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THE UNIFORM COMMERCIAL ACTS

(*Continued from the November issue*).

We have seen that the first characteristic of negotiability, the right to sue the bailee on the contract in one's own name, is not the real distinction under the acts between negotiation and transfer, the only difference in this regard being that this right follows immediately upon negotiation of a document but only arises after notice to the bailee in case the transaction is a transfer. The second distinction is of much greater importance. The bailor may have defrauded the bailee, as by misrepresenting the character or quantity of the goods bailed. A document may be purchased from one who secured it from a prior owner by fraud, duress or mistake, or the seller of a document may have found or stolen it or the document may have been issued to one who found or stole the goods. In some of these cases the purchaser is protected if the transaction was a negotiation and not if it was merely a transfer. In others the purchaser loses even though the transaction was a negotiation. Let us see what the Acts say as to the effect of negotiation as conferring greater rights than those possessed by the original holder or by later holders. First, negotiation differs from transfer in its effect upon the obligations of the bailee. "The holder in due course of a negotia-

ble contract can rely on the form of the instrument as telling the whole story, provided the form of the instrument has not been altered before it comes to his hands." Williston on Commercial Law, § 247, p. 133. Accordingly, Sec. 33 of the Sales Act, Sec. 41 of the Warehouse Receipts Act and Sec. 32 of the Bills of Lading Act, all provide that one to whom a document has been negotiated can hold the bailee according to the terms of the document. The bailee cannot set up the wrong of the depositor or shipper. The effect of transfer is not the same. Sec. 24 of the Sales Act and Sec. 42 of the Warehouse Receipts Act hold the bailee "according to the terms of the document" after notice from the transferee. But the Bills of Lading Act contains a different provision, (Sec. 33). Notice to the carrier makes the transferee "the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification." Therefore, if one consigns goods to himself, and by fraudulently misrepresenting the nature of the goods, secures a bill misdescribing them, the carrier may avoid liability for the failure of the goods to correspond to the description, for such liability, under Sec. 23, arises only when the "*consignee* gave value in good faith relying upon the description" in the bill. As the transferee of a straight bill is given no greater right than the transferor had, the carrier has a good defence even as against him. Surely the provisions of the Sales Act and of the Warehouse Receipts Act are preferable, for an innocent purchaser should always be able to rely on the representations of the document but the rule as to bills of lading follows the distinction between negotiable and non-negotiable contracts and the Sales Act must be read in the light of this provison of the Bills of Lading Act.

But the most important difference in effect between negotiation and transfer has to do with the title acquired by the one to whom the document is negotiated or transferred. If the document is negotiable, its form is regarded as definitely showing the title. He to whose order the goods are deliverable is taken to have title or at least authority to

transfer title. By this we mean authority from the depositor or shipper. If the latter stole the goods, the bona fide purchaser of a document gets nothing, regardless of the form of the document. In re Dreuil & Co., 205 Fed. 568. This is true of all defects of title existng prior to the deposit or shipment of the goods, except such defects as affect only the equitable title. If the shipper or depositor had a good legal title but one voidable for fraud, as this defect would be cured by a sale of the goods to a bona fide purchaser, a sale of a document representing them would have the same effect and this regardless of the negotiable or non-negotiable form of the document. But when the depositor or shipper has a perfect title but someone secures possession of the document by fraud or conversion, all will depend upon the negotiable form of the document, when the question arises as to the rights of an innocent purchaser from the wrongdoer. All the acts agree that the transfer of a straight document passes such title to the goods as the transferor had, but if he in fact was to hold the goods subject to the orders of the depositor or shipper, the transferee would hold subject to this limitation. Though the acts are silent on the subject, it seems that if the transferor was a purchaser of the goods but because of fraud, had only a voidable title, a transferee who bought for value and without notice of the fraud, would take a good title to the goods. The transferor of a straight document is in possession of the goods, in legal contemplation, and the same effect should be given to a sale when the goods are in the hands of a bailee as when they are in the hands of the seller himself. Therefore, if a transferor has a title to the goods which he has ability to convey to a bona fide purchaser for value, the transferee will take a good title.

When we said above that, if the document is negotiable, its form is regarded as definitely showing the title, we said what is true of bills of exchange, promissory notes, stock certificates and bills of lading. It is only partially true of warehouse receipts. Sec. 32 of the Sales Act provides who may make an effective negotiation of a docu-

ment. He must either be the owner or the one to whose order the goods are deliverable or the document must be in form to be negotiated without indorsement and *he must have been "entrusted with the possession or custody of the document."* Sec. 40 of the Warehouse Receipts Act makes exactly the same provision. But the Transfer of Stock Act and the Bills of Lading Act contain very different provisions. Sec. 5 of the Transfer of Stock Act provides that one in possession of a certificate, properly indorsed, may transfer title, though he had no right of possession nor any authority from the owner or the one named in the certificate as owner or any later indorser. A thief or a finder of the certificate can give a good title. Of course conversion by one entrusted with the possession or custody of the certificate does not impair the title of the purchaser.

Sec. 31 of the Bills of Lading Act similarly provides that a bill may be negotiated by any person in possession of it, however such possession may have been acquired, if the one negotiating it was the consignee or it is already properly indorsed by the one to whose order the goods are deliverable. It is to be regretted that warehouse receipts still lack that degree of negotiability possessed by all other negotiable instruments. The Sales Act must of course be read in the light of the Bills of Lading Act and its provision must be applied only to warehouse receipts. If the document is not negotiable, the owner may safely entrust it to anyone and if it is lost or stolen from him, he has only lost his evidence of his contract with the bailee. One who has converted a straight document can pass no better title than that which he himself has and that is none. The same is of course true in the case of negotiable documents when any of the indorsements thereon are forgeries. The document itself and all indorsements must be genuine. This risk that a negotiable document may be forged or altered "has in practice proved the most serious risk of all." (Williston's Lectures on Commercial Law, Sec. 179, p. 98). Forgery is easy because of the carelessness with which receipts and bills of lading are made out. Warehouse re-

ceipts are now required to have a serial number but this is not true of bills of lading. Great precautions are usually taken in the case of stock certificates and forgery of a certificate is very difficult. It is stamped, punched and countersigned. See Trust Co. v. R. R. Co., 237 Pa. 519.

