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shall be recorded before the entry of the judgment under which such subsequent judgment creditor claims. Thus, since the time of the vesting of the title relates back to the time when the grantor handed the deed over to the depositary, the unrecorded deed, in point of time, comes before all judgment creditors after that date. But if the judgment is duly entered, the Act of 1931 protects the judgment creditor. Of course, if the judgment creditor has actual notice, or if the deed is recorded, he is not protected. Upon the death of the grantor all his debts become a lien upon his property for one year. But, since the Act of 1931 specifies judgment creditors and omits any mention of these lien creditors,⁴⁸ creditors who got their lien because of the death of the grantor probably will not be protected over such a prior unrecorded deed.

HAROLD F. KERCHNER

MURDER IN THE FIRST DEGREE IN THE PERPETRATION OF FELONIES: DEFINITION OF THE FELONIES

An interesting question in the Pennsylvania law of homicide involves the precise definitions of the five enumerated felonies a murder in the perpetration of which becomes murder in the first degree. The Criminal Code of 1860 provides that:

"All murder which shall be . . . committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree . . ."¹

An amendment, enacted in 1923,² makes minor changes in the wording and adds kidnapping to the list of felonies.

The question may be illustrated by a hypothetical case: a man commits murder in the course of burning down the house he occupies but does not own. Has he murdered in the commission of "arson"? His burning of the house which he occupied was not arson at common law,³ nor by the Code of 1860,⁴ but became arson by statute in 1881.⁵ It was arson at the time of the commission of the crime.

⁴⁸Act of 1901 said "judgment or other lien creditors."

¹Act of March 31, 1860, P. L. 382, §74.

²Act of May 22, 1923, P. L. 306, §1.

³C. J., 553; *Rex v. Holmes*, Cro. Car. 376, 79 Eng. Rep. 928; *Rex v. Schofield*, East P. C. 1028; *Rex v. Breeme*, East P. C. 1026; and see *C. v. Gentzler*, 15 Pa. Dist. 934; *C. v. Bruno*, 316 Pa. 394.

⁴See discussion of this point in *C. v. Bruno*, 316 Pa. 394, at 400, 175 A. 518, at 520-21, and authorities cited. Although no Pennsylvania case so holds directly, there is little doubt that this is the law, as is set forth in the dicta in the Bruno case, based on the general rule as to statutory reiteration of substantially the same definitions of crimes as obtained at the common law, and upon authorities from other states having similar statutory provisions.

⁵Act of June 10, 1881, P. L. 117; *C. v. Levine*, 82 Pa. Super. 105.

No case gives the specific answer, which can therefore be determined only by noting the decisions in analogous cases and by organizing the material into a logical trend. In the abstract, the question might be answered in these different ways:

I. The courts might define each of the felonies separately, without reference to any rule of definition. This appears unlikely, in view of the widely accepted use of reasoning by analogy by the courts, which would lead them to accept the same rule of definition for one felony as had been announced for another.

II. The courts might lay down a general rule of definition, as, for example, the definition most favorable to the defendant, or the narrowest definition of the felony. There is language in some of the cases which would support this interpretation,⁶ but this method is advanced largely by way of additional justification for a holding under the third theory, the logic of which is considered to be superior.

III. The courts might set forth a rule depending on chronology. Under this theory the following possibilities present themselves:

1. The definition at common law;
2. The definition provided by the Code of 1860;
3. The definition prevailing in 1923, the time of the amendment and re-enactment;
4. The definition prevailing at the time of commission of the crime.

The fourth possibility is quickly eliminated. Under such a rule the definition of first degree murder by the statute of 1860 would be subject to unlimited change, without specific amendment, by the mere fact of subsequent enlargement of any of the enumerated felonies. This would be contrary to the rule that a criminal statute cannot be enlarged by implication.⁷ The leading case of *Commonwealth v. Exler*, 243 Pa. 155, specifically eliminates this possibility. In that case, the

⁶"It is not the construction that is supported by the greater reason that is to prevail, but the one which, if reasonable, operates in favor of life and liberty." *C. v. Exler*, 243 Pa. 155 at page 162. ". . . strict construction is imperatively required . . ." *Id.* at page 164. "No person is to be made subject to a penal statute by implication, all doubts concerning their interpretation are to preponderate in favor of the accused." *Id.* at page 163, quoting Bishop's Criminal Law. See also, similar language in *C. v. Ruttenberg*, 19 D. & C. 534; *C. v. Miller*, 80 Pa. Super. 309.

