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Recent Cases

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RECENT CASES

CRIMINAL LAW: HOMICIDE—DEGREES OF MURDER—WILFUL, DELIBERATE AND PREMEDITATED KILLINGS

At common law there were no degrees of murder, and the punishment for murder was, in all cases, death.

The division of murder into degrees originated in Pennsylvania. The second section of the act of April 22, 1794, divided murder into degrees by declaring that all murder perpetrated in certain designated ways should be murder of the first degree and all other kinds of murder should be murder of the second degree. Among the murders declared to be murders of the first degree were murders "which shall be perpetrated by any kind of wilful, deliberate and premeditated killing."

The plan inaugurated in Pennsylvania has been generally followed, and the Pennsylvania statute has been the model for the statutes of many states.

The courts of these states have differed as to whether the words "wilful, deliberate and premeditated" (1) are synonymous, or (2) taken together refer to one mental operation, or (3) refer to three distinct mental operations.

In the states which hold that the three words, as used in the statute, denote three distinct mental operations, the courts have experienced difficulty in defining and distinguishing these operations; have differed as to whether the three operations are synchronous or successive; and, if successive, as to the order of succession; and have differed as to the period of time required for each operation.

The Pennsylvania courts have occasionally attempted to assign to each of the three words a distinct meaning. The most florid and futile of these attempts was that of Chief Justice Agnew in *Com. v. Drum,* 58 Pa. 9 (1868).

But at an earlier date Chief Justice Lowrie had declared in *Keenan v. Com.,* 44 Pa. 55 (1862), that "the true criterion of murder of the first degree is the intent to take life. The deliberation and premeditation required by the statute are not upon the intent but upon the killing. *It is deliberation and premeditation enough to form the intent* and not upon the intent after it is formed."

Fortunately the theory of Chief Justice Lowrie recently has been adopted by the Supreme Court in an opinion of Justice Jones.

"The main distinction", said the Court, "of murder in the first and that of second degree lies in the specific intent to take life required for the former. *Such intent implies the qualities of wilfulness, deliberation and premeditation otherwise essential by the statute to murder in the first degree." Com. v. Jones,* —Pa.— (1947), 50 A. 2d 317.

If, therefore, an intent to kill is shown, the requisite deliberation and premeditation are ipso facto discovered, because they always exist when the intent exists.

WALTER H. HITCHLER

CONSTITUTIONAL LAW: BRIDGES—MOTOR LICENSE FUND—STATUTES

The danger of constitutional amendments which narrowly restrict the use of state funds was graphically illustrated in a recent Pennsylvania case, *Peoples Bridge Co. of Harrisburg v. Shroyer, et al.,* —Pa.— (1947), 50 A. 2d. 499.

This was a taxpayers' class bill brought by the owners of the Walnut Street Bridge over the Susquehanna River at Harrisburg against the Secretary of Highways, the Auditor General and the State Treasurer to enjoin them from using any of the moneys in the motor license fund of the Commonwealth for the purpose of acquiring any toll bridges until they ascertained that all toll bridges within the state could be acquired for a sum not to exceed $7,000,000.

The lower court after hearing argument on legal issues pursuant to stipulations sustained the bill and enjoined the defendants as requested on the ground

that: (1) Acts No. 406, P.L. 1139, 36 PS 3141.1 and No. 407, P.L. 1144, 72 PS 3564 approved May 29, 1945 authorized the defendants to acquire the bridges *only* if the total cost for *all* bridges did not exceed $7,000,000; and (2) the constitutional amendment of November 6, 1945 restricting the use of the moneys in the motor license fund superseded Acts No. 406 and 407.

In affirming the decree the Supreme Court found little difficulty in agreeing with the lower court on the first ground, for the language of the appropriation Act No. 407 is explicit: "Provided, however, that the total amount to be expended for the acquisition of all toll bridges in Pennsylvania shall not exceed the sum of seven million dollars ($7,000,000)."

In adopting the lower court's construction of the constitutional amendment of November 6, 1945 the Court made a decision of far-reaching importance for its effect is to prevent the legislature from using any of the moneys in the motor license fund for acquiring any or all of the ten existing toll bridges in Pennsylvania.

The amendment reads: "All proceeds from gasoline and other motor fuel excise taxes, motor vehicle registration fees and license taxes, operators' license fees and other excise taxes imposed on products used in motor transportation after providing therefrom for (a) cost of administration and collection, (b) payment of obligations incurred in the construction and reconstruction of public highways and bridges shall be appropriated by the General Assembly to agencies of the State or political subdivisions thereof; and used solely for construction, reconstruction, maintenance and repair of and safety on public highways and bridges and air navigation facilities and costs and expenses incident thereto, and for the payment of obligations incurred for such purposes, and shall not be diverted by transfer or otherwise to any other purpose. . . ."