The difference in the law relating to receipts and bills in regard to the title that may be given by a thief or a finder is further indicated by a comparison of Sec. 38 of the Sales Act and Sec. 38 of the Warehouse Receipts Act with Sec. 38 of the Bills of Lading Act. The first two provide that the negotiation shall be effective though it involved a "breach of duty" by the one negotiating it, and though the owner was "induced by fraud, mistake or duress to entrust it" to the wrongdoer. The Bills of Lading Act says all this and adds that the negotiation shall be effective though the owner "was deprived of the possession by accident or conversion." This clearly covers lost and stolen bills, while the purchaser of a lost or stolen receipt gets nothing. Sec. 6 of the Stock Transfer Act contains provisions not found in any of the other acts. Instead of the fraud, duress or mistake being used to induce the owner to entrust the document to the wrongdoer, they may have been used to secure the indorsement. Does this impair the title of a purchaser? The Transfer of Stock Act provides that the indorsement is effectual though it was induced by fraud, duress or mistake. After indorsement of a document and its delivery to an agent for sale, the owner may revoke the authority to dispose of it, or the law may revoke the power as the result of the death of the owner or his insanity occurring after indorsement. Subsequent disposal by an agent under such circumstances would be a conversion but of the kind described in the acts as a "breach of duty" and the purchaser of any negotiable document is protected. This is left to inference in all the acts except the Transfer of Stock Act. Secs. 6 and 7 of said act expressly so provide. The owner, to be protected, must reclaim his certificate and forestall the wrongful disposal of it and it is further pro-

vided that even this right may be lost by laches in seeking to enforce it.

There is still another risk which the purchaser of a document runs. The indorsement may be genuine but the party making it may have lacked legal capacity or authority to make the indorsement. The indorser may have been an infant, a lunatic, an habitual drunkard, or a trustee, executor or administrator or other fiduciary without authority in the instrument creating the trust to convert securities. The uniform acts do not diminish at all this risk. It is so provided in Sec. 2 of the Stock Transfer Act, but is left to inference in the other acts. All the acts provide that in cases not covered by them, "the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause, shall govern." (Sec. 73 of Sales Act, Sec. 18 of Stock Transfer Act, Sec. 56 of Warehouse Receipts Act and Sec. 51 of Bills of Lading Act).

Defects of Title Antedating the Document

We have still to consider the position of one who buys a document perfect in itself but which was issued for goods which were converted by the bailor at or before the time the bailment was created. Or again the deposit or shipment of the goods may constitute a violation of the rights of a mortgagee or lienholder. It is obvious that the law could not enable one who has found or stolen goods to place himself in a position to pass a good title to them merely by resorting to the expedient of placing them in storage or in transit and taking a negotiable receipt or bill for them. Sec. 43 of the Bills of Lading Act covers such cases. Sec. 42 provides that the seller's lien and right to stop in transit shall be lost if the buyer negotiates a bill for the goods. Sec. 43 provides that any other lien which exists on goods prior to their delivery to the carrier may be enforced even against the purchaser of a negotiable bill representing

them, provided the lien would not have been lost had the goods themselves been the subject of the transaction, without any document of title being involved. Therefore, one who buys a negotiable document of title runs the risk, not only that the bailor may have found or stolen the goods but also that he may have received them from the owner under a contract of lease with only an option to buy and that he has not yet fully paid for them. Sec. 33 of the Sales Act, Sec. 41 of the Warehouse Receipts Act and Sec. 32 of the Bills of Lading Act are all alike in providing that the negotiation of a document passes only the title which the person negotiating it had or had ability to convey to a bona fide purchaser and the title of the original parties to the document. If none of them had title, the purchaser gets none. All three acts say it is enough if the one to whose order the goods were to be delivered had title or ability to convey title to a bona fide purchaser. The Warehouse Receipts Act adds that negotiation also passes the depositor's title and the Bills of Lading Act says the same of the consignor's title. Curiously the Sales Act makes no reference to the bailor's title but again this act must be read in the light of the other acts. The omission was evidently inadvertent.

Warranties on the Sale of a Document

The existence of the risks just mentioned and the absence of any warranty on the part of the bailee that any party to the document had title to the goods make it important to a purchaser to know what recourse he has against prior indorsers. Sec. 37 of the Sales Act, Sec. 45 of the Warehouse Receipts Act and Sec. 36 of the Bills of Lading Act all provide that indorsement shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations. Indorsement is simply a necessary incident of negotiation. If the bailee does not honor the document upon presentation, the holder of an indorsed document of title cannot have recourse to the in-

dorser, as could the holder of a draft or a note. Though, as stated, no liability attaches to an indorser as such, anyone who disposes of a document, (whether negotiable or not), to another for value, including one who assigns for value a claim secured by a document, unless a contrary intention appears, does make certain warranties. This is provided by Sec. 36 of the Sales Act, Sec. 11 of the Stock Transfer Act, Sec. 44 of the Warehouse Receipts Act and Sec. 35 of the Bills of Lading Act. Three of the warranties named are found in all of the acts. They are these: First, that the document is genuine; second, that he has a right to dispose of the document; and third, that he is ignorant of any fact which would impair the validity or worth of the document. Therefore, if one only deals with responsible parties, he has a remedy if the document be forged or altered, or if the one from whom he purchased had neither title to the document nor authority to dispose of it. This latter is only important in the case of warehouse receipts or straight documents, for negotiation would cure defects of title in the other cases and the prior owner would have to proceed against the wrongdoer. If the document has no goods behind it, the holder's only remedy is against the bailee, unless he can prove that the seller had knowledge of the facts. The Sales Act, the Warehouse Receipts Act and the Bills of Lading Act all contain a further warranty, namely, that the one disposing of the document had the right to transfer title to the goods and such other warranties as are implied in sales of goods. This gives the purchaser his remedy in case the goods were lost or stolen before they were deposited or shipped. The Stock Transfer Act and the Bills of Lading Act contain a further provision not found in the Sales Act or the Warehouse Receipts Act, though it should be in all the acts. It is this: "In the case of the assignment of a claim secured by a certificate of stock or by a bill of lading, the liability of the assignor shall not exceed the amount of the claim." The

omission from the other acts must have been inadvertent and it must be read into the Sales Act from the Bills of Lading Act.

Accepting Payment of a Debt

It is a disputed question as to whether a bank which discounts a draft, taking a bill of lading as security, succeeds to the liability of the seller of the goods, in case the buyer, after paying the draft, finds the bill of lading to be forged, or the goods not to be of the character described in the bill. The bank is not an assignee of a claim secured by a document and so within the provisions of the sections just referred to, it is merely accepting payment of a debt. See Williston on Sales, p. 745. However, the cases are sufficiently close to have led to a further provision in the Stock Transfer Act, Sec. 12; the Warehouse Receipts Act, Sec. 46 and the Bills of Lading Act, Sec. 37. But, curiously, there is no such provision in the Sales Act. The other acts all provide that, "a mortgagee or pledgee or other holder of a document for security who in good faith demands or receives payment of the debt for which such document is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed to represent or to warrant the genuineness of the document or the quantity or quality of the goods therein described or the value of the shares represented by a certificate of stock." Again, it would seem that this omission from the Sales Act was inadvertent and the provisions of the other acts must be read into it. Williston on Sales, § 281.

