United States has adopted this principle of reasoning by analogy from statute in a most lucid and emphatic manner. This occurred in the very recent case of Keifer & Keifer v. Reconstruction Finance Corporation et al.,58 which, while not a case originating in Pennsylvania, is important from the point of view of this discussion in showing the attitude of the highest tribunal in the country on this principle of statutory construction.

That case was an action to recover damages for negligence in caring for cattle. The Reconstruction Finance Corporation was authorized by statute to create regional agricultural credit corporations, the organization, management and powers of such corporations being prescribed. Pursuant to such authorization, the Reconstruction Finance Corporation chartered the Regional Agricultural Credit Corporation in question. This corporation, in the due exercise of its powers, entered into so-called cattle feeding contracts, whereby it undertook to provide sufficient feed and water for livestock, with appropriate security for rendering these services. The plaintiff delivered its cattle to the defendant corporation under such an arrangement, and the cattle were damaged, the plaintiff claimed, as the result of the defendant negligently failing to provide the proper care for them.

The plaintiff, a copartnership, brought an action to recover the damages resulting from such negligence against both the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation. A demurrer of the former, on a ground not here pertinent, was sustained. The Regional Agricultural Credit Corporation demurred on the ground that it was not subject to suit without its consent, since it had not been given the right to sue and be sued by its charter or the statute under which it was created. The District Court sustained the demurrer,54 and on appeal by the plaintiff, the Circuit Court of Appeals affirmed the

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58Italics added.
5422 F. Supp. 918.
The plaintiff took the case to the Supreme Court on a writ of certiorari. The Supreme Court, in an opinion by Mr. Justice Frankfurter, reversed the judgments of the courts below. Considering whether or not Congress intended that such corporations should be subject to suit, regardless of the express terms of the statutes under which they were created, the court said: "In spawning these corporations during the last two decades, Congress has uniformly included amenability to suit. Congress has provided for not less than forty such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope." 

In considering and supporting this statement more fully, the following note was appended: "Mr. Justice Holmes, on Circuit, gave pioneer expression to inferences to be drawn from legislative policy. 'A statute,' he wrote in Johnson v. United States, 1 Cir. 163 F. 30, 32, 18 L. R. A., N. S., 1194, 'may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" Comment on so brilliant a statement emanating from such eminent jurists of the highest tribunal in the United States would seem superfluous. Could more weighty authority be found for this liberal course which the Pennsylvania courts have adopted tentatively?

In the course of the opinion, the court admits that, while the statute creating the Reconstruction Finance Corporation gave that body the right to sue and be sued, no such power was given to the Regional Agricultural Credit Corporation.

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8697 Fed. (2d) 812.
86P. 318.
86Italics added.
86p. 319, n. 4.
when the former organization was authorized to create it by the Emergency Relief
and Construction Act of 1932.61 But it points out that in view of the Congres-
sional policy mentioned above, of giving such power to governmental corporations
in the past, Congress must have assumed that the power to sue and be sued given
to the Reconstruction Finance Corporation "would flow automatically to the
Regionals from the source of their being."62 The opinion concludes with the
statement:63 "Congress has thus clearly manifested an attitude which serves as
a guide to the scope of liability implied in the general authority it has conferred
on governmental corporations to sue and be sued. We should be denying the
recent trend of Congressional policy to relieve Regional from liability."64

THE FUTURE

The course of the Pennsylvania courts in the future seems difficult to predict.
It would appear that in the cases considered above, the courts reached the con-
cclusions set forth merely upon the ground that the equities of each case required
a liberal construction of the statute under consideration. And it must be admitted
that were the courts to extend the provisions of any statute to any situation advanc-
ced by counsel in any case would lead to chaos. But just as true is the proposi-
tion that there have been in the past, and there will be in the future, cases in which
the equities will strongly demand the application of the policy of a statute not
applicable by its terms to the particular situation involved.

The point here sought to be established is that there is no longer any reason
for rigidly adhering to the ancient common law rule that statutes in derogation
of the common law are to be strictly construed. In order to justify legislative
enactments at all, it must be upon the premise that times and conditions necessitate
changes in the law as it previously existed. The courts should not seek to avoid
facing this proposition squarely by interposing a rule no longer based upon reason.

The statement of a New York court as early as 1859 is particularly apt. It
was said:65 "Why, in this noon of the 19th century, and under a free government
are we solemnly warned against innovations upon the common law as it existed,
and the legal precedents established in the days of the Norman conqueror? Did
all knowledge exist in the past? Is the glory of the ancient common law so
dazzling that the learning of the present day, and all the attempted reforms upon
the system to meet the wants of the age, are to be regarded as dangerous experi-
ments? With melancholy auguries against progress I have no sympathy. For
theories which have no support but antiquity I have no veneration. For the outcry
against innovations upon the mysterious excellence of the English common law,

61 Act of July 21, 1932, c. 520, § 201 (e), 47 Stat. 713; Mar. 27, 1933, Ex. Or. 6084.
62 P. 520.
63 P. 521.
64 Italics added.
which I cannot behold, I have no reverence. I hold an honest, sensible construction of the statute, according to its true intent, to be practical wisdom, and that the spirit of justice, befitting the wants of the age, is the soundest philosophy in a system of law. I regard it as a humiliating admission of intellectual decline, and worse than weak superstition, to assume that all wisdom existed in the former common law of England, or that laws suited to the condition of a free government could only be framed by the ancient inhabitants of Britain ... nor do I believe that it is only in the annals of past ages that we shall look for the wisdom necessary to guide us in our own. As changes are wrought in the circumstances of a people, or country, it is necessary not only that their laws themselves, but also the spirit of the laws should be accommodated."

The way to liberal statutory construction has been pointed out through the medium of reasoning by analogy from statute. It is to be hoped that it will not be ignored in the future.

ROBERT I. SHADLE

CONSTRUCTIVE TRUSTS ARISING OUT OF SHERIFFS’ SALES

"All declarations or creations of trusts or confidences of any lands, ..., and all grants and assignments thereof, shall be manifested by writing, signed by the party holding the title thereof, ..., or else to be void: Provided, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by implication or construction of law, then and in every such case such trust or confidence shall be of the like force and effect as if this act had not been passed."

Considering judicial sale cases with reference to the prevailing general rule in Pennsylvania as to repudiation of oral express trusts of, and oral agreements to convey,² land, one would expect little relief from equity where a purchaser at a sheriff’s sale agrees orally to hold in trust for, or convey to, the defendant in the execution or some third person, and then later violates his agreement. But, in any case, if it be determined that a constructive trust should be set up for the benefit of the promisee, the decision should be the same whether the Act of 1856 or the Act of 1772 be regarded as applicable to the situation.³ Should a trust arise by construction or implication of law in these public sale cases? If so, what dif-

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¹Act of 1856, April 22, P. L. 532, section 4.
²As developed from construction of the Act of 1772, 1 Sm. L. 389, section 1 in conjunction with the fact that Pennsylvania has had, since 1857, no Statute of Frauds requiring contracts for the sale of land to be in writing.
³See Bogert: Trusts & Trustees, Vol. 3, Section 494.