⁷Endlich on Interpretation of Statutes, §332; 59 C. J. 1115; *C. v. Exler*, 243 Pa. 155; *C. v. Baker*, 115 Pa. Super. 183, 175 A. 438; *Bucher v. C.*, 103 Pa. 528, 534; *C. v. Sevey*, 26 D. & C. 600; *Johnson v. S.*, (Ga., 1907) 58 S. E. 265. Note that this principle does not apply to second degree murder. *S. v. Smith*, 32 Me. 369; *P. v. Enoch*, 13 Wend. (N. Y.) 159. See *post*, note 16.

evidence indicated that the defendant had had sexual intercourse with a girl under sixteen years of age, causing injuries and shock of which she died. No evidence showing lack of consent on the part of the girl was produced. The defendant, therefore, could not have been convicted of rape under the common law,⁸ nor under the statute of 1860.⁹ The evidence did, however, make out a case of "statutory rape," under the Act of 1887.¹⁰ The court held that a killing in the perpetration of statutory rape was not murder in the first degree, because to so hold would be to extend (by implication and without express amendment) the penalty of the 74th section of the Code of 1860 defining murder in the first degree to an offense created and defined by a subsequent statute. This decision was in accord with a general rule for the construction of penal statutes, which is supported by strong authority.¹¹

The rule of the *Exler* case was followed in the case of *Commonwealth v. Ruttenberg*, 19 D. & C. 534. In this case, defendant was convicted of second degree murder. He had burned his own building, a store and dwelling, in the course of which one Zimmerman received fatal burns. The question was different from, but analogous to, the one at hand. It involved the necessity for proving that the death resulted during the commission of a felony, since a killing during commission of any felony is murder.¹² The burning of his own building, the court said, was not a felony at common law¹³ nor by the code of 1860¹⁴ but became arson and a felony by the Act of April 25, 1929.¹⁵ The court held that

⁸1 East P. C. 434; 4 Bl. Com. 210; see *C. v. Miller*, 80 Pa. Super. 309.

⁹*C. v. Miller*, 80 Pa. Super. 309; see also *C. v. Childs*, 2 Pitts. 391; *C. v. Duchnicz*, 42 C. C. 651.

¹⁰Act of May 19, 1887, P. L. 128.

¹¹See authorities cited *supra*, note 7; and Bishop, Criminal Law, §225.

¹²The Pennsylvania statutes do not define murder but merely separate it into degrees. Therefore, the definition of murder in Pennsylvania remains the same as the definition at common law. See Hitchler, "The New Definition of Murder in the First Degree," 29 Dickinson L. R. 63. A killing during the commission of any felony was murder at common law, 29 C. J. 1097; *S. v. Leiper*, 70 Ia. 748, 30 N. W. 501; *P. v. Enoch*, 13 Wend. (N. Y.) 159; and remains so under the murder statute. See *C. v. Robb*, 284 Pa. 99, and Hitchler, *supra*, at page 73.

¹³It is to be questioned whether or not the court was correct here in stating that "prior to the Act of 1929, a defendant who burned his own dwelling house could not be convicted of arson," and that the Act of 1929 broadened the scope of arson "to include the burning of any dwelling whether the property of himself or another," since common law arson was not an offense against ownership, but against occupancy, (*C. v. Bruno*, 316 Pa. 394) and an owner might be guilty of arson if he burned a building which was occupied by another although owned by himself. Wharton Criminal Law, 8th ed., §837. It does not appear in the reported opinion whether or not the defendant occupied his building or merely owned it while it was occupied by another. Had the defendant not been occupying the building, it is submitted that his burning of the building would have been arson at common law.

¹⁴Section 137 of the Act of 1860 enlarges common law arson to certain additional classes of structures burnt, but does not otherwise change the elements of the crime. The statute contains the words "of another." See discussion in *C. v. Levine*, 82 Pa. Super. 105.

¹⁵P. L. 767. If, as discussed in note 13, the defendant had been the occupant of the building it would appear that reference to the 1929 statute would be superfluous, and the Act of 1881, P. L. 117, abolishing the defense of occupancy, would control. The Act of 1929 does not refer to occupancy, but merely uses words of ownership: "whether the property of himself or of another," which words would appear to leave unchanged, but for the prior statute of 1881, the common law in regard to occupancy.

the 1929 statute merely created a new offense, burning one's own building, which had no amendatory effect upon the murder statute of 1860.¹⁶

Said the court:

"When an offense is created by statute and the same statute provides a penalty or mode of punishment, only that which the statute provides can be followed. While remedial laws may extend to new things not in esse at the time of the making of the statute, penal laws will not, nor will they extend to an offense created and defined by subsequent statutes."