How to Ship Goods to a Buyer

Sometimes neither party to a sale of goods cares to trust the other. The seller wants to retain his hold on the goods till paid and the buyer does not want to pay till he gets the goods. How can this be done? Secs. 40 of the Bills of Lading Act and 19 and 20 of the Sales Act give the answer. A seller may ship the goods in any of four ways: 1st, by straight bill naming the buyer or his agent as consignee; 2nd, by an order bill to the buyer or his agent; 3d,

by straight bill, naming himself as consignee; 4th, by an order bill to himself or his agent. By naming the buyer as consignee, the seller indicates his intent to pass the title to the buyer when the goods are shipped, whether the bill be a straight bill or an order bill. But since the buyer cannot get his goods till he gets an order bill, the seller retains his hold on the goods until he surrenders such a bill. But by naming the buyer as consignee, the seller has put himself in an awkward position. If the buyer refuses to pay on tender of the bill of lading and also refuses to indorse the bill of lading back to the seller, the carrier will hold the goods until it is convinced that the consignee has no interest in the goods.

By naming himself or his agent as consignee the seller indicates his intent to retain title. In order to indicate his intention to appropriate the goods to a definite buyer, he may insert in the bill the words, "Notify A. B.," that is, the buyer. But for the form of the bill, the title would have passed to the buyer on shipment of the goods, and as this form is used only because it is necessary to compel payment by the buyer, the acts place upon the buyer the risks of ownership, just as if the goods had been consigned to him. Sec. 9 of the Bills of Lading Act provides that the presence in the bill of the words, "Notify A. B." shall not affect the negotiability of the bill nor be notice to a later purchaser of the bill of any rights or equities of the original buyer. Therefore, when the goods are shipped in this way, the buyer has all the burdens of ownership without any of its advantages. The seller can change his mind and sell the goods to another and the buyer has only his action against the seller personally, unless the second buyer knew of the equitable title of the first buyer.

Frequently the seller draws a draft on the buyer for the price and sends the draft with the bill of lading attached either to his own agent or to the buyer direct. He often discounts the draft at his home bank and the bank then forwards the draft, with the bill attached, to its correspondent bank in the buyer's city to present the draft for ac-

ceptance or payment. The seller has indorsed the bill in blank, so that, if the buyer does not honor the draft, the bank can sell the bill of lading or fall back on the drawer of the draft and return the bill of lading. But suppose the seller sends the draft and bill, indorsed in blank, to the buyer direct, and the buyer uses the bill but does not honor the draft, is an innocent purchaser of the goods in the same position as if he had bought goods from a thief? Both acts provide that, whether the buyer gets the goods from the carrier and sells them or negotiates the bill of lading, the innocent purchaser shall be protected, though, of course, the buyer has committed a conversion. The case is treated just as a delivery to a buyer under a contract of conditional sale is treated in Pennsylvania. The foregoing rules as to the intention of the seller to be inferred from the form of the bill of lading are absolute as to third parties but as between the seller and the buyer, it may always be shown that the contract of the parties made a different provision as to when title was to pass.

The Warehouse Receipts Act and the Stock Transfer Act contain no provisions similar to the foregoing provisions of the Sales Act and the Bills of Lading Act, but one selling goods to remain in storage or one selling shares of stock may use a draft with the negotiable document attached in the same way and the same rules would be applied.

Duty of Bailee When Converted Goods Are Bailed

When the one entitled to the goods by the terms of a document of title demands the goods, may the bailee decline to deliver the goods on the ground that the title of the bailor was defective and that delivery would expose the bailee to an action for conversion at the suit of the real owner? Sec. 11 of the Bills of Lading Act casts the burden on the carrier of proving the existence of a lawful excuse for non-delivery. Sec. 8 of the Warehouse Receipts Act contains a like provision but adds that the excuse must be one provided by the act itself. Sec. 12 of the Bills of

Lading Act and Sec. 9 of the Warehouse Receipts Act both provide that it shall be a good excuse for non-delivery if the bailee has already surrendered the goods to one who was entitled to their possession, that is, the one whose goods were converted by the bailor. On the other hand, the same sections protect the bailee if he has delivered the goods to the one entitled by the document before he learned of the claims of the one whose goods were converted. The act of storing or carrying the goods and redelivering them to the wrongdoer or another at his behest is no longer a tort, if the bailee acted innocently in the matter. But if the bailee has information of the claim of the real owner but is in doubt as to the validity of his alleged rights, what is he to do? Sec. 10 of the Warehouse Receipts Act and Sec. 13 of the Bills of Lading Act make the bailor liable, if it makes a mistaken delivery in such a case. If he delivers to the one appearing to be entitled by the terms of the document, he is liable to the real owner, if the latter had requested him not to make such delivery or if the bailee had information from any source that such person was not entitled to the goods. On the other hand, if he undertakes to deliver to the claimant, he must be able to show that his claim was well founded. But one agent of a carrier may be delivering goods at the very time notice of the prior conversion is being given to another agent. Accordingly the above section protects the carrier unless there has been a reasonable time for the agent knowing the facts to communicate with the agent in actual control of the goods, and unless the notice was received by an agent whose apparent duty it was to act upon it. Sec. 18 of the Warehouse Receipts Act and Sec. 21 of the Bills of Lading Act give the bailee a reasonable time to determine the validity of such claims of which it has notice, and in the meantime it may justify retention of the goods as against both claimants. After the lapse of such a time it must act at its peril or begin legal proceedings to compel the different claimants to interplead. The right of a bailee to call on his bailor to interplead has been denied, hence Sec. 17 of the Warehouse

Receipts Act and Sec. 20 of the Bills of Lading Act expressly give this remedy to the bailee, either as a defense to an action or as an original proceeding. The Sales Act casts no light on this question because no sale is involved in it. And as shares of stock are intangible and only the certificate can be converted, the Stock Transfer Act contains no relevant provisions. But a corporation may be met by adverse claims to the ownership of a certificate and it would be justified in retaining dividends till the validity of the claims was decided, and interpleader would be the only appropriate remedy.

