requiring a spouse to provide support for the other spouse when they are living together only where the evidence establishes that the breadwinner-spouse is neglecting to provide food, clothing, shelter, medical and dental care and other necessary living expenses which are reasonable and in accordance with the family station in life. Such necessaries are not however to be confused with luxuries, spending money or financial control. Since the approval of the Equal Rights Amendment and the line of cases construing the Amendment, it is also necessary in each case for the trial court to ascertain and give consideration to the income or earning capacity of the petitioner-spouse.

Thus, the answer to the first issue must be that this Court may impose an order for support in the case at bar, despite the fact that the parties are living together if the facts of the case establish a neglect to provide necessary support on the part of the respondent.

In the case at bar, the petitioner submitted a list of weekly expenditures totalling $109.91. Her average weekly earned income was $91.00, and she receives $25.00 per week from the respondent for a total weekly income of $116.00. When the petitioner was questioned concerning the apparent surplus of income over expenses, she testified that she spent the $25.00 provided by the respondent on items not included on her expense list such as several dollars worth of dog food, and concluded that there was a weekly deficit rather than a surplus. Petitioner's memorandum suggests, in addition to dog food, that she purchased cleansing and laundry supplies.

Considering the facts that the petitioner has a $10.00 miscellaneous item in her expense list, and (with all due regard to the importance of man's best friend) dog food hardly qualifies as a necessary for petitioner, we conclude that the petitioner has failed to sustain her burden of proving that the respondent has neglected to support her. On the facts presently before the Court, we conclude it would be an error of law to impose an order of support upon the respondent.

We are mindful of the facts that the petitioner expressed concern over the failure of the respondent to pay certain current real estate taxes and a furnace or heating repair bill, and that respondent's counsel, with his client's approval, stated that respondent would pay the taxes and the bill and continue to pay all other expenses as heretofore with the $25.00 per week to petitioner.

We also note that petitioner includes in her expense list a past due bill of the Waynesboro Hospital in the amount of

$232.00, which she proposes to pay at the rate of $2.50 per week. Clearly, hospital bills are a necessary item of support. Respondent's financial ability to pay for such necessaries is equally clear as is his legal responsibility to do so. There is no justification in law or logic why the hospital should be expected to wait more than 92 weeks for its past due bill.

We conclude that the best interests and the rights of both parties and the law will be served if this Court retains jurisdiction of this proceeding for a further period of three months. If during that period the parties should discontinue their present living arrangement, or the respondent should discontinue or lower the level of his contributions to the petitioner, or the respondent should within the three months fail to pay in full the current real estate taxes, heating repair bill and balance of the Waynesboro Hospital bill; then the petitioner, via her counsel, may request a prompt hearing to consider her right to have a support order entered. If the parties' living arrangement continues with the respondent's contributions undiminished, and the taxes and bills are paid in full by respondent, then the Court will entertain a motion at the expiration of three months for the dismissal of the petition.

ORDER OF COURT

NOW, this 20th day of October, 1978, this case is continued until January 22, 1979.

Exceptions are granted the parties.

CHAMBERSBURG MOTOR SPEEDWAY, INC. V. HOOVER, C. P. Franklin County Branch, E. D. Vol. 7, p. 64

Equity - Agreement to Lease - Specific Performance

1. An agreement to lease is an executory contract, which, if valid, may be specifically enforced.

2. An agreement to lease, signed by both parties and complete in itself as to essential and material terms, constitutes a presently enforceable contract.

3. Where an agreement to lease recites an express intent to be legally bound to enter into a lease for described premises for an express term beginning upon a specific date, and defines the rental payments, a demurrer to an action for specific performance will be overruled.

Joel R. Zullinger, Esq., Attorney for Plaintiff

J. Glenn Benedict, Esq., and *Kenneth F. Lee, Esq.*, Attorneys for Defendant

OPINION AND ORDER

Before Eppinger, P. J. and Keller, J.

Opinion by Eppinger, P. J., March 5, 1976:

Chambersburg Motor Speedway, Inc. (Speedway) commenced an action in equity to compel specific performance of an agreement to lease entered into by the Speedway and Raymond O. Hoover (Hoover) on April 12, 1975. Hoover died four days later. The agreement provided that the terms should extend to the benefit of and be binding upon the executors, etc., of the parties. After his death, executors (Executors) were appointed of Hoover's estate and the Speedway requested them to honor the agreement and execute a lease. The Executors refused and this action followed. The Executors have filed a preliminary objection to the complaint in the form of a demurrer which is presently before this Court for disposition.

The written agreement set forth in the complaint indicates that both parties had been negotiating a long term lease of land owned by Hoover for the purpose of conducting motor vehicle races. In addition, it recites that Hoover was in ill health and realized time was needed for preparing a long term lease, and desired to ensure that the lands described by a draft appended to the agreement be leased to the corporation. The agreement stated Hoover felt this would accomplish his desires in relation to the future use of the land. Accordingly, said the agreement, "the parties hereto, intending to be legally bound hereby . . ., do hereby agree to enter into a long term lease" for a period of fifty years, beginning on May 1, 1975, and "shall include but not be limited to the following terms and conditions". The agreement enumerates specific terms including a description of the land, an option to extend the term and a definition and mode of payment of rental fees as consideration for the lease.