In other words, the mere fact that the Legislature chose to name its new crime "arson" had no effect on other existing statutes based upon the burning of the building of *another*, long known as "arson." The Legislature might have cleared up all doubt by calling the new crime "burning of one's own house," but the fact that it preferred "arson" made no difference in its effect. So far as the laws of 1860 or 1923 are concerned, it is not arson.

The third possible definition, which at first sight appears to be the most logical, can also be disposed of easily. Language later used by the Court in support of the reasoning of the *Exler* case based the result upon the fact that the "legislature did not have and could not have had 'statutory rape' in mind when it determined the penalty" for first degree murder in the commission of rape.¹⁷ The Legislature most certainly must have had statutory rape in mind as rape when it re-enacted the murder statute in the course of amendment in 1923. Statutory rape was at that time a thing "in esse," and was obviously known by the Legislature to be included in the term "rape." There are no cases, however, which support this view, and the general rule of construction is that "words used in the original act will be presumed to be used in the same sense in the amendment,"¹⁸

¹⁶But did the court need to look to the 1860 statute at all, except for punishment? The offense of second degree murder is not defined in any sense by statute, but is merely all of common law murder which is not included under the statutory delineation of murder in the first degree. See Hitchler, "The New Definition of Murder in the First Degree," 29 Dickinson L. R. 63. If this is so, it should follow that second degree murder may be enlarged by enlargements in the common law. The common law definitions of felonies may be enlarged by statute (C. v. Levine, 82 Pa. Super. 105). Why, then, is not the common law definition of murder enlarged by statutory enlargement of the common law definitions of felonies in the course of which it is committed? It was so held in *S. v. Smith*, 32 Me. 369, 54 Am. Dec. 578, the court holding that the common law rule that an unintended killing is murder or manslaughter depending on whether committed during a felony or a misdemeanor had "reference to such gradation of crimes as might from time to time obtain" and was not "to perpetuate the ancient classification of offenses." The reason that first degree murder is not enlarged by subsequent enlargement of the collateral felonies lies in rules of construction of penal statutes—the Act of 1860. But the elements of second degree murder are not defined by statute, and it is difficult to see how rules of law governing construction of such statutes can apply to a definition purely common law in character. See also *C. v. Pemberton*, 118 Mass. 36; *P. v. Enoch*, 13 Wend. (N.Y.) 159, 174, where the court says, "as often as the legislature creates new felonies, a new class of murders is created."

¹⁷*C. v. Bruno*, 316 Pa. 394, 401.

¹⁸59 C. J. 1095; *Thorn v. Brown*, 257 Fed. 519, 523; *Johnson v. S.*, (Ga., 1907) 58 S. E. 265.

for it is presumed that the Legislature in adopting the amendment had in mind the judicial construction of the original statute.¹⁹ "Where an amendment leaves certain portions of the original act unchanged, such portions of the existing law as are retained are regarded as continuation of existing law and not a new enactment."²⁰ Thus, it seems that the fact that the Legislature knew that the crimes of rape and arson had been enlarged since the original enactment of the statute of 1860 would be immaterial, for the judicial construction placed upon the term "rape" in the murder statute (as construed by the *Exler* case) would continue to apply, even after a re-enactment of the murder statute in the course of amendment.²¹

In the light of all the foregoing, it must be taken that the terms rape, robbery, arson, and burglary, as used in the first degree murder statute, may not be defined as of the date of the commission of the crime, nor as of the date of the amending statute, but may possibly be defined in either of two ways: (1) according to the definitions prevailing at common law, or (2) according to those set forth in the Criminal Code of 1860. There are dicta which indicate a feeling on the part of our Supreme Court that the definitions at common law are to be used, but the actual holdings in no wise indicate such a conclusion, and it would seem that perhaps better reasoning supports the view that the definitions of the felonies as laid down in 1860 should prevail.

In the *Exler* case, the Court said that the term rape as used in the murder statute meant common law rape,²² but since rape at common law and rape by the 1860 Code are substantially the same crime,²³ and since the term "common law rape" is frequently used colloquially to differentiate the older non-consensual crime from the newer "statutory rape," this use of the term is not convincing. There is, indeed, a well recognized rule that where a word which had a definite meaning at common law is used in a statute, the word is taken to be used in its common law sense, unless a contrary intention on the part of the Legislature is indicated.²⁴ But this rule would not apply here, for inclusion of statutory definitions of these felonies in the same Code which used them to define first degree murder would seem to express very definitely the required contrary intention on the part of the Legislature.