Criminal Offenses

The Sales Act and the Stock Transfer Act contain no criminal provisions. The crimes created by the Warehouse Receipts Act and those created by the Bills of Lading Act are not the same, except in part. Both acts make it a crime to issue a document with knowledge that the goods have not actually been received at the time it is issued. If the receiving agent deceives the issuing agent, the former only is guilty. Similarly both acts make it criminal to issue a document known to contain any false statement. Again both acts make it criminal to issue a second *negotiable* document, not marked "duplicate," while knowing the original to be outstanding. The issue of new documents after judicial proceedings upon the loss or destruction of the original is excepted in the Warehouse Receipts Act but not in the Bills of Lading Act. The issue of a receipt by a warehouseman for goods in which he has an interest, which the receipt does not disclose is criminal. This fraud has not arisen in the case of carriers and the Bills of Lading Act has no section covering it. Both acts make it criminal to bail goods, the title to which the bailor knows is defective, if he later negotiates a negotiable document representing them without disclosing his defect of title. As previously stated, the Warehouse Receipts Act makes it a crime to surrender goods for which a negotiable receipt is shown to be outstanding, except in the case of a judicial decree upon proof of the loss of the original. There is no such severe

rule in the case of carriers, their civil liability being deemed sufficient. On the other hand, to issue a straight bill of lading and not mark it "not negotiable," is made a crime if done with intent to defraud. There is no similar provision in regard to warehouse receipts. The Bills of Lading Act contains two further provisions not in the Warehouse Receipts Act. It is made criminal to fraudulently dispose of a bill knowing that there are no goods behind it and also to secure the issuance of a fictitious bill by inducing the freight agent to believe that the goods have been received by the carrier.

We have pointed out the many points of difference between these "Uniform Acts," in their provisions dealing with analogous situations. Is it not time for the Commissioners to begin the preparation of an act to unify these acts and put these documents on exactly the same basis? It would greatly reduce the labor of students and practitioners and the writer knows of no objection which could be urged against such a course.

J. P. McKEEHAN.

MOOT COURT

OAKMAN v. TORREY, ATCHISON et al.

Corporations—Partnerships—Defective Incorporation—Act of April 29, 1874, Sec. 3.

STATEMENT OF FACTS

Torrey and the other defendants obtained a charter from the governor, as the Westmoreland Shoe Company; but they failed to record it in the county. As such company they have conducted business and have bought goods to the value of $2000 from Oakman, the plaintiff. Oakman sues them, not as a corporation, but as partners.

Leopold, for the plaintiff.

Krause, for the defendant.

OPINION OF THE COURT

MILLER, J. The plaintiff has sued the defendant company as a partnership. The defendants maintain that they should have been sued, not as a partnership but as a corporation; that the charter of incorporation granted them by the state is a bar to a recovery in this suit against them as partners. On the other hand the plaintiff contends that the recordation of their certificate in the county is a prerequisite essential to their existence as a corporation, and that therefore, not being such corporation, they are a partnership.

As a corporation the assets of the company alone are liable for the debts incurred by said company. As a partnership, a creditor has recourse not only to the assets of the company, but if that prove insufficient, also to the individual assets of its members. Naturally therefore the distinction here contended for is material and of importance.

The Act of April 29, 1874, P. L. 73, § 3 regulates the manner of incorporation of manufacturing concerns such as the defendant, and provides as follows: "The said original certificate, with all of its endorsements, shall then be recorded in the office for the recording of deeds, in and for the county where the chief operations are to be carried on, and from thenceforth the subscribers thereto, and their associates and successors, shall be a corporaation for the purpose and upon the terms named in the said charter."

The literal reading of the statute would seem to be quite conclusive against the defendants' contention that they are a valid subsisting corporation. The act says, "the certificate" shall "be recorded" ..... "and from thenceforth" ..... the association

"shall be a corporation." For the reason of the difference as to liability, it is obviously material that the public should have notice of the incorporation as prescribed in the act. The provision is clear, precise, and simple. Certainly no one should be made to suffer loss through failure to comply with the terms of this statute except those whose negligence and apparent indifference as to the welfare of the parties with whom they deal, have made injury possible. To hold otherwise would be to open an avenue for a simple, but effectual fraud upon the business concerns of our state. Hence it has been held both in this and other jurisdictions that the requirements in respect to filing of charters are imperative, and that the acts relative thereto should be strictly construed. Guckert v. Hacke et al., 159 Pa. 303; Bank v. Crowell, 177 Pa. 313; Pinkerton v. Traction Co., 193 Pa. 229; Manufacturing Co. v. Beale, 204 Pa. 85; Tonge v. Item Publishing Co., 244 Pa. 417; Garnett v. Richardson, 35 Ark. 144; Abbott v. Refining Co., 4 Neb. 416; Ferris v. Thaw, 72 Mo. 446; Childs v. Smith, 55 Barbour 45; Doyle v. Mizner, 42 Mich. 332.

The defendant contends on the authority of Spahr v. Bank, 94 Pa. 429, that the plaintiff having dealt with the defendant as a corporation, is estopped from denying their existence as a corporation even though they failed to record their charter. From the facts as stated there is no affirmative evidence that the plaintiff dealt with the defendants as a corporation, and we certainly can not presume that he did so. There is nothing in the name of the defendants' company which should have put the plaintiff upon inquiry, nor are the methods pursued by corporations distinctive. Partnerships and unincorporated societies frequently conduct their business upon methods similar to those of corporations, and their organizations as to officers, etc., may be identically alike. Moreover, even were it affirmatively shown that the plaintiff had dealt with the company, with knowledge of their incorporation, we doubt if the rule as laid down in Spahr v. Bank, would be law today. The more recent authorities would seem to hold contra. In Tonge v. Item Publishing Co., 244 Pa. 417, a judgment was recovered against the company as a corporation and it was held that those conducting the business were liable alone. The members having failed to record their certificate, the company was not a corporation, and that fact barred levying an assessment upon the subscribers for their unpaid shares. In Manufacturing Company v. Beale, 204 Pa. 85, the plaintiff recovered a judgment against the company as a corporation. He was later denied enforcing his judgment on the ground that the non-recordation of the certificates was sufficient notice to plaintiff that they were not a corporation. Consequently, the company not being a corporation under these circumstances, how can we impute knowledge to any plaintiff of the contrary, that it is a corporation?

Moreover, the decision in Spahr v. Bank was made upon circumstances peculiar to the case. This point, however, being unnecessary to the decision in the case at bar, we will not decide it.

In accordance with the authorities cited, justice, and right, we hold that, having failed to record their certificate, the defendant company is not a corporation, and that its members are liable as partners.

Judgment for plaintiff.

OPINION OF THE SUPREME COURT

There exists a striking conflict of authority as to the partnership liability of stockholders in corporations which are defectively organized. The conflict is well illustrated by the decisions in the cases where the defect in the organization was the failure to file or record the articles of incorporation in a certain public office. See 13 Ann. Cas. 1146; 17 L. R. A. 549; 30 Cyc. 399.

