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Recent Cases

RECENT CASES

CRIMINAL LAW—MURDER IN THE FIRST DEGREE IN THE PERPETRATION OF FELONIES—DEFINITION OF THE FELONIES:[1] In every trial for murder based upon the felony-murder in the first degree doctrine,[2] the trial judge is faced with the duty of defining the felonies enumerated in the statute. For the sake of convenience, the possible definitions of the felonies can be classified into two groups: common law and statutory. Which definition should the trial judge use?

In an excellent note in 43 DICKINSON LAW REVIEW 194, Thomas L. Myers reviews the trend of the cases up to 1939. The purpose of this note is merely to bring that discussion up to date.

The logical rule would appear to be that where a Penal Code uses a term which is defined in the same Code, that definition is the one to prevail. That is the holding of *Commonwealth* v. *Maloney*.[3] In that case a homicide occurred in the perpetration of a robbery and burglary. The jury returned a verdict of guilty of murder in the first degree. The defendant excepted to the court's charge to the jury because in defining the term *burglary* to the jury, the trial judge defined it as it was defined under the Penal Code of June 24, 1939, P. L. section 901, 18 P. S. § 4901: "Whoever, at any time, wilfully and maliciously, enters any building, with intent to commit any felony therein, is guilty of burglary." This definition which the Supreme Court affirmed is much broader than its common law definition. The defense relied upon *Commonwealth* v. *Exler*.[4] In that case the defendant had sexual intercourse with a girl 12½ years old. Due to the resulting injuries and shock, the girl died. No evidence of lack of consent was presented. Lack of consent being the important element of common law rape, the defendant was not guilty of such a crime. In understanding the court's disposition of this case, it is important to note the time and sequence of the passage of the statutes involved in this case. The Penal Code of 1860[5] contained the definition of common law rape. The so-called "statutory rape" statute was not passed until 1887[6] when the felony of rape was extended to include consensual intercourse with a girl under 16. In the *Exler* case, the court concluded that a killing in the perpetration of "statutory rape" was not murder in the first degree because so to hold would be to extend by implication and without express amendment, the penalty of the section of the Code of 1860 defining murder in the first

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1 For an excellent and thorough treatment of this subject see the note at 43 DICK. L. REV. 194 by Thomas L. Myers.
2 Act of June 24, 1939, P. L. 872, 18 P. S. 4704.
3 365 Pa. 1, 73 A.2d 707 (1950).
4 243 Pa. 155, 89 A. 968 (1914).
5 Section 91 of Penal Code of March 31, 1860, P. L. 382, 18 P. S. § 2261.
6 Act of May 19, 1887, P. L. 128, 18 P. S. § 2261.

degree to an offense created and defined by a subsequent statute. It is often pointed out that in the course of its opinion in the *Exler* case the court makes the statement that the term rape as used in the Penal Code of 1860 means common law rape. As capably explained by Mr. Myers in his article, since the statutory definition of rape under the 1860 Penal Code and its common law definition are substantially the same, and since the term "common law rape" is frequently used to differentiate it from the newer "statutory rape," the court's labeling the crime according to its common law definition is not convincing.

Which course have the cases followed since the adoption of the Penal Code of 1939? There is dicta in *Commonwealth* v. *Neill*[7] to the effect that " the term 'rape' as used in the murder statute is limited to rape at common law and does not include statutory rape." Standing alone, this statement would appear to indicate that the common law definition of the felonies is to prevail. But as this is only dicta and the case can be explained as a misinterpretation of *Commonwealth* v. *Exler* and in view of the most recent cases pronouncement on the subject, it is of doubtful authority for the topic under discussion.

In *Commonwealth* v. *Darcy*[8] the defendant was convicted of murder in the first degree for having killed the victim in the perpetration of robbery. The trial court did not explain to the jury "that the term 'robbery' as used in the first degree murder statute means common law robbery."[9] But the court goes on to point out that the Penal Code nowhere defines robbery so that by necessity its definition is according to the common law. The court also points out that the defendant was clearly guilty of common law robbery and as no issue was raised during the trial, the trial court's omission to define the crime was not error.