As the Court pointed out, there is no provision for the use of the fund for the purchase of existing bridges. In discounting the Commonwealth's contention that the word "construction" should be construed so as to include "purchase" the Court said, "We must reject the suggestion that in providing for payment of bridge construction, the electors would understand that they were authorizing bridge purchase; the common understanding of the word 'construction' is strongly against it (compare *In re Howett-Landis's Appeal,* 10 Pa. 379; *Hoffman v. Kline,* 300 Pa. 485, 150 A. 889) and it is the common understanding of the word to which we must give effect."

Justice Jones in a concurring opinion took issue with such an interpretation of the amendment: "As I do not think pertinent legal authority requires such a narrow interpretation of the amendment, the action of this court in such connection seems the more regrettable because it effectually ties the hands of the

legislature with respect to the permissible disbursement of revenues whose use for highway and highway bridge purposes has never heretofor been inhibited and the amendment was not intended to restrict."

The Court laid great stress on the intention and will of the electorate: "We must regard the electors as having understood and intended that 'all proceeds' of the character described ,which, many years ago, as we have seen, were created into the Motor License Fund, 'shall be appropriated . . . and used solely for construction, reconstruction, maintenance and repair of and safety on public highways and bridges and air navigation facilities and costs and expenses incident thereto, . . . and shall not be diverted by transfer or otherwise to any other purpose, . . .' " In this conection an interesting fact not considered by the Court is that the amendment as printed on the ballots in brief form according to the Election Code of June 3, 1937, P.L. 1333, Section 605, 25 PS 2755 did not mention "construction" but read as follows: ". . . that revenues from taxes and license fees on gasoline, motor fuels, motor vehicles and operators and other products used in motor transportation, shall be used solely for highways, safety thereon, air navigation facilities, costs and expenses incident thereto; and permitting loans from such revenues to the Commonwealth only if repaid in the next fiscal year."

As interpreted by the Supreme Court this amendment has become a boomerang to those most interested in its passage, the motorists of Pennsylvania, for it now stands in the way of another of their most earnest objectives, the freeing of the state's toll bridges. So long as this interpretation of the amendment stands, the only feasible methods for the State to buy the bridges would be the repeal or modification of the amendment, or the authorization of a State bond issue. Either alternative will require the approval of the electors at a General Election, and will be a lengthy process.

ROBERT L. RUBENDALL

TORTS: ADJOINING LANDOWNERS—NUISANCE—SPITE FENCE—MOTIVE

In *Cohen v. Perrino,* 355 Pa. 455 (1947), 50 A. 2d 348, the Court held that an owner of land has a privilege to build thereon a structure which obstructs the light, air and view of an adjoining owner even though it serves no useful purpose and is erected for the sole purpose of annoying the adjoining owner and interfering with his use and enjoyment of his land.

The Court admitted that there was a conflict of authority upon question; refused to follow the rule announced in the Restatement; gave no independent

reason for its decision; but quoted with approval and seemed to rely principally upon the opinion in *Jenkins v. Fowler,* 24 Pa. 308, in which the court said:

> "Malicious motives make a bad act worse but they cannot make that wrong which, in its own essence, is lawful."

The meaning of this statement is not clear. If it means that that which is lawful is lawful it is, of course, an incontrovertible proposition. But if it means that the motive which prompts an act can have no effect upon its legal quality; that an act per se, or in its "essence", has such quality; and that whether it is legal or illegal, it remains legal or illegal through all the vicissitudes of motives and purpose from which it may spring, it is contrary to much of the law of the land and is stupid and pernicious beyond all toleration.

The question presented by the case under discussion was: Shall defendant who has a right to erect a structure upon his own land if his desire and object are something else than the hurt of plaintiff, have the right to erect it, when he desires that hurt and that hurt is his only object?

This question is not answered by talking about "bad motives making that wrong which, in its essence, is lawful", for if the statement of the Court is translated to mean that if defendant without malice toward plaintiff may do any given external act, he may with equal impunity do it with malice toward plaintiff, it becomes a stupendous absurdity.