The view taken by many of the leading text writers is that the supposed stockholders are liable as partners. Cook on Stock and Stockholders, 233; Beach on Private Corporations, 112; Spelling on Private Corporations, 838. "According to these authorities, the requirement of the statutes that articles of incorporation shall be filed in a certain public office falls within the class of mandatory provisions without compliance with which there is no incorporation, and the coadventurers remain liable as partners." 10 Cyc. 658. To the same effect is Thompson on Corporations, §§ 239, 2875.

The doctrine announced by these writers has been adopted by the courts of Pennsylvania. Guckert v. Hacke, 159 Pa. 303; N. Y. Bank v. Crowell, 177 Pa. 313; Braddock Boro v. Water Co., 189 Pa. 379; Pinkerton v. Traction Co., 193 Pa. 234; Keller v. Riverton Co., 34 Super. 305; Mandeville v. Courtright, 142 Fed. 97; 6 L. R. A. (N. S.) 1009; 30 Cyc. 400.

The doctrine of Spahr v. Bank, 94 Pa. 429, is not applicable to the present case. The burden of proof is on the party alleging and relying on an estoppel to establish all the facts necessary to constitute it. 16 Cyc. 811.

The reasoning of the learned judge below sufficiently vindicates the decision which the opinion enunciates.

Judgment affirmed.

MERTON v. ALLISON

Negotiable Instruments—Principal and Surety—Subrogation

STATEMENT OF FACTS

Merton and Allison made a note for $300 payable to Frew in three months. Merton was surety for Allison on the note. Allison, without Merton's knowledge, begged for further time, and Frew, in consideration of interest prepaid for three months, agreed to a three months' extension. Subsequent to the expiration of this extended time, Merton, threatened with suit, paid the note, although he knew of the agreement to extend time, and although he could have defeated an action by alleging this extension. This is a suit against Allison, the principal debtor, by the surety.

Baxter, for the plaintiff.

Bonen, for the defendant.

OPINION OF THE COURT

BRUNER, J. It is a well settled rule of law that the payment of interest in advance is sufficient consideration to support a contract for an extension of time to the principal so as to discharge the surety. 32 Cyc. 2027, and cases cited. The agreement between Frew and Allison furnished Merton with a valid and sufficient defense to an action on the note. Could he, Merton, by paying the note, recover the sum paid from the maker? With what intent did he pay the note; in his capacity as surety, or as a purchaser?

Was it as a purchaser for value? If so, Merton became a holder in due course for value, and under section 57 of the Negotiable Instruments Act of 1901, he would hold "the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." If the case at bar could be decided upon this point alone, judgment would have to be for the plaintiff.

But whether the payment of the debt was a purchase depends primarily upon the intent of the parties at the time the transaction takes place. It is prima facie a purchase. Burke's Appeal, 95 Pa. 145; Brown v. Marmaduke, 248 Pa. 247; 7 Cyc. 1025. What was Merton's intention? Frew, after the note became due, threatened Merton, the surety, with suit. The latter, now cognizant of the extension which had been granted without his knowledge or consent, paid the note, although he could have defeated an action by alleging this extension. These are the only facts with which the record furnishes us. In our opinion they are not sufficient to make Merton,

prima facie, a purchaser for value of the instrument. Is it not more reasonable to suppose that he, desirous of keeping out of litigation, paid the sum due as an interested party, namely, as surety?

Allison, the maker of the note, and the defendant in this case, relies upon this ground. He claims that Merton, by the payment of the note, has extinguished the debt voluntarily, and not as a purchaser for value. If this is true, is there no legal obligation resting upon Allison to repay Merton? There is certainly a moral obligation. And there is at least an implied contract between the parties which obliges a principal to reimburse his surety when the latter has paid the debt. 32 Cyc. 250. Is subrogation of the surety against the principal to be defeated by the fact that the surety could avail himself of a perfect defense against the creditor, by reason of the extension of time to the principal by the creditor without the knowledge or consent of the surety at the time the extension is granted? Cannot the surety waive his defenses? We are of the opinion that he can. To quote: A surety can waive his defense, such as that an extension of time has been given to the principal. 32 Cyc. 163, and cases cited; 7 Cyc. 887. In Hinds v. Ingham, 31 Ill. 400, the surety, with the knowledge of the extension, paid a part of the note, and promised to pay the balance. The learned Court in its opinion held that this was a waiver on the part of the surety of his discharge by an extension.

The Supreme Court of Pennsylvania, in Brown v. Marmaduke, 248 Pa. 247, has said: "The fact that the payment of a promissory note has been extended without the consent of the surety is a defense for the benefit of the surety, the use of which is optional on his part." In that case both makers of a judgment note, one a principal and the other a surety, died before the amount was paid. Later the widow of the principal paid the amount of the note to the payee and the note was thereupon delivered to her. The widow then brought suit on the note against the executors of the surety and recovered. The case reported in 248 Pa. 247 was a subsequent action by the executors of the surety against the widow, as executrix of the principal, to recover the amount of the judgment. Although the facts in Brown v. Marmaduke are not similar to the facts in the case at bar, yet the opinion of the Court, quoted above, is sufficient, we believe, to point out the probable decision if the present case were to be presented for their adjudication.

If the surety can waive his defenses, and thus be subrogated to the creditor, and we believe he can, we fail to see any ground upon which the defendant is deserving of judgment. Mere moral obligation alone would decree that the maker of the note should not so easily escape liability for its payment. And above this is the law. If Merton is to be considered a purchaser for value, he can recover;

if he is to be regarded as having acted as surety on the note, he can waive his defenses, and still recover. Judgment must be for the plaintiff.

OPINION OF THE SUPERIOR COURT

The learned court below has sustained the plaintiff's action on the ground that the plaintiff, as a purchaser of the note, could enforce it. But he is not attempting to enforce it. Apparently he is a joint maker of the note, and to sue on it would be to sue himself. This he cannot do at law.

This suit is necessarily based on his having paid money on behalf of the defendant which the latter should in equity repay to him. When he became a surety, there was a duty put on Allison to repay him, should he pay under legal compulsion the note which represented Allison's debt. The question before us is, was Allison under a duty tc repay Merton, if Merton paid the debt, whether under legal compulsion or not? We think he was. Had Merton not paid Frew, Frew could have compelled Allison to pay him. The invitation to Merton to become a surety was, we think, an authority to him to pay Frew, so long as Allison continued liable, and not barely an authority to pay Frew, so long as he, Merton, continued liable.

Affirmed.

PHILLIPS v. MOUNTMORRIS

Evidence—Modification of Written Instrument by Parol Testimony—Bill of Sale

STATEMENT OF FACTS

Phillips sold a horse by a bill of sale calling for $250 as the price. He sues for the price of the horse, or $350, and offers the bill of sale and parol evidence that for a reason specified the defendant wished $100 omitted from the price, promising however to pay $350 in spite of the mention in the bill of $250 only. The defendant is willing and offers to pay $250, but objects to the modification of the writing by the parol evidence. The court admitted this evidence, and the order is for $350 plus interest.