¹⁹59 C. J. 1096.

²⁰*Id.*, 1097.

²¹*Thorn v. Brown*, 257 Fed. 519.

²²At page 159.

²³Compare the wording of the statute with the language of IV Bl. Com. 210-211, and see excellent discussion of the important elements in the *Exler* opinion and in *C. v. Miller*, 80 Pa. Super, 309.

²⁴When a legislative body selects and uses in a statute words or clauses which before the enactment of the law had acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute it enacts." *Thorn v. Brown*, 257 Fed. 519, at 523.

Furthermore, the reasoning used would equally support the argument that the definitions used in the Code of 1860 are to control. This is true of the *Exler* opinion wherein the court said that the definitions at common law were meant.²⁵ Surely, if the court is to base its decision on the fact that a penal statute will not be construed to extend by implication to that which was not in the mind of the Legislature at the time of passage, it cannot ignore the fact that the Legislature in the case of our present problem had most immediately under consideration at the time of enactment of the 1860 Code the statutory definitions contained in that same Code. It is to defy common sense to maintain that a legislative body will in one part of an act define certain terms, then, using the same terms in another part of the same act, intend that their meaning shall be otherwise. Yet this is the conclusion we cannot escape if we say that the definitions of arson, robbery, rape and burglary as used in Section 74 of the Code are not the arson, robbery, rape and burglary as defined in other sections of the same Code.

Examining the cases, we find that the court in *Commonwealth v. Bruno*, 316 Pa. 394, stated that "there can be no doubt whatever that 'arson' as used in the murder section of the Act of 1860 was intended to *include* (italics supplied) common law arson, in view of the fact that section 137 of that act embraced in its definition of arson the malicious burning of 'any dwelling house of another'." The court did not say that the term "arson," as used in the murder section, *meant* common law arson, but merely that it *included* it. And in noting that the arson as defined elsewhere in the act "embraced" common law arson, the court did nothing to clarify the point. At least the court appears to give weight to the definitions of the felonies contained in the other sections of the 1860 Code.

In the case of *Commonwealth v. Robb*, 284 Pa. 99, where the conviction was merely for murder in the second degree, the case, therefore, involving only determination of whether the killing was in the perpetration of a felony, the defendant had been engaged in attempting to break and enter a freight station when the killing occurred. This was not burglary at common law,²⁶ but became so by the Act of 1860, which made the breaking, etc., of any structure belonging to "any body corporate" burglary.²⁷ Thus, the act of the defendant was a felony sufficient to convict defendant of second degree murder, but the court expressed doubt as to the outcome if a conviction of murder in the first degree had resulted. This

²⁵"Did the legislature in creating a new offense and calling it felonious rape . . . intend to attach to it a meaning . . . making an unintentional homicide occurring in its commission murder of the first degree? If so, then the term rape as it occurs in the 91st section of the Act has now a larger and wider meaning than it had when the act was passed." Note that the court referred to the meaning of the 91st section, which defines rape, as being controlling.

²⁶One of the elements of burglary at common law was that the breaking and entry be a dwelling house. IV Bl. Com. 224; 3 Co. Inst. 63.

²⁷Act of March 31, 1860, P. L. 382, §135.

case shows that at least in second degree murder in the commission of a felony, a felony created by the statute of 1860, not existing at common law, is sufficient.²⁸

In cases not involving this precise question, but involving seemingly identical principles, reasoning is given which would support the view that the statutory definitions should be used. In *Commonwealth v. Wells*, 110 Pa. 463, the Commonwealth sought to exact a forfeit of the stakes in a bet on the outcome of a primary election. An old statute made betting on elections subject to such penalty. But primary elections had been established by a subsequent statute. The court held that such penalty could not be applied, on the ground that the statute making such bets illegal could not, at the time of its enactment, have referred to primary elections, and could not be extended to do so by implication. Here the question was presented without reference to any common law definitions, but with the issue clearly stated as to whether an offense defined and punishable by one statute may be enlarged, and the original penalty attached to such enlargement, by a subsequent statute. There was no thought of the word "elections" having any other meaning than that it had at the time of the passage of the penal statute, and the statutory meaning at that time was taken without question as the test.

