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SALES OF GOODS AND THE STATUTE OF FRAUDS

Since 1915 Pennsylvania had had its Sales Act. The 4th Section introduced a new defense in suits on sale contracts. It has proven a popular defense and it may be useful to review the decisions and note the construction placed upon this section by the courts.

The section is as follows:

"Section 4. First. A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

Second. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract, or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may

be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

Third. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, or any part thereof, expresses by words, or conduct his assent to becoming the owner of those specific goods."

"SHALL NOT BE ENFORCEABLE BY ACTION"

Manufactures Light & Heat Company v. Lamp, 269 Pa. 517, decided that parol evidence could not be used to show the term during which a contract for the sale of natural gas was to be effective, though the defendant had signed a writing fixing the price. The statute is declared to be a limitation upon the judicial authority to afford remedies. It does more than provide a mere rule of evidence. This construction logically led to the decisions in Mason-Heflin Coal Company v. Currie, 270 Pa. 221, and Briggs v. Logan, I. & S. Co., 276 Pa. 326, that a plaintiff must set forth in his statement of claim enough facts to show that the statutory requirements have been complied with, though he is not required to aver facts relied on to take his case out of the statute of limitations. Apologies are made for prolonging the latter rule. The former works for defeat at the outset. The latter but illustrates the "Law's delays."

CONFLICT OF LAWS

The decision in the last named case was interpreted by the District Court of the United States in a suit brought in Delaware on a Pennsylvania contract to amount to a decision that the section relates to the validity of the contract rather than to the remedy and hence that the contract was invalid everywhere though there was no such statute where

suit was brought. Franklin Sugar Refining Company v. Holstein Harvey's Sons, Inc., 275 Fed. 622.

CONTENTS OF THE WRITING

In the Manufacturers Light & Heat Company case the court declared that all of the essentials of the agreement must appear in the writing, as had long been settled in cases involving real estate. "Separate writings must bear internal reference one to the other." In C. Noel Leigh Co. v. Stitzinger & Company, 281 Federal 1015, this case is cited and the rule is given as follows: "To satisfy the statute the memorandum must contain within itself or by some reference to other written evidence the names of the vendor and the vendee, and all of the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, if any, without any aid from parol testimony." The doctrine was applied again in Northwestern Consol. Milling Company v. Rosenberg, 287 Fed. 785, by the Circuit Court of Appeals affirming the District Court's decisions reported in 275 Fed. 878 and 277 Fed. 245. The buyer had signed an application for a shipping permit but not the sale memo. Oral evidence was inadmissible to connect the papers. It is the memo. of the agreement that must be signed and the internal reference to the other writing must appear in the one that is signed.

Franklin Sugar Ref. Co. v. Howell, 274 Pa. 190, reiterates the doctrine, reversing Judge Finletter's able opinion reported in 30 D. R. 1079. To fix the price of sugar the seller could deliver under the contract, reference had to be made to a trade list showing the differential between granulated and other sugars, since the sale memo. only fixed the price of the former as a basis from which all other prices were to be figured. There being no internal reference to this list in the sale memo. it was excluded. Whether this list was admissible to explain a trade usage or custom was not before the court in the Howell case. It has since been

disposed of. This case is followed in Lippincott v. Stringer, 80 Super Ct. 162.

Ideal Manufacturing Company v. Aronson & Treegoob, 29 D. & C. 471, held that a letter from the defendant to the plaintiff which did not identify within its four corners the invoice exhibited as representing the contract sued on is not a sufficient memo. and the invoice cannot be used to supplement the latter.

Ottenberg v. Bailey Cigar Co., 1 D. & C. 768, decides that a memo. is insufficient which does not contain the name of the person to whom the order is given. Letters accepting the order may not be used since they were not referred to in the writing signed by defendant.

Southern Pine Sales Corporation v. Braddock Lumber Co., 69 Pittsb. L. J. 240, holds that a letter of defendant which identifies an order by the number of the slip and which acknowledges the making of it and requests cancellation is a sufficient memo., but Michigan Star Furniture Co. v. Tiddy, 3 D. & C. 621, limits this doctrine to cases in which defendant's letters clearly identify the order referred to.