Dunn, for the appellant.

Clark, for the appellee.

OPINION OF THE SUPERIOR COURT

FARRELL, J. We consider that the question to be decided in this case is whether parol contemporaneous evidence is admissible to contradict or vary the terms of a valid written instrument, in this case, a bill of sale.

The general rule is that when any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, or any contract, agreement, or understanding has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to or varied by parol or extrinsic evidence. The rule is a necessary one because of the obvious fact that written instruments would soon come to be of little value if their explicit provisions could be varied, controlled or superseded by such evidence; and it is also plain that a different rule would greatly increase the temptations to commit perjury.

Bills of sale or sales notes, by the great weight of authority, are placed on the same footing as other written instruments, with respect to their being varied by the admission of parol evidence, and it is therefore held that such instruments cannot be varied, added to, contradicted or explained by parol evidence. In so far as a bill of sale partakes of the nature of a receipt or is simply declaratory of a fact, it may be explained or perhaps contradicted; but to the extent that it expresses the contract of the parties, and defines their rights and liabilities, it is subject to the same rule as other written contracts and precludes the admission of parol or extrinsic evidence.

The rule in Pennsylvania is that parol evidence is allowed to contradict or vary instruments, (1) where there was fraud, accident or mistake in the creation of the instrument itself, and (2) where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed. This is supported by Phillips v. Meily, in 106 Pa. 536, per Paxson, J. It is clear that the present case does not fall within these exceptions. It was written just as both parties wished it to be written. There was nothing omitted. Can a party to a contract receive more than the contract price merely because he says it was verbally agreed he was to receive more? Surely this would be a very unjust rule.

In the recent case of Potter v. Grimm, 248 Pa. 440, there is a very learned dissenting opinion by Justice Stewart in which he says that in the absence of fraud, accident, or mistake parol evidence is not admissible to contradict or vary the terms of a valid written instrument.

The learned counsel for the appellee bases his argument primarily upon the case of Croyle v. The Cambria Land and Improvement Co., 233 Pa. 310. In that case there was an omission not contemplated by the parties, but which happened through the mistake of the scriviner. When the omission was discovered, the party prejudiced by it refused to sign the paper as written. He was induced to sign

it by the other party's promising to make good what had been omitted. The case was thus brought clearly within the established exceptions to the rule that excludes parol testimony when offered to contradict or vary the terms of a written instrument. In this case there is no equity shown to bring it within any recognized exception.

In Renshaw v. Gans, 7 Pa. 117, parol evidence was admitted because the case fell under one of the exceptions, mistake.

Here nothing was omitted from the written contract that was ever intended to be inserted in it; neither fraud, accident or mistake is alleged in connection with the written articles and for this reason it was error to allow parol evidence to alter their terms. The parol promise set up was no part of the written contract, but an independent undertaking for which the consideration was the written agreement, and for which a separate action would lie.

We therefore think that the parol evidence should not have been admitted.

OPINION OF THE SUPREME COURT

The bill of sale which was signed by the purchaser, the defendant, mentions $250 as the price to be paid for the horse. The offer was to show that the price agreed to be paid was $350, and that it was stated in the bill to be only $250 on the request of the defendant, who assigned a particular reason for making it.

There was, as the learned court below says, no fraud, accident, or mistake in the composing of the bill. Both parties knew that it named $250 as the price. There was no accident in making it name this price. The designation of $250 was solicited by the defendant, and acceded to by the plaintiff. There was no mistake. The writing exactly corresponded with what the parties intended it to contain.

But, if the evidence is believed, the vendor consented to execute the bill, with $250 mentioned as the price, only at the request of the vendee, and upon his promise to pay $350. It would be a fraud for the vendee to refuse to pay more than $250, because, he having procured the writing on his promise to pay $350, the smaller sum was written in the bill.

There may have been no fraudulent purpose, in Mountmorris, when he signed the bill, and induced Phillips to sign it. But why should a difference be made between the effect of a fraudulent purpose existing when the bill was drawn, and a fraudulent purpose subsequently formed? To use the bill now to defeat the recovery of more than $250 is to use it fraudulently. Says Stewart, J. in Croyle v. Land & Improvement Co., 233 Pa. 310, "The English rule in its strictness would exclude all evidence of the promise, (e. g. to pay the

additional $100) notwithstanding a subsequent refusal by defendant, to observe its promise, while holding on to what is obtained by reason of it, would be quite as much a fraud on the plaintiff as any wilful suppression or misrepresentation of fact in connection with the making of the instrument."

Whether statutes of fraud have lessened the amount of successful fraud, no man knows. There was no statute requiring this sale to be in writing. Why should the courts invent a rule requiring that, if any part of a transaction is reduced to writing, the whole of it shall be; or if an averment with respect to price is made, that it shall be conclusively assumed exactly to correspond with the price agreed upon? It has long been held that prices mentioned in deeds for land, may be shown by parol to be different from the price actually agreed to be paid and paid. Acknowledgments in deeds of the receipt of purchase money may be contradicted.

That the parties may desire to express but a part of their agreement in writing is evident. Why should the courts arbitrarily prohibit their doing so; or, the same thing, determine that only the part expressed in writing should be regarded?

We are aware of the hopeless contradiction among the decisions, and Potter v. Grimm, 248 Pa. 440, illustrates the regrettable unsteadiness of the attitude of the courts on this important subject.

We think the evidence was properly admitted, and the judgment of the Superior Court must be reversed.

Reversed.

ROPER, ADMR. OF JEFFERSON v. HARRINGTON

Fraudulent Conveyance—Statute of 13th Elizabeth—Remedy in Equity

Rockmaker, for plaintiff.

Rosenberg, for defendant.

OPINION OF THE COURT

SHELLEY, J. The petition sets forth that Jefferson, insolvent, conveyed his farm to Harrington for $5000. The farm was worth no more. Harrington was aware that Jefferson was selling the farm in order to withdraw it from the reach of his creditors, but Harrington was not induced to any extent to make the purchase by the desire to assist Jefferson in effecting his object. Jefferson has died and his administrator, Roper, filed this bill to have the conveyance to Harrington declared void. The existing debts would consume all the property of Jefferson and the total value of the farm.