In *Commonwealth* v. *Darcy*,[8] the defendant was convicted of murder in the first degree for a homicide resulting in the attempt to perpetrate robbery. The defendant relied upon the following argument: that only by the common law is murder defined in Pennsylvania, that the Criminal Code of 1860 makes nothing murder that was not murder before; that when Pennsylvania was first settled, an accidental killing was not murder unless it occurred as the proximate result of and during or in connection with the commission of a felony; that a bare attempt to rob was not then a felony although such attempt had been made a felony by Statute 7 George II, c. 21 (1735); and, therefore, that the necessary ingredients of murder were not proved. The court answered this with the well-settled rule that an unintentional homicide in the commission or attempted commission of a felony such as rape, burglary, or robbery was murder at common law. The court also points out, without assenting to the claim of the defense that an attempt to rob was not a felony at common law, that it was made a felony by section 102 of the

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7 362 Pa. 507 (1949).
8 362 Pa. 259 (1949).
9 At page 277.
10 341 Pa. 305, 19 A.2d 98 (1941).

Criminal Code of 1860.[11] This, it is submitted, strengthens the conclusion that the court intends the statutory definition of the felony to prevail. For does not the court imply that it suffices that the attempt to commit robbery is made a felony by statute?

Should the point ever be squarely presented whether murder in the prepetration of "statutory rape" is murder in the first degree, just what course the court will take is not yet clear. The dicta in *Commonwealth* v. *Neill* based upon *Commonwealth* v. *Exler* should no longer prevail for the basis of its conclusion, namely, the objection to extending the punishment of a crime in the Penal Code of 1860 to a new crime created in 1887, is no longer valid.

It is submitted that the only rule supported by the cases on point and the rule dictated by reason is that a word or phrase, the meaning of which is clear in one section of an act, will be construed to mean the same thing in another section of the same act.[12]

Emanuel A. Cassimatis

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[11] 18 P. S. § 2891.
[12] Bonomo Unemployment Compensation Case, 161 Pa. Super., 622, 56 A.2d 288 (1948).

SPECIFIC ENFORCEMENT OF CONTRACTS TO LOAN MONEY—RULE OF ROGERS V. CHALLIS MODIFIED: In the recent decision of *City of Camden* v. *South Jersey Port Commission*,[1] the Supreme Court of New Jersey approved an action of the New Jersey Superior Court, Chancery Division, ordering specific performance of a contract to lend money.[2] The decision, in which the Court followed the precendent-breaking *Columbus Club* v. *Simons*[3] and a prior New Jersey case[4] along the same lines, marks the most radical departure to date from the once unbending *Rule of Rogers* v. *Challis*[5] that mere executory contracts to borrow or lend money, with or without security, are not specifically enforceable in equity for the reason that there is an adequate remedy at law. In a lucid and carefully reasoned opinion written by Chief Justice Vanderbilt, the New Jersey Court recognized the over-all propriety of the general rule, first laid down by Sir John Romilly, in 1859, but modified it by asserting that, "where the circumstances are such that specific performance is the only method by which relief can be granted, it is well within the power of the court so to order."[6] The writer feels the corollary to be a proper one and, further, in view of the peculiar facts presented in the *City of Camden* case, to have been by the Court happily applied, although he also feels that the Court might have been more accurate in assigning reasons for its action.

The *City of Camden* case grew out of a contractual dispute between the City of Camden, a muncipial corporation, and the South Jersey Port Commission, a public corporation created to govern the South Jersey Port District, with power to "determine upon the location, type, size and construction of requisite port facilities," as well as to "lease, * * * construct, make, equip, and maintain port facilities in the district."[7] In pursuance of this power and authority, the Port Commission decided to construct a pier and warehouse on the Camden waterfront, the benefits of which would accrue solely to the City of Camden. By special statute,[8] the Commission was authorized to enter into a contract with the City of Camden under the terms of which that muncipality would lend to the Port Commission the sums necessary for financing the project, the money to be first raised by a special tax approved by the voters in a general referendum. The loan to the Port Commission was to be payable in annual installments of a stipulated amount, but, in reliance on future payments of these installments, the Commission was authorized to issue a series of 4% bonds to obtain immediate working capital,

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1 ——N. J. Eq. ——, 73 A.2d 55 (1950).
2 2 N. J. Super. 278, 63 A.2d 552 (1948).
3 110 Okla. 48, 236 P. 12, 41 A. L. R. 350 (Sup. Ct. 1925).
4 Jacobsen v. First National Bank of Bloomingdale, 129 N. J. Eq. 440, 20 A.2d 19 (Ch. 1941), *aff.* 130 N. J. Eq. 604, 23 A.2d 409 (E & A. 1942).
5 27 Beav. 175, 54 Eng. Rep. 68, 18 Eng. Rul. Cas. 278 (1859); see WILLISTON, CONTRACTS, 1421; 5 POMEROY'S EQ 2175.
6 73 A.2d 55, 63.
7 P. L. 1926, Chapter 336, R. S. 12:11-1 et seq., N. J. S. A.
8 P. L. 1928, Chapter 64, R. S. 12:11-26 to 39, N. J. S. A.

these bonds, however, to be the sole obligations of the Port Commission rather than of the contracting municipality.