IS THE AGREEMENT TO LEASE EXECUTED BY THE SPEEDWAY AND HOOVER PRIMA FACIE UNENFORCEABLE AS A MATTER OF LAW?

An agreement to lease is an executory contract. Such an agreement, if valid, may be specifically enforced by the court. *Mover v. Diehl*, 139 Pa. Super. 59, 11 A. 2d 651 (1940). The rights flowing from an executory contract are governed by the law of contracts. The inquiry here is whether an enforceable contract exists where another writing was contemplated by the

parties, to wit, the lease. The *Restatement (Second) of Contracts, Sect. 26 (1973)*, states: "Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations."

The law in Pennsylvania pertaining to agreements to contracts is stated in *Taylor v. Stanley Co of America*, 305 Pa. 546, 552, 158 A. 157 (1932):

> "Where all the terms of a contract are agreed upon, and its reduction to writing is provided for, merely for proof as to its terms, such provision for a written contract is not inconsistent with a present contract, and this is especially true where the thing to be done is provided for in a written memorandum. The minds of the parties having met and reached an accord as to the essential provisions of the contract, such writing would simply exhibit just what they agreed upon and understood."

To sustain the defendant's demurrer, the court must find as a matter of law that the parties did not agree upon the material and essential details of the bargain. *Lombardo v. Gasparini Excavating Company*, 385 Pa. 388, 123 A. 2d 663 (1956). Moreover, the court in disposing of the question of whether the parties intended the agreement to be a written memorial of the terms of the lease or simply evidence of preliminary negotiations must extract their intent from the express language of the agreement. *Frey v. Nakles*, 380 Pa. 616, 112 A. 2d 329 (1955).

The interpretation and construction of a lease, as of contracts generally, is a question for the court. *Diamond v. Drucker*, 177 Pa. Super. 226, 110 A. 2d 820 (1955). The court in scrutinizing the agreement should be mindful of the requisites of a valid lease which are: (1) a lessor capable of making a demise; (2) a lessee capable of accepting a demise; (3) a thing which is demisable; (4) a writing; (5) a definite time to take effect in possession as well as termination and (6) an accurate description of the place to be leased. *Stern's Trickett on the Law of Landlord and Tenant*, ch. 1, Sect. 2, p. 2. An analysis of the agreement displays the presence of these six elements for a lease with the sixth being met through incorporating by reference a survey prepared expressly for the contemplated lease.

Generally, a contract, in order to be specifically enforceable, must be complete in itself with respect to its essential and material terms, parts and elements. Thus on its

face the agreement contains all the necessary terms and in the absence of an intent to the contrary would be sufficient to deny the executors' demurrer.

The executors contend that the agreement to lease contemplates further negotiation between the parties. In support of this position, they cite the case of *Whitemarsh Township Authority v. Finelli Brothers, Inc.*, 408 Pa. 373, 184 A. 2d 512 (1962). There the Authority advertised for bids on the construction of a sanitary sewage system. Finelli Brothers, Inc., submitted the lowest bid and it was accepted by the Authority. In refusing to perform, the contractor argued that its failure to sign the form as mandated by the advertisement made its bid void. The court agreed and held the requirement of a signature was an essential one and without it the Authority could not have considered it in the first place.

The executors also point to the *Lombardo* case, supra, where it was held that an oral contract to pay the plaintiff fifty percent of the profits was unenforceable because the consideration was insufficient. The purported consideration was the forbearance by the plaintiff from bringing suit on a prior oral contract. The court found that the terms of the alleged contract were never decided upon by the parties and hence could not be sufficient consideration.

In *Onyx Oils and Resins, Inc. v. Moss*, 367 Pa. 416, 80 A. 2d 815 (1951), the plaintiff and the defendant executed an agreement whereby the parties agreed, *inter alia*, to enter into an instrument among themselves as stockholders to include "a voting trust agreement mutually agreeable". The court concluded that the agreement was unenforceable especially when it was stipulated that the proposed contract was to be mutually satisfactory. In essence, there was no full and definite meeting of the minds as to the terms of such agreement.