Under the Statute of 13th Elizabeth, which is the law of Penn-

sylvania at the present time in regard to Fraudulent Conveyances, (Davis v. Bigler, 62 Pa. 242), a conveyance in fraud of creditors can be assailed only by the creditors, and it is valid as to all other parties. Clark v. Douglass, 62 Pa. 408. Respondent claims, therefore, that Roper, as administrator of Jefferson, is not the proper party to bring this suit. In so claiming he overlooks a very important principle of law, which is that the executor or administrator is the trustee for the distributees and creditors; and here, as the estate is insolvent and there will be no distributees, he is the trustee solely for the creditors, and, consequently, he is the proper party to bring the action for the benefit of the said creditors.

Returning to the Statute of 13th Elizabeth, we see that as early as 1602 in the celebrated "Twynes Case," the Statute was construed to exempt those conveyances which were made for a good or valuable consideration and bona fide on the part of the purchaser. Both of these requirements had to be present. This is still the recognized meaning of the Statute. Reehling v. Boyer, 94 Pa. 316.

Applying these principles to the facts alleged in this bill, we see that so far as the consideration was concerned, Harrington's title could not be attacked. The consideration was $5000 which, it is admitted, was the full value of the farm. The question therefore presents itself whether from Harrington's knowledge of Jefferson's intention to withdraw the farm from the reach of his creditors we can attribute to him the lack of such bona fides as will render the conveyance void.

There are a great many decisions in this State on the question of bona fides, and the Courts have advanced a great many conditions which must exist one way or another; but they have almost uniformly held that a bona fide purchaser is not affected by a fraudulent intent of which he had no notice. This is true in regard to personalty as well as realty, and has been held to be the law in a vast number of cases. Purd. Sup. page 6155. Another line of decisions holds that the transaction will be deemed fraudulent though made for a valuable consideration where the intent to defraud, hinder or delay creditors exists on the part of the vendor, and the purchaser does not show ignorance thereof.

From these decisions we can readily see that if the purchaser actually knew that his grantor was conveying the land in order to defraud his creditors, he would be judged to have participated in the fraud whether he really intended doing so or not; and as against the creditors, his title would be absolutely void. In fact, we find that the Courts have so decided. In Covanhovan v. Hart, 21 Pa. 495, the following rule was stated by Chief Justice Black: "If a debtor, with the purpose to cheat his creditors, converts his land into money, because money is more easily shuffled out of sight than land, he, of course,

commits gross fraud. If his object in making the sale is known to the purchaser, and he nevertheless aids and assists in executing it, his title is worthless as against creditors, though he may have paid a full price."

Referring to the bill we see that Harrington had knowledge of Jefferson's intention to withdraw the farm from the reach of his creditors, and, although it clearly appears that he had no intention to assist Jefferson in so doing, nevertheless, we think that by his knowledge of this fraudulent intention and his subsequent purchase of the land thereunder, he has placed himself within the exception of the cited authorities, and that by so doing, his title is such as will avail him nothing in this suit.

Although it will in all probability work a hardship on the respondent to take from him his title to and interest in the land of Jefferson without returning to him the consideration which he paid for the same, nevertheless, we fail to see how in the face of all the precedent authority on the subject the Court can do otherwise.

We therefore decree that the conveyance from Jefferson to Harrington was void as against the creditors of the former, and that Harrington deliver up his deed for cancellation.

OPINION OF THE SUPREME COURT

Three questions are presented for determination: (1) Was the conveyance voidable as against Harrington? (2) Was the conveyance voidable at the instance of Roper? (3) Was the conveyance voidable in a court of equity?

(1) This question must be answered in the affirmative. "A purchase made by one not a creditor is fraudulent and void as against creditors, where it is made with notice of the fraudulent intent of the seller notwithstanding that the buyer has paid an adequate consideration. Knowledge is equivalent to, and constitutes, participation, where the transfer is to one not a creditor. It is not necessary that the purchaser shall have bought with the intention of aiding the grantor in his fraudulent design." 20 Cyc. 470; Renninger v. Spatz, 128 Pa. 524; Chester Co. v. Pugh, 241 Pa. 125.

(2) This question must be answered in the affirmative. "The executor or administrator * * * * cannot set aside the fraudulent act for the benefit of the heirs or next of kin. But * * * the executor or administrator may set up the fraud and avoid the act of the decedent for the benefit of the creditors where the estate is insolvent." Bouslough v. Bouslough, 68 Pa. 495; Buehler v. Gloninger, 2 Watts 226; Skiles Ap., 110 Pa. 248; Chester Co. v. Pugh, 241 Pa. 124.

(3) This question must be answered in the affirmative. In Pennsylvania in ordinary cases a bill in equity does not lie to set aside a

fraudulent conveyance. The remedy of the creditor is by levy of execution and sale and then contesting the title of the fraudulent vendee in an action of ejectment. But where the fraudulent vendor has died such a bill may be maintained by his executor or administrator. Chester Co. v. Pugh, 241 Pa. 124.

Affirmed.

JOHNSON'S ESTATE

Wills—Ambiguity in Designation of Legatee—Parol Evidence

Johnson's will bequeathed $2000 to "my friend Henry Abbott Milford." Among his friends was a Samuel Milford, with whom he had constant and intimate relations. Within 5 miles of Johnson's place of abode, there was a Henry Abbott Milford, but Johnson barely knew of his existence and seldom spoke to him. In the distribution of his estate, both these persons claimed the legacy.

Plessett, for the plaintiff.

Powell, for the defendant.

OPINION OF THE COURT

PRINCE, J. Concerning few subjects is there more confusion in the decisions than exists in regard to the admissibility of parol evidence to explain an ambiguity. There is confusion as to what constitutes an ambiguity, and still more confusion as to the circumstances which must exist to justify admitting parol evidence to explain it.

Ambiguities have been divided into two classes, patent and latent ambiguities. Lord Bacon in Circa 1597, Maxims, rule XXV, states, "There be two sorts of ambiguities of words; the one is ambiguitas patens and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seems certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed (here the will) that breedeth the ambiguity....." Despite the classification, diverse views have been adopted by courts and text book writers as to the proper distinction. The law of evidence now embraces Lord Bacon's view, Chaplin's view, Underhill's view, Schouler's view, and others. Hughes on Evidence, page 257.

For our purposes it will be sufficient to examine only the views of Schouler and Underhill. Schouler on Wills (3rd ed.) 576, states, "The two classes of cases, then, in which direct evidence dehors the will appears admissible to show the testator's intention, are these: (1)

Where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing. (2) Where the description of the person or thing is partly correct and partly incorrect, and the correct part leaves something equivocal....."