WALTER H. HITCHLER

TORTS: NEGLIGENCE—VOLUNTARY ASSUMPTION OF RISK—STREET RAILROAD ACCIDENT

The fact that one failed to anticipate that a trolley car would not comply with a timely warning to stop does not, in and of itself, make that person guilty of a reckless disregard of his safety, or even of contributory negligence. *Van Note v. Philidelphia Transportation Company,* 353 Pa. 277. The recent case of *Elliott v. Philadelphia Transportation Company,* —Pa. Super.— (1947), 50 A. 2d 537, gave strong recognition to this principle and further added, "To bar a recovery a plaintiff must act in reckless disregard of his own safety to practically the same extent that the defendant acts in a reckless disregard of plaintiff's safety." The Restatement of Torts in sections 482 and 503 is in accord with this rule.

In the *Elliott* case the plaintiff was walking south on one of the Philadelphia streets. When he reached the intersection he heard a bell ringing and saw a fire engine, which was returning from a fire and proceeding to the firehouse. He went to the center of the intersecting streets and stood in the middle of the trolley tracks that traversed one of the streets. At this time of day it happened

that the only traffic was the defendant's trolley car—about 420 feet away and traveling towards the plaintiff at the intersection. According to the plaintiff's evidence, when the car was about at a distance of 400 feet he held up his hand to warn the motorman of the approaching fire engine, and the plaintiff claimed he could see the motorman looking at him. He continued to watch the trolley until it was at some indefinite point between one street, 230 feet away, and another street, 75 feet away. In his testimony Elliott stated: "When the trolley car got to Budd Street (230 feet away) I turned around and had my hands up and waved for the fire engine to come on, and the trolley car kept moving toward me." Very soon after turning around the trolley car struck and injured the plaintiff.

The defendant in his evidence attempted to prove that the plaintiff jumped in front of the trolley when it was but 5 to 20 feet from him. Through this proof the defendant sought to show that Elliott acted within the doctrine of voluntary assumption of risk by voluntarily and unreasonably exposing himself to a known danger and that, therefore, following a long line of decision, plaintiff was barred from recovery.

On these facts the trial judge instructed the jury that even if the plaintiff was guilty of ordinary negligence, the motorman was liable if guilty of "wanton misconduct". The jury returned a verdict for the plaintiff but the lower court, after further studying the evidence on defendant's motion for judgment *non obstante veredicto,* concluded that the plaintiff was guilty of more than ordinary negligence or, otherwise considered, his conduct was such as to place him within the doctrine of assumption of risk and hence on either ground his right to recover was barred. Thereupon defendant's motion was sustained.

In reversing the judgment and remitting the record to the lower court to pass upon the undisposed of motion for a new trial, the Superior Court said: "We think that neither the doctrine of voluntary assumption of risk, nor wanton misconduct, which are closely related and founded on the same fundamental principles, has any application so far as plaintiff's evidence of his conduct is concerned, and that is all that need be considered in passing upon defendant's motion for judgment n. o. v. . . . It could fairly have been assumed by Elliott that the motorman saw him standing on the track giving a signal for the trolley car to stop and that he would not be run down. Whether or not the plaintiff's conduct created an unreasonable risk involving a high degree of probability of harm to himself was a question for the jury's determination." Further on in the case the Court also states, "This plaintiff may have been meddlesome in volunteering to direct traffic, but that does not warrant a holding as a matter of law that he cannot recover for injuries he sustained." See *Sonil v. Pittsburgh Railways Co.,* 122 Pa. Super. 169; *Swilley v. Philadelphia Transportation Co.,* 153 Pa. Super. 467; *Van Note v. Philadelphia Transportation Co.,* supra.

It is quite evident from a study of the case that the jury felt that the plaintiff was not guilty of reckless disregard of his safety and that therefore, in view of the aforementioned Pennsylvania rule, the lower court should have been bound by the findings of the jury.

As was pointed out in the *Elliott* case, the term assumption of risk has been the subject of much confusion by authorities. It has often been used synonymously with contributory negligence and such a practice can have a bad effect—for example, when there is a statute involved which allows a reduction of damages when contributory negligence is present, while proof of assumption of risk would be a complete bar to a cause of action. The need for distinguishing the one from the other is evident from such a case and to aid in clarification of this confused point, Prosser on Torts, first at page 377, points out that assumption of risk means "the plaintiff has consented to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk"; and at page 378 defines contributory negligence by stating: "This means that the plaintiff's own conduct has been unreasonable in view of the forseeable risk. His behavior may not indicate in any way that he consents to relieve the defendant of any duty towards him, but he is barred from recovery by the policy of the law which refuses to allow him to shift to the defendant a loss for which his own *unreasonable* conduct is in fact responsible."