Finally, the executors strongly suggest that the case of *Upsal Street Realty Company v. Rubin*, 326 Pa. 397, 192 A. 481 (1937), clearly supports their position. There, the defendant offered to lease from the plaintiff an apartment for 21 months. To manifest his intent the defendant unilaterally executed and delivered a document entitled an "Application For Lease" to the plaintiff. The plaintiff orally accepted and they jointly agreed to arrange for the execution of a written lease. The defendant subsequently refused to sign a lease and plaintiff brought suit to compel performance according to the terms of the "Application". The court noted that the terms of the "Application" included a description of the apartment, a figure for rental and the terms of the proposed lease. However,

the court concluded that the document was a mere offer with the understanding that if the applicant was acceptable to the plaintiff, they would both meet and execute a lease "provided they could both agree on all the necessary stipulations" (p. 335). The application said that "the selection of colors will be made after the lease is signed." This indicated to the court that a lease was contemplated which would have to be signed before the matter of redecoration would be considered. The rental item which specified a figure without any formula as to when or how such payment was to be made, was also found to be incomplete.

The above cited cases have one common basis. All of the agreements, oral or written, contained open terms which were essential to their enforceability. The agreements were all held preliminary since they were incapable of being performed without adding to their terms. Essential and material terms were subject to further negotiation and settlement.

The executors contend that such a situation exists here. However, reviewing the agreement in a light most favorable to the plaintiff leads the Court to conclude as a matter of law that the language does not manifest incompleteness. As previously pointed out, the agreement contains the essential elements for a lease. Moreover, the statement that "the terms shall include but not be limited to," does not import the lack of final understanding that was present in the clause "mutually agreeable" viewed in the *Onyx* case. Furthermore, the definition of rental in the present agreement in no way resembles the situation in *Upsal*, supra. Here the term is defined as gross profits less expenses; with an enumeration of some of the factors to be included as expenses. The fact that all expense items were not mentioned is clearly insufficient to find that the decedent intended the agreement to lease to be only preliminary.

The weight to be attributed to such recitals as "realizing the preparation of such a long-term lease involves considerable time" and "over a period of several months, have been negotiating a long-term lease" are questions for the trier of fact to resolve. Speedway readily concedes that it might have been desirable to have more details provided for in the agreement. However, this observation does not detract from the fact the agreement to lease on its face contains the "essential" and "material" provisions required for its enforcement. The parties were "intending to be legally bound" as the agreement explicitly states. "Where all of the essential elements of a contract are stated a failure to include other provisions which might properly have been incorporated does not prevent a

EDITORIAL

Two of our Journal Board members declined to accept nomination for a succeeding term at this past Friday's corporation meeting. Both of them have been with us for a long time. Roy Angle, our Founding Father, who was advocating for this publication before your editor was even a member of the Bar, received a well deserved round of applause for this fine lesson in advocacy, and its successful result. Roy has been the subject of another commendatory editorial, and I am sure we are all aware of the value of his service to the Journal, without my going into greater length about it here.

Eddy Beck was another one. Our Treasurer from the inception of plans to actually get this publication into operation, Eddy has also served us for years. He assumed this office when our only asset was a $100.00 loan from the Bar Association. His budgeting and other financial expertise have resulted in the repayment of this loan and an operation running clearly in the black, with a cash reserve buffer for hard times. Eddy has to leave because he has a number of commitments to serve charitable organizations. Such organizations need the kind of service Eddy can render in this regard, so we reluctantly conclude we should not monopolize upon him.

We hope these two retiring officers will remain available to counsel and assist the rest of us and our own successors for many years to come. We extend our best wishes to them, and our thanks for the fine services they have rendered our Journal.

MANAGING EDITOR

decree of specific performance." 81 *Corpus Juris Secundum*, Specific Performance, Sect. 35, p. 496.

The clauses pointed to by the executors do not display as a matter of law an intent by the parties that the agreement embodies only preliminary negotiations. Speedway directs the Court's attention to the case of *West Heights Realty Corp. v. Adelman*, 107 N. J. Eq. 351, 152 A. 196 (1930). There the defendant entered into an agreement to lease to the plaintiff a parcel of land for a three year term. The agreement was held to embody the essential terms of a lease.

> The dispute arose because of a clause stating: "Any further provisions... to be made in addition to the above mentioned and later to be agreed upon, shall be incorporated in addition to the provisions herein contained in a lease . . . not later than March 25, 1920."

The court found that the agreement on its face was a complete and binding contract at law and in equity, remarking:

> "It is better to construe a single clause in an elaborate and extensive contract as an inoperative but harmless provision than to give a clause a construction which renders the whole contract voidable at the option of either party thus depriving the entire instrument of all finality and legal force."

ORDER OF COURT

NOW, March 5, 1976, the demurrer is overruled and the defendants are given twenty (20) days from this date to file an answer. Exception to the defendants.

COMMONWEALTH OF PA. V. EVANGELISTA, C.P. Cr.D. Franklin County Branch, No. 171 of 1978

Criminal Conspiracy - Demurrer - Insufficient Evidence

1. A mere statement by a person to an undercover agent that a third individual would be willing to sell a controlled substance is insufficient to convict that person of conspiracy to commit the crime of selling controlled substances.

John F. Nelson, Assistant District Attorney, Attorney for the Commonwealth

Blake E. Martin, Public Defender, Attorney for the Defendant