Underhill on the Law of Wills, 910, states, "It is not necessary in order that parol evidence may be received, that the description in the will shall apply precisely and in every respect to two or more persons or things. In some cases where the rule has been invoked, two persons of exactly the same name, or answering precisely the same description, have claimed. But the law requires only that the testamentary description shall apply to the several objects with legal certainty, so that the mind of the court is satisfied. The description, whether by name, locality or occupation must be sufficient to fairly satisfy the court that the testator may have meant either of the several persons or things which are revealed by the extrinsic evidence....Thus, if a benefit is claimed by several persons, all answering the description of the will in one or more material particulars, though none of them answer to it perfectly and accurately in every particular, extrinsic evidence is received." In the leading case or Miller v. Travers, 8 Bing. 244, (1832), Chief Justice Tindal recognizes the above two separate classes of latent ambiguities. He explains, ".....The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A, and is described as in the occupation of B, and it is found, that though there is an estate called A, yet the whole is not in B's possession; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate;.....parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence." The confusion is the result of the decision in the paradoxical case of Doe v. Hiscocks, 5 M. & W. 363, (1839), which Lord Abinger decided contra to the decision in Miller v. Travers, (supra), although he stated, "We are prepared on this point (the point in judgment in the case of Millers v. Travers) to adhere to the authority of that case." The effect of Doe v. Hiscocks (supra) has been, (1) To limit the admissibility of declarations of intention made by a testator to the one class of cases, "where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing"; and (2) To exclude "where the description of the person or thing is partly correct and partly incorrect, and the correct part

leaves something equivocal." In England, while it has met with some adverse criticism, it has been quite generally followed. In the United States its reception has not been so hearty, nor can it be called the American Rule. The weight of authority is against it, and in harmony with Miller v. Travers. Illinois follows Miller v. Travers on all points. Willard v. Darrah, 168 Mo. 660, 668; Decker v. Decker, 121 Ill. 341. Professor Thayer, late of Harvard Law School, favored Doe v. Hiscocks, while Professor Wigmore, of Northwestern Law School, favors Miller v. Travers.

Therefore, it may be stated that the general rule is that extrinsic evidence is admissible to identify a legatee described by an erroneous name in a will. Re Paulson, 127 Wis. 612, 5 L. R. A. (N. S.) 804; Powell v. Biddle, 2 Dallas 70. Henry, on evidence, page 344, "For this purpose, facts relating to the claimants under the will, the property claimed, the circumstances of the testator, the state of his affections toward the object of his bounty, his family and affairs, and his acts and declarations relating to the thing given or the person to whom it is given, are all relevant." Vernor v. Henry, 3 Watts 385; Brownfield v. Brownfield, 12 Pa. 136; Wagner's Appeal, 43 Pa. 102; Washington & Lee University's Appeal, 111 Pa. 572; Wampole's Estate, 3 Superior 414; Snyder's Estate, 217 Pa. 71; Presbyterian Mission v. Culp, 151 Pa. 467; Bryson's Estate, 7 Superior 624; Amberson's Estate, 204 Pa. 397; Newell's Appeal, 24 Pa. 197; Kimmel v. Wagner, 1 Walker 191; Miller's Estate, 26 Superior 443.

The above cases clearly enunciate the doctrine that evidence may be introduced to clear away the ambiguity, but in these cases there has been no thing or person corresponding in all particulars with the statement in the will. However, in the case at bar, there is a party who answers to the name used in the will, i. e. Henry Abbott Milford. Does this additional circumstance alter the decision? Counsel for the defendant contend that it does, and that the Statute of Frauds prevents the introduction of extrinsic evidence, on the ground that it would be making a will for the testator. We cannot agree to that. The Statute of Frauds was passed in England to prevent frauds and not to aid frauds. To assist the defendant would be to aid in perpetrating a fraud. Let us turn aside from the legal standpoint and inquire as to the practical side or result of a decision in favor of the defendant. X has as an intimate friend John Henry Smith. X makes a will, leaving a bequest to John Smith; both claim; the question is, should John Smith recover? A perusal of the city directory discloses the fact that there are 10 John Smiths in the city, the existence of all being known to X. Can anyone claim that all the John Smiths were entitled to recover, or that the one John Smith was entitled to get the share and not the other nine Smiths? This shows the fallacy in the defendant's argument. A MERE SIM-

ILARITY IN NAME OR DESCRIPTION IS NOT SUFFICIENT. Evidence should be introduced to show some connecting links. Thus, in the case of Powell v. Biddle, 2 Dallas 70, a legacy to "Samuel" was shown to have been intended for "William" though there were persons answering to each name, as it appeared that the testator did not know the former and usually called the latter Samuel. To the same effect is the case in 8 Forum 17, where evidence was held admissible to correct the misnomer.

We have assumed that Henry Abbott Milford exactly corresponded to the person named in the will. But this was assumed merely for the sake of making the decision more specific and certain. Let us now consider the evidence.

The will states, "$2000 to my FRIEND Henry Abbott Milford." Webster defines "friend" as "one who entertains for another such sentiments of esteem, respect and affection, that he seeks his society and welfare." In the case at bar, Johnson barely knew of Henry Abbott Milford's existence, and seldom spoke to him. Certainly he is not a friend. The learned counsel for the plaintiff has tried to give a psychological reason for the presence of his name in the will. We are content to state that no one is infallible. Therefore, in view of the above expressed doctrines and cases, Samuel Stephen Milford is the party intended to receive the bequest, and judgment in his favor is decreed.

OPINION OF THE SUPREME COURT

Johnson's legacy was "to my friend Henry Abbott Milford." There was a Henry Abbott Milford, but he was not Johnson's friend. Johnson barely knew of his existence, and seldom spoke to him. The name corresponded with that of this individual. The description "my friend" did not correspond with his property or quality.

There was a person who was a "friend" of the testator. His name also was Milford. It was not Henry Abbott Milford, however, but Samuel Stephen Milford.

Parol evidence is always necessary to identify any particular person as grantee, legatee, etc. This evidence brings into view these two persons, revealing one as having the name adopted by the testator, but not having the relation which the words "my friend" depict. The testator is giving a considerable sum of money, $2000. Men, dying men, do not usually give property to strangers, to persons the benefiting of whom is not likely to be a wish. Friendship is the motive expressed for the gift. It is impossible to believe that Henry Abbott was the person whom the testator intended to benefit.

The testator may have known that his friend's name was Milford. He may not have as well known his Christian name. He could

more easily be mistaken in this name, than in the assumption that he was "my friend."

It is not even necessary to assume that he was mistaken as to the Christian name of his friend. He may have, in the writing of the will, confused for the moment, the name of his friend and of the stranger. Such confusions occur.

The interpretation of wills involves the discovery of probabilities; rarely of certainties. It is improbable that Henry Abbott was intended to receive $2000. It is not improbable that Samuel Stephe was intended to receive the legacy. The case is similar to that of Siegley v. Simpson et al., 73 Wash. 69, 131 Pacif. 479, the decision of which accords with that which we have given.

Appeal dismissed.