The tax for supporting the project having been approved at a general election, the City of Camden and the Port Commission entered into an agreement by which the City agreed to make the advances authorized, the advances to extend over a 25 year period, and the Commission in turn agreed to repay the advances and the interest thereon out of the profits to be derived by it from the proposed port facilities. In reliance on this agreement, the Commission floated the bond issue and with the funds obtained from the sale thereof commenced construction of the pier and warehouse. The City, on its part, levied the approved tax and made the stipulated advances until September 1, 1946, when it refused the Commission further funds, apparently because the City felt it was not receiving benefits commensurate with its contributions. After first commencing and discontinuing an action at law against the City for breach of the loan contract, the Port Commission then filed the action in question for specific enforcement by way of an equitable counterclaim to an action by the City seeking from the Commission an accounting in equity on another unsuccessful transaction to which Port and City had been parties.

In meeting the Commission's counterclaim, the City filed a number of defenses, all of which eventually proved unsuccessful, but the only one pertinent to the present discussion was that in which the City contended that, since its contract with the Commission was a mere executory loan agreement, under the *Rule of Rogers* v. *Challis* the Commission was relegated for its remedy to an action for damages at law. This contention the New Jersey Court met foursquare. And, in granting the Commission's counterclaim, they repudiated the *Rule of Rogers* v. *Challis,* at least in so far as it was to be regarded as universally binding, calmly and without equivocation, by saying that executory loan contracts, like any other type of contract, were specifically enforcible in equity if there was no adequate remedy at law. In making its decision, the Court relied on two cases, but neither of them, as will appear presently, was in any way nearly so decisive as was the ruling of the *City of Camden* Court itself.

In *Columbus Club* v. *Simons,* 110 Okla. 48, 236 Pac. 12, 41 A. L. R. 350 (1925), for the first time in nearly three quarters of a century, a court of appellate jurisdiction gave careful consideration to the *Rogers* v. *Challis* holding. And after a case-by-case analysis of the leading authorities, the Oklahoma Court decided that, in certain extraordinary instances, the *Rule* did not apply. But, and this is not to detract from the judiciousness of the Oklahoma decision, the *Columbus* case involved an action to compel a mortgagee, who had already taken his mortgage as security, to follow through on his promise to make the petitioner a loan. And, after first deciding that certain executory loan contracts were enforceable in equity as such, the Oklahoma Court took great pains to buttress its decision by emphasizing that the same decision could be and was reached

on the particular facts before them, because the case was analagous to one by a vendor of realty for specific performance by a vendee of his contract to purchase the vendor's land.

Jacobsen et. al. v. *First National Bank of Bloomingdale et. al.*, 129 N. J. Eq. 440, 20 A. 2d. 19 (Ch. 1941), *aff.* 130 N. J. Eq. 604, 23 A. 2d. 409 (E. & A. 1942), the other case cited as authority by Chief Justice Vanderbilt in his opinion, while in accord with the *City of Camden* decision and, too, in tones less equivocal than those of *Columbus Club v. Simons,* still found the court hedging its conclusion by citing other grounds therefor. The complainants in that case had negotiated and obtained a loan from the defendant bank through a concern known as the Mortgage Bureau, giving their mortgage as security for their note. The Mortgage Bureau had received the money from the bank in the form of checks made out to the complainants but had forged the complainants' signatures thereto and appropriated the funds themselves. The complainants brought a bill in equity asking that the bank be restrained in proceeding against them on the mortgage or note, or that the mortgage and note be cancelled or reduced in amount, or that the bank be ordered to specifically perform its loan agreement with the complainants by issuing new checks to replace those forged and cashed by the absconded agent. The Court felt that unless specific performance were granted the complainants, they would be in the impossible position of having on their hands an unfinished house (the original loan had been obtained for the purpose of completing the house), against which was the lien of the bank's first mortgage, and which house would not be adequate security for any further loan by another party. Therefore, because the remedy at law was obviously inadequate, the Court ordered the bank to specifically perform its contract, even though, under the *Rule of Rogers* v. *Challis,* the remedy would not have been available. But the court also emphasized that since the object of the complainants' bill was to restrain the defendant from further proceeding on outstanding writings, which writings were apparently correct on their face though actually representing a considerably smaller claim, the bill was actually one in the nature of a bill *quia timet,* over which equity had inherent jurisdiction, which gave the court additional basis for its decree.