There are situations where the defense of contributory negligence will extend over and more or less merge with the defense of assumption of risk. The acceptance of the risk may be unreasonable in view of the conduct of the plaintiff—as in the case where a person dashes onto a highway filled with speeding cars to retrieve a piece of paper. In such a situation both defenses would be available and it is this so called merger which has helped to cause the confusion. Consequently, many courts have simplified the distinction to the point that if by a reasonable exercise of care the risks might have been discovered, contributory negligence will arise; if the risks were known or were so obvious to be taken as known, the doctrine of assumption of risk arises.

In regards to the subject of contributory negligence, *Kasanovich, Admx. v. George,* 348 Pa. 199, restated the interesting rule that where the defendant by reckless or wanton misconduct caused an injury the defense of contributory negligence will not be available to him. Support for this rule can be found in *North Pennsylvania Railroad Co. v. Rehman,* 49 Pa. 101, *Dell v. Phillips Glass Co.,* 169 Pa. 549, and *Tomey v. West Pennsylvania Railways Co.,* 300 Pa. 189.

In the *Kasanovich* case, the plaintiff's decedent, in plain view, was walking extremely close to the outside rail of a trolley track with his back to an oncoming trolley and as a result was struck by the car. It was definitely shown that the motorman, as in the *Elliott* case, had plenty of time to avoid the accident. And the Supreme Court, after reviewing these facts, stated that although the plaintiff's

decedent was guilty of contributory negligence, he still could recover because of the defendant's wanton misconduct.

To protect the injured pedestrian, if at all possible, seems to be the tendency of the courts and the case of *McFarland v. Consolidated Traction Co.,* 204 Pa. 423, is a graphic example of where the rights of a pedestrian and duties of a motorman are vigorously set forth and these standards were given zealous approval in the *Elliott* case.

The plaintiff in the *McFarland* case backed his horse-drawn wagon against the curb with the horse standing on the tracks, and proceeded to unload a piano from the wagon—this being the universal manner of unloading wagons. A man had been sent down the street to warn any car that might approach. A trolley car come along without giving any warning, and although he had been given notice to stop and had an unobstructed view of the horse and wagon for 3 or 4 squares, he continued his course and hit the horse and wagon and as a result injured the plaintiff.

The wanton misconduct of the motorman was very obvious and the Court said: "Street cars do not have the sole use of streets. Streets of the municipalities of the state are for the use of the traveling public and the right of the street railway company to use them is in common with the public", and, "each must exercise its right thereon with care and a due regard for the rights of the other."

This view is aided by *Allen S. Thatcher v. Central Traction Co.,* 166 Pa. 66, wherein it was firmly asserted: "It is not negligence per se for a citizen to be upon the tracks of a street railway. So long as the right of common user of the tracks exists in the public", great care has to be exercised by a motorman of a trolley car. Accord in *Ehrisman v. East Harrisburg City Passenger Railway Co.,* 150 Pa. 180.

In *Galliano v. East Pennsylvania Electric Co.,* 303 Pa. 498, the present Chief Justice Maxey established a strict rule when he said: "It is the duty of a driver of a street car or motor vehicle to have his car under control at all times, and having one's car under control means having it under such control that it can be stopped before doing injury to any person in any situation that is reasonably likely to arise under the circumstances."

The *Elliott* case, besides being in accord with the weight of authority, finds support in the statement by Prosser on page 389 which helps to establish the soundness of the decision,, when he says on the subject of voluntary assumption of risk: "If, however, he [plaintiff] surrenders his better judgment upon an assurance of safety or a promise of protection, he does not assume the risk, unless the danger is so obvious and so extreme that there can be no reasonable reliance upon the assurance." Nothing is more fitting to the facts of the *Elliott* case than this eloquently stated rule.

RICHARD C. CURRY

TORTS: JOINT TORT-FEASORS—RELEASE—COVENANT NOT TO SUE—BURDEN OF PROOF

A recent Pennsylvania case, *Masters et al. v. Philadelphia Transportation Co. et al.,* —Pa. Super.— (1947), 50 A. 2d. 532, brought into focus the legal effect on one joint tort-feasor of a release given by an injured party to another joint tort-feasor.

The plaintiff was injured in a collision between an automobile in which he was a passenger and a bus operated by the defendant. The plaintiff gave a release, without consideration, to the driver of the automobile. The defendant joined the automobile driver as an additional defendant.

In the lower court trial, the question of negligence of the parties was left to the jury, which found that the Phila. Transp. Co. was negligent, and that the automobile driver was not negligent. However, the lower court entered judgment n.o.v. for defendant, on the theory that the release of one of two joint tort-feasors releases the other joint tort-feasor.