And in a Maine case²⁹ where the grade of a homicide depended upon the classification of the crime in the perpetration of which the killing was done as a felony or a misdemeanor, the court said that this rule was "adopted without any view to perpetuate the ancient classification of offenses," indicating that the definition of the necessary collateral crime was to be that which was in force at the time of the adoption of the rule or statute based upon such classification, and not an inflexible common law classification.³⁰

A rule of statutory construction which supports the same view is expressed in these words: "If in a subsequent clause of the same act provisions are introduced which show the sense in which the Legislature employed the doubtful phrases previously used, that sense is to be adopted in construing those paragraphs."³¹ Some of the felonies, a definition of which we are attempting to determine, are so defined by "subsequent clauses of the same act," and some are defined by previous clauses, making the assumption even stronger that the definitions in the same act, the Code of 1860, are to be used. If this be the rule of law as it is of logic, the adoption of the statutory definitions will result from its application to the present problem.

It would seem, in consideration of the theory which seems to underlie all the foregoing, that the question is reduced to a choice of one of two definite

²⁸Accord: *S. v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *P. v. Enoch*, 13 Wend. (N. Y.) 159. See *supra*, note 16.

²⁹*S. v. Smith*, 32 Me. 369, 54 Am. Dec. 578.

³⁰Accord, holding that a legislative creation of new felonies or abolition of old enlarges or diminishes the scope of a substantial re-enactment by statute of the common law definition of murder: *P. v. Enoch*, 13 Wend. (N. Y.) 159.

³¹25 R. C. L. 1064.

ideas: adoption of (1) the common law definitions, or of (2) the definitions contained in the Code. An effort has been made to show that the latter is more sound, but in either case we know that the courts adhere to the rule that what was not embraced in the terms arson, rape, robbery and burglary at the time of their use in the murder statute will not be included in them except by express amendment. Yet despite this very definite theory, there appear to be cases in which a concept wholly at variance with it appears.

This concept finds expression in the case of *Commonwealth v. Levine*, 82 Pa. Super. 105. In this case the defendant, who had burned down the house occupied by himself and was charged with arson, advanced as his defense the fact that the statute relied on by the prosecution, removing the defense of occupancy to an arson charge,³² was unconstitutional, because it amended the Code of 1860 defining arson, and was not in conformity with constitutional provisions regarding amending acts.³³ The court held that the act was constitutional, and that it did not amend the older statute. Yet it did change the meaning of terms in the older statute—the words “of another”—just as completely as the Act of 1887 changed the meaning of the term “rape.” It enlarged the scope of the crime as originally defined. And, in further analogy to our murder problem, the statute in question required reference to and incorporation in the older statute in order to make it effective, because the later act neither defined the crime itself nor prescribed a punishment. The court indicated a realization of this by saying in effect that the new statute amended the other by implication, and by admitting that it enlarged the old established crime of arson by including within its scope a new class of persons—those who burn the house they occupy. This, as we have seen, is just what the court in the *Exler* case refused to do: enlarge the scope of a criminal statute by allowing a later statute to amend it by implication. On the one hand we have a court stating categorically that a statute will not operate to amend an earlier one unless the amendment be express; and on the other we find a court enforcing a statute which did operate to extend the terms of a prior statute, and which, if the amendment had been express, would have been wholly invalid.

The court in the *Levine* case cited as an illustration the statute which made dogs personal property and the subject of larceny, which was passed subsequently to the statute defining larceny, and was not an express amendment thereof. This statute was held to be constitutional and was enforced without any question being raised as to the effectiveness of its operation upon the pre-existing law of larceny.³⁴ This is not strictly in point, but the similarity of the principles of statutory con-

³²Act of June 10, 1881, P. L. 117; and see *ante*, note 13.

³³“No law shall be revived, amended or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended or extended or conferred shall be re-enacted and published at length.” Const. of Penna., Art. III, §6. The 1881 act made no specific reference of any sort to the section of the Code of 1860 defining arson.

³⁴*C. v. Depuy*, 148 Pa. 201.

struction involved must appear at once and the difference in theory become almost startling. If this be the case, is it not logical to assert that dogs, made the subject of larceny in this way, would also be the subject of robbery, by the same reasoning; and that dog-takers thus made subject to the punishment accompanying larceny, by implied reference to pre-existing statutes punishing larceny, would also in like manner be made subject to the punishment accompanying robbery? The same reasoning applies to other types of property not subject to larceny at common law but made so by statute, and there are authorities to this effect.⁸⁵

In summary form, the difference may be expressed thus: in both cases we have (1) a criminal statute, which is (2) followed by a subsequent enactment (3) enlarging the scope of one of the terms of the original statute. The question is, does the subsequent enlargement of the term enlarge its operation as used in the original statute? If it does, it is in effect an amendment. In the *Levine* case, such a subsequent statute was held not to be an express amendment. Since the operation was to enlarge a term of the original statute ("of another") it operated as an amendment, which forces us to the conclusion, by simple elimination, that it was an implied amendment. A result was reached which flatly contradicts the rule laid down in the other line of cases, viz., that a criminal statute may not be amended by implication.