From a consideration of the cases just discussed, therefore, it is apparent that the *City of Camden* decision represents the first absolute break yet taken[9] from the *Rogers* v. *Challis* Rule. But, as has been emphasized previously, the writer has no reason to criticize and he does not criticize the court's decision. Un-

[9] In Stewart v. Bounds et. al., 167 Wash. 554, 9 P.2d 1112 (1932), the Washington court implied that in a proper case they would grant specific performance of an executory loan contract, but the court did not grant specific performance in the case before it; and in Lonergan v. Highland Trust Co. et al., 287 Mass. 550, 192 N. E. 34 (1934), the Massachusetts court enforced as of course specific performance of an executory contract for the payment of money where the legal remedy was inadequate, but without considering the Rule of Rogers v. Challis in any way.

fortunately, however, it would seem that the court might have assigned clearer reasons for making the exception in the particular case involved. Said the court, in deciding that the particular loan contract between the City of Camden and the South Jersey Port Commission was specifically enforceable:[10] "If the City were now to be relieved of its obligations, the entire project would come to a halt and the rights of the citizens and third parties who had relied upon it would be irreparably injured, including the rights of the bond holders whose interests total over $2,400,000."

This statement, of course, was true as far as it went. The question is whether it was sufficient to support the Court's decision, and the writer feels that it was not. After all, whether or not a legal remedy is adequate should be decided primarily from the point of view of the litigants in the action and not from the standpoint of its effect on the rights of "citizens and third parties" not in any way privy to the contract in question. What the Court should have emphasized in its opinion, and what was probably the actual basis of their decision, was that, *from the point of view of the particular complainant,* i. e. from the point of view of the South Jersey Port Commission, an action at law for breach by the City of its loan contract would have been an entirely frustrating remedy, in effect no remedy at all. The sole purpose for which the Port Commission was created, the one object of its existence, was to "construct, make, equip, and maintain" port facilities. But, unless the Port Commission could obtain funds from the City of Camden, and that was the sole source available to it under the statute giving the Commission its mandate, it could carry out none of its functions. The damages available in an action at law would have fallen far short of the amount necessary to build the pier and warehouse; yet, unless equity granted its plea for specific enforcement, the Commission had no other resource at law!

In the final analysis, of course, that the *City of Camden* Court's opinion contained reasoning which was slightly askew is of only incidental importance. The point to be most emphasized is that, in *City of Camden* v. *South Jersey Port Commission,* for the first, or perhaps the second,[11] time in nearly a century, a court of final resort looked behind the *Rule of Rogers* v. *Challis* and said, without qualification or citation of secondary theory, that whether or not a contract to loan money was specifically enforcible depended solely upon whether or not damages at law were an adequate remedy for its breach; that usually damages *were* an adequate remedy, but that in certain peculiar situations they were not adequate; and that, in such cases, the other requisites for specific enforcement being present, a court of equity would decree specific performance just as forthrightly and just as certainly as they would have done were the contract before them one for the sale of land or a unique chattel.

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10 73 A.2d 55, 63.
11 See note 9, *supra,* Lonergan v. Highland Trust Co. et al.

It is notoriously true that equity, characterized as it is by precise decrees as contrasted with general verdicts, is prone to dig itself too narrow canyons, is apt to seize upon an altogether correct decision such as that in *Rogers* v. *Challis* and carry it to heights, and depths, undreamed of by the court of origin. No wonder, then, that Chancellor Eldon thought, "It is dangerous to define!" But in its *City of Camden* decision, the New Jersey Court viewed *Rogers* v. *Challis* in its true perspective. And, though Pennsylvania courts have as yet never been faced with any case upon this issue, it is to be hoped that, when such an issue does arise here, Pennsylvania will be guided in its decision by the law of New Jersey.

Thomas P. Monteverde