In reversing the judgment, and in entering judgment in favor of plaintiff-appellant in the amount of the jury verdict, the Superior Court stated: "The effect of the granting of the original defendant's motion for judgment n.o.v. was to declare the additional defendant negligent as a matter of law. This was palpable error." The jury had found that the automobile driver was not a *joint tort-feasor.* Thus the well established rule of release of one of two joint tort-feasors was not applicable.

The problem of burden of proof was also in issue in this case. Judge Dithrick reiterated the rule of *Mason v. C. Lewis Lavine, Inc.,* 302 Pa. 472 (1931), 153 A. 754, and of *Koller vs. Pennsylvania Railroad Co.,* 351 Pa. 60 (1944), 40 A. 2d 89, that, "The release was without consideration, but having executed it, the plaintiffs assumed the burden of proving throughout the trial that the original defendant was alone liable for the injuries complained of."

This rule was first established in *Peterson vs. Wiggins,* 230 Pa. 631 (1911), 79 A. 767. In that case, plaintiff brought an action of trespass against a sub-contractor for the death of her husband. She settled and discontinued the suit for a money consideration. Later she brought another action of trespass against the principal contractor for the death of her husband on the same cause of action. The defendant offered in evidence the record of the first suit, and the Court held that this record established a prima facie case that the sub-contractor was negligent. The burden then shifted to plaintiff to show, if she could, that defendant's negligence *alone* occasioned the injury.

This doctrine was extended in *Smith v. Roydhouse, Arey & Co.*, 244 Pa. 474 (1914), 90 A. 919. In this case, the first suit had only been threatened, but the Court held that, upon the introduction into evidence in the second suit of a release, signed by the plaintiff and given to the first party, this first party was prima facie negligent, and that the burden was then cast upon the plaintiff to show that the defendant in the second suit was solely responsible for the injury.

It is believed by the writer that the courts are again confusing the propositions "burden of proof" and "burden of going forward with the evidence." The burden of proof is always upon the plaintiff to establish his cause of action. In cases of the type under discussion, the plaintiff, by way of sustaining this burden, introduces facts showing that the defendant is negligent. The burden of going forward with the evidence shifts to the defendant. The defendant now introduces into evidence the release executed by the plaintiff to the other alleged joint tort-feasor. A prima facie case that the alleged joint tort-feasor *is* a joint tort-feasor is now established. At this point, the courts say that the burden of proof is cast on the plaintiff. It is submitted that what they really mean is that the burden of going forward with the evidence now shifts back to the plaintiff. The plaintiff must prove that the defendant alone was negligent, or else the court will find for the defendant as a matter of law.

In the principal case, the plaintiff sustained the burden of going forward with the evidence. The jury found, as a matter of fact, that the Phila. Transp. Co. alone was negligent.

This issue as to burden of proof caused Judge Patterson to write a dissenting opinion in the *Koller* case, supra. The gist of his dissent was that if the plaintiff had undertaken to sustain the burden of going forward with the evidence, the plaintiff could not have disproved the prima facie case established by the release. Apparently the majority opinion was based upon the doctrine of incontrovertability of physical facts. The Court stated that, "Here the testimony is clear and, when combined with the physical facts, leaves no room for doubt that (the party released) was in no way responsible for the accident." It is not clear whether the plaintiff introduced positive evidence that the party released was not negligent. If this had not been done, Judge Patterson's opinion seems to be correct in the light of statements in previous cases.

The problem frequently arises in cases involving joint tort-feasors whether the instrument executed by the plaintiff is to be construed as a release or as a covenant not to sue.

A release is defined in 53 Corpus Juris 1196, Release, paragraph 1, as "the relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues to the person against whom it might have been demanded or enforced." A covenant not to sue is defined in

53 Corpus Juris 1196, Release, paragraph 3, as "a covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action."

The rule is well established in Pennsylvania that a *release of one joint tort-feasor operates as a release of the other joint tort-feasor.* In *Thompson v. Fox,* 326 Pa. 209, (1937), 192 A. 107, Justice Stern said, "the principle which underlies the rule is that an injured person is given a legal remedy only to obtain compensation for the damage done to him, and when that compensation has been received from any of the wrongdoers, his right to further remedy is at an end."

On the other hand, "a covenant or agreement to sue one or less than all of the joint tort-feasors does not release and will not bar an action against the others." *Gregg v. Hilsen,* 12 Phila. 348, *Pinnick v. Morewood Gardens Inc.,* 80 P. L. J. 347. It is said that a covenant not to sue does not extinguish the cause of action, whereas a release has this effect.