Evaluation of the weight of the two conflicting approaches, however, is not a difficult matter. In the *Exler* case and those following its rule, the matter is dealt with unclouded with issues as to mere form, and a result in accord with the weight of authority generally is reached. In the *Levine* case, moreover, the Court recognized the problem in the form of its discussion here only by its dicta as to the larceny of a dog, and did not deal with the question of amendment by implication except in illustration. Fortunately for present purposes, the question as to the possibility of robbing a man of his dog or his written evidence of a chose in action under the present statutory situation is not now under discussion, and no attempt will be made to analyze the law on these points.

In passing, however, some consideration should be given to the argument of expediency advanced by the Superior Court in the *Levine* opinion. The Court called attention to the extremely clumsy processes which would be necessary under the doctrine of the *Exler* case to make a term occurring in several phases of the statutory criminal law larger in scope and at the same time prevent it from having a different meaning in each different connection in which it is used. This result could only be obviated by combing through the whole mass of the statutory law, and expressly amending each criminal statute in which the enlarged term appeared, so as to make the term uniform with the new meaning which it has acquired by the enlarging statute. Using the court's example of larceny of a dog, the new

⁸⁵54 C. J. 1012; Clark & Marshall, *Criminal Law*, 2nd ed., 549, 550; *Turner v. S.*, 1 Oh. St. 422.

definition of dogs as personal property would have necessitated a re-enactment of all the criminal statutes turning upon the definition of personal property, and expressly inserting therein a statement that dogs shall be included in the term "personal property." It is scarcely necessary to add that under the modern liberalized approach to the criminal law, this extreme strictness in construction is unreasonable, and the likelihood of the Legislature's taking the steps to amend such terms uniformly is very small indeed. Under the law as it stands, as stated in the *Exler* case and followed in the subsequent Pennsylvania decisions,⁸⁶ it appears inevitable that we shall have to work with words and phrases in criminal statutes which have one meaning here, another there, and a third in some other connection.

There remains glaringly untouched the word "kidnapping," added to the list of felonies by the amendment of the murder statute in 1923. That this crime presents special problems unique to itself will be seen at once in the fact that kidnapping at common law and by the Code of 1860 was a mere misdemeanor and became a felony in Pennsylvania only by subsequent statute.⁸⁷ The cases on kidnapping in general in the state are few and apparently of no great significance, and there are none involving the question of murder in kidnapping. Nothing, therefore, can be added here to the adequate and extensive survey of the problems in this connection by Dean W. H. Hitchler in Volume 29, *Dickinson Law Review*, beginning at page 63.⁸⁸

THOMAS I. MYERS

UNILATERAL CONTRACT OF FORBEARANCE IN PENNSYLVANIA

It is well settled that forbearance to exercise a right may be sufficient consideration for a promise.¹ The Restatement of the Law of Contracts² defines consideration for a promise as being (1) an act other than a promise, or (2) a *forbearance*, or (3) the creation, modification, or destruction of a legal relation, or (4) a return promise, *bargained for and given in exchange for the promise*.

⁸⁶C. v. Miller, 80 Pa. Super. 309; C. v. Fronheiser, 6 D. & C. 710; C. v. Robb, 284 Pa. 99; C. v. Foster, 111 Pa. Super. 451; C. v. Sevey, 26 D. & C. 600.

⁸⁷Act of Feb. 25, 1875, P. L. 4; Act of April 4, 1901, P. L. 65.

⁸⁸By way of supplementing Dean Hitchler's discussion of the problem of murder in kidnapping, it would appear that his assumption that the word "kidnapping" must be given its common law meaning might be misleading, in that it would appear that the word might be given a meaning acquired by statute prior to 1923. If this is the case, kidnapping as used in the Act of 1923 would be a felony, an unintentional killing in the commission of which would be murder. See *ante*, notes 16 and 30.

¹Williston on Contracts, Rev. Ed. Sec. 135, and cases there cited.

²Sec. 75.