Decisions throughout the United States on the effect of a covenant not to sue seem to be fairly uniform, but there is a split of authority on the effect of a release given to a joint tort-feasor. A recent federal court case abolished the distinction. In *McKenna vs. Austin,* 77 App. D. C. 228 (1944), 134 F (2d) 659, 148 ALR 1253, the Court said, "The distinction between a 'release' and a 'covenant not to sue' is entirely artificial." The Court held that a release of one joint tort-feasor will not release the others unless, and only to the extent that, complete indemnity has been made. The Court also stated that, "It is immaterial for the purpose of determining the effect of a compromise with a joint tort-feasor as releasing other tort-feasors, whether the instrument of compromise be labelled a 'release' or a 'covenant not to sue', where, by reserving rights against the joint tort-feasor, the instrument shows on its face that it was not intended to discharge the latter."

Union of Russian Societies of St. Michael and St. George, Inc. v. Koss, 348 Pa. 574 (1944), 36 A. 2d 433, held that the rule as to releases was applicable ". . . even though it was intended, or the release expressly stipulated, that the other wrongdoers should not hereby be released." In opposition to this view, the court in the *McKenna* case, supra, said, "Other courts, adhering to the distinction, refuse to permit such a clause to overcome express words of release and allow escape only when the formula is limited to covenanting not to sue. To the extent that they decline to give effect to the clause, they disregard the parties' intentions."

In the *Masters* case, supra, the release was given without consideration. Suppose the jury had found that the automobile driver was also negligent. Under this supposition, would there be an equitable result? By Pennsylvania law, the plaintiff would have received exactly nothing for a very legitimate claim.

It is submitted that as long as the Pennsylvania courts adhere to the distinction between a release and a covenant not to sue, it will be well for the lawyer representing the injured party to make a careful choice of words if he wishes to preserve his cause of action against other wrongdoers.

HARRY C. ELSESSER

CONTRACTS: SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—ORAL CONTRACTS TO CONVEY REAL ESTATE—ADMISSIONS BY DEFENDANT

If the rule laid down by the Pennsylvania Supreme Court in the recent case of *Zlotziver v. Zlotziver,* 355 Pa. 299 (1946), 49 A. 2d 779, is followed literally in the future, Pennsylvania will be one of the few jurisdictions following the old English rule that the admission by the defendant in his testimony or his pleadings of the terms of an oral agreement to convey real estate, while at the same time insisting on the statute of frauds as a defense, satisfies the purpose of the statute and deprives him of his defense. This rule has been repudiated in the courts of England and the United States and greatly reduces the effectiveness of the statute as a defense in an action for specific performance of such an agreement.

In this case the Court granted specific performance of an oral separation agreement in which the defendant had agreed to transfer to the plaintiff, his wife, three properties in the city of McKeesport. The first defense relied on by the defendant was the statute of frauds, but the Court said that since he had admitted, in his testimony, the making of the agreement, the statute of frauds was not applicable. In arriving at this conclusion the Court said: "The statute of frauds does not absolutely invalidate an oral contract relating to land but is intended merely to guard against perjury on the part of one claiming under the alleged agreement. Accordingly, if the title holder admits, either in his pleadings or his testimony, that he did in fact enter into the contract, the purpose of the statute of frauds is served and the oral agreement will be enforced by the court: *Sferra v. Urling,* 328 Pa. 161, 167, 168, 195 A. 422, 425, 426; *Williams v. Moodhard,* 341 Pa. 273, 280, 281, 19 A. 2d 101, 104, 105; *Shaffer v. Shaffer,* 344 Pa. 158, 161, 23 A. 2d 883, 885. Here defendant, in his testimony, admitted the making of the agreement as claimed by plaintiff."

In *Sferra v. Urling,* supra, the Court made two statements, only one of which seems to have been followed by the Court in the rule stated in the principal case. The first statement was, "It has long been established that a contract within the statute of frauds will be accorded full legal effect if those who are entitled to the protection of the statute choose to affirm the existence of the contract and recognize it as binding on them." The second, "In *Hanover v. Lamont,* 55 Pa.

311, this court stated at p. 311: 'It is settled equity law that courts of equity will enforce specific performance of a contract within the statute of frauds, where it (the contract) is confessed in the answer of the defendant: 2 Story's Equity, section 755'." Apparently the Court chose to follow the second rule literally and to enforce the admitted contract whether the defendant recognized the contract as binding on him or not. The rule expressed in the statement is followed by the English courts and is "Fully recognized in America": 3 Story's Eq. Jur., sections 1043, 1044.

In 3 Story's Eq. Jur., section 1041, a general rule is stated to be, ". . . Courts of Equity will enforce a specific performance of a contract within the statute, not in writing, where it is fully set forth in the bill and is confessed by the answer of the defendant." In section 1042 the old application of this general rule is shown, "Lord Macclesfield expressly decreed a specific performance where the parol agreement was confessed by the answer and the statute of frauds was insisted on as a defense." In the two succeeding sections, 1043 and 1044, he goes on to say that this old application has been fully repudiated because it is not conformable to the true intent and objects of the statute and that, "it is immaterial what admissions are made by a defendant who insists upon the benefit of the statute; for he throws it upon the plaintiff to show a complete written agreement. . ."

Pennsylvania decisions prior to the *Zlotziver* case seem to follow the rule expressed in the first statement in *Sferra v. Urling,* supra, as will be shown in the following summary of cases.

One of the earliest cases on the subject is *Taylor v. Adams,* 2 S. & R. 534 (1816). In this case the person transferring the estate was not a party to the action of ejectment but was a witness for the plaintiff and confessed to the agreement and to the receipt of the purchase money. Under the facts, even if the contract was found to be within the statute and unenforceable, the plaintiff would have been able to maintain his action as a tenant at will. The court decided that he had title. "On a bill in equity filed against the vendors, if they confessed the agreement, they would be decreed to execute a conveyance."

In 1850 the case of *Christy v. Brien,* 14 Pa. (Harris) 248, was decided on the "single question" of "whether it (the contract of sale) is taken out of the statute of frauds by the aquiescence of the vendors, who are the plaintiff's witnesses." Again the party entitled to the protection of the statute was not a party to the action, ejectment. The Court pointed out, "In England, the plaintiffs would file their bill against them (the vendors), if they were unwilling to convey without the direction of a court of equity; and on their confessing the contract, without interposing the statute, specific performance would be decreed; . . ." The Court then decided that it could settle the equity and the law of the case in one operation and held that the plaintiff had good title and granted him the decision in

ejectment. Note that here the Court specifically stated that the oral contract would be enforced if the vendor admitted the contract *without interposing the statute,* implying that the result would have been otherwise if the vendor, while admitting the contract, interposed the statute.

The next important case is the frequently cited *Houser v. Lamont,* 55 Pa. 311 (1867), in which 2 Story's Equity, section 755, is again relied on and *Christy v. Brien* is cited. Here the party entitled to set up the statute was a defense witness who testified that the deed to him was given as security only and that it was transferred as such by him to the plaintiff, who had full knowledge that it was a security transaction at the time he agreed to pay the money owed by the defendant and accept the deed from the witness, as security for repayment by defendant. The party entitled to the protection of the statute chose to waive it. The plaintiff was denied relief, the Court holding that he was a mortgagee.

In 1899 the Court decided in *Burkhart v. Insurance Co.,* 11 Pa. Super. 280, that the insurance company could not claim that a deed, absolute in form, given as security, was an assignment of the insured's interest such as voided the policy when the grantee in the deed admitted the oral agreement to reconvey on payment of the debt and had reconveyed prior to the loss. The Court cited *Christy v. Brien* and *Houser v. Lamont,* supra.

In 1907 in *Prospect Dye Works v. Federal Ins. Co.,* 33 Pa. Super. 223, the Court found that the purchaser under an oral contract to sell did not have an insurable interest in the property though the contract was performed and the property conveyed, after the loss. The Court affirmed the rule that the parties ". . . may take the contract out of the statute by waiving its restrictions and confessing their obligation," citing *Christy v. Brien et al.,* 14 Pa. 248, *Houser v. Lamont,* 55 Pa. 311, *Lloyds Appeal,* 82 Pa. 285, *Burkhart v. Ins. Co.,* 11 Pa. Super. 280. The Court also cited *Taylor v. Adams,* supra. After quoting the rule above the Court went on to say, "But, suppose they do not confess the agreement, or, confessing it, set up the statute of frauds, and, like in the case at bar, there is no written contract, no payment of purchase money by the vendee and no possession under the parol agreement; then it is equally true that no court of equity would have power to decree a conveyance of title whatever." This last rule is certainly contra to that stated in the *Zlotziver* case. By application of this rule the Court found that the plaintiff here had no insurable interest because he was not certain, so long as no more than the oral agreement existed, of ever getting title to the premises. The other party could, by successfully pleading the statute, defeat any action for specific performance. The Court clearly said that though he confessed the agreement, if he interposed the statute, there is no power in equity to decree a conveyance. This *Prospects Dye Works* case was cited in *Williams v. Moorhard,* supra, discussed below, which is one of the cases cited by the Court as a basis for its *Zlotziver* decision.

In deciding that a parol modification of a lease for a period longer than three years was valid, the Court in *Sferra v. Urling,* supra, after noting that the statute was not invoked in the court below, set forth the two statements expressing two general rules discussed above and gave as the reason for the second rule (expressed in 2 Story's Equity) the fact that the admission, by the party entitled to rely on the statute for defense, of the terms of the agreement fulfils the purpose of the statute. It relied on *Lloyds Appeal, Christy v. Brien,* and *Houser v. Lamont,* supra. The Court then went on to discuss the proper method of invoking the statute, and said, "We will follow the majority rule as the best to promote justice with regard to invoking the statute of frauds. The majority view is that a party will be deemed to have renounced his rights under the statute of frauds if he does not in some way make known to the court his intention to invoke it either by pleading specially or interposing a timely objection to testimony in support of the oral agreement, or by claiming its protection in some other manner that gives the opposition opportunity to meet the objection." The implication is that the Court would not grant specific performance where the defendant admits the agreement but invokes the statute. This is also evident in a later statement, "Where a vendor admits an oral agreement to sell land without invoking the statute of frauds, it constitutes a waiver of the statute." This is the first case cited in the *Zlotziver* case.

The second case cited is *Williams v. Moodhard,* supra, decided in 1941. Here again it was the party whom the statute was designed to protect who wanted to rely on the oral agreement. The Court, very reasonably, said, "The title holder may waive the benefit of the statute, and may state in his pleadings, or his testimony in the proceedings, that he did in fact enter into an oral agreement when the title was conveyed to him, and, if he does so state, the oral agreement will be enforced by the court. *Prospect Dye Works v. Federal Ins. Co. . . . Sferra v. Urling . . .*" There is no indication here that the Court intended the rule to be that one who does not waive but clearly shows intention to rely on the statute is deprived of its protection by an admission that the agreement was made.

The third case cited is *Shaffer v. Shaffer,* supra, decided in 1942. The action was to impose a constructive trust on real property under the rule that one who receives land upon an oral trust while standing in a confidential relation to the transferor will be held as a constructive trustee for the transferor if he refuses to perform the trust. (Restatement of Trusts, section 44). The action was brought by a mother against her son for failure to carry out the terms of an oral trust agreement. He admitted the terms of the oral trust and introduced a subsequently executed writing, signed by himself, setting forth the terms of the agreement. The court denied the mother the relief requested on the ground that the express trust was enforceable. Here, again, the party required to execute the writing was the one whom the statute of frauds was designed to protect, and he was pleading the agreement as a defense and not relying on the statute as a defense.

And so we see that the chain of cases relied on by the Court in the principal case does not support the finding in this case. In most of the cases cited there were circumstances that amounted to a waiver of the statute by the party entitled to its protection. The Court in several cases says or implies that the rule is *against* granting of specific performance of an oral contract for the conveyance of land where the defendant admits the contract if he clearly shows that he intends to rely on the protection of the statute.

The reasoning of the Court in saying that the admission by the defendant satisfies the purpose of the statute does not go far enough. The purpose of the statute is to prevent perjury. But, the intent of the statute is to bar transfers of interests in land by oral agreements and this has been extended in equity to preclude specific performance of oral contracts to convey such interests.

That the rule has been thought to be otherwise than as stated in this case is further substantiated by the method provided for pleading the statute of frauds in the new Rules of Civil Procedure. Rule 1030, entitled "Affirmative Defenses," provides, "The defenses of . . . statute of frauds . . . shall be pleaded in a responsive pleading under the heading 'new matter.' " The implication seems clear that the statute is an absolute defense and not one that is waived by the admission of the existence of the very thing which the statute is designed to deprive of legal force, an oral agreement.

The statute is designed to bar actions to enforce such agreements but not to deprive the parties of the right to carry them out if they see fit. So it is only right that the rule should be that the one entitled to the protection of the statute can waive it and carry out the terms of the unenforceable contract. It seems equally clear that the rule in the *Zlotziver* case deprives the party for whose protection the statute was passed of the protection of the statute if he happens to be honest enough to admit the existence of the oral agreement.

It is unfortunate that the procedure followed in the lower court in this case is not more clearly set forth in the opinion and that the Court does not more fully state its reasons behind its holding. It may be that there were very good reasons for holding that the plaintiff should get specific performance in this case. It may also be true that the Court did not intend to state such a general rule. But the rule is clearly stated and may now be difficult to change before much hardship results.

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