TRADE USAGES

In Am. Sugar Ref. Co. v. Colvin Atwell & Co., 286 Fed. 685, plaintiff undertook to translate in his statement the words "basis 22.50," and he set forth therein the list of differentials. The court declared that there was "but one standard trade differential in each grade or package," and accordingly held that the differentials might be shown by parol evidence. "I have no difficulty," said the court, "in reaching the conclusion that under the pleadings, the writings in question satisfy the statute. The cases of Franklin Sugar Ref. Co. v. Sprunks, 23 Lack. Jur. 313 and of Franklin Sugar Ref. Co. v. Ellsworth, 22 Luz. Leg. Reg. 207 and other Pennsylvania cases, are in harmony with this conclusion."

But in Franklin Sugar Ref. Co. v. Kane M. & G. Co., 278 Pa. 105, a demurrer to a like statement was sustained. A trade usage or custom may be used to show the meaning, in the trade, of words actually used in the contract, but the memorandum must contain all the necessary terms of an express contract or by proper reference include as part thereof a separate writing. It appeared that the trade differential changed from time to time and the signed memo. made no reference to any writing which showed what the differential was at the time the memo. was signed. It was changed at will by the sugar companies as their desires for profit dictated. To call this a custom was ridiculed by the court. The victory of Owen J. Roberts over his eminent adversary Senator George Wharton Pepper, in this long drawn out battle over these sugar contracts, involving, as they did, hundreds of defendants who had cancelled orders after the bottom dropped out of the sugar market, with losses of many millions to be placed on the buyers or the sellers as the issue might be decided, has attracted wide attention. We wonder whether it did not help the Senator to his decision to recommend Mr. Roberts to the President to prosecute the oil cases, now absorbing the attention of the nation.

CONSTITUTIONALITY

The section has been attacked as unconstitutional on two grounds. First, as special legislation, since it only applies if the goods are "of the value of five hundred dollars or upwards." The Mason-Heflin Coal Co. case declared that the reasonableness of the distinction was manifest and the point at which the line should be drawn was held to be a legislative and not a judicial question.

In Gano, Moore & Co., Inc. v. Burtons Coal Co., 28 D. R. 825, it was objected that the title of the act was defective as not disclosing that it contained a substantial reenactment in Pennsylvania of the Seventeenth Section of the English Statute of Frauds. "In legislation of the character before us," said the judge, "where it appears to be the ob-

vious intention of the lawmaking body to codify, revise and clarify the whole law of the state relating to the sale of goods under a title clearly expressed in words which by their very generality give warning that everything within their limits may be affected in the body of the act, we do not feel that we are required to apply critical or strained construction; nor are we at liberty to set aside the legislative will except for imperious necessity imposed by the Constitution. Such necessity does not appear in this case."

"SIGNED BY THE PARTY TO BE CHARGED"

The last mentioned case also adopts the settled rule that the section only requires signature by the defendant in the action, though a recovery by a plaintiff who has not signed involves enforcing a contract which is not enforceable against him. Mutuality has never been regarded as essential in cases arising under statutes using the expression "party to be charged." Our statute relating to real estate, in contrast to this, requires signature by the vendor in all cases and by him alone, a distinction peculiar to Pennsylvania and one not always observed even by our appellate court judges.

"OR HIS AGENT IN THAT BEHALF"

Dodd v. Stewart, 276 Pa. 225, holds that the agent employed by the sellers to make the sale cannot bind the purchaser by executing a memo. on his behalf. This case ruled the decision in Rasche v. Campbell, 276 Pa. 268, in which the alleged memo. was a telegram sent by an employee of the sellers' agent to the sellers' advising them of the buyer's acceptance. These cases were distinguished, however, in Hill v. Marcus and Holtzman, 81 Super. Ct. 314, holding that a broker not in the regular employ of either party, who induces the buyers to buy and the sellers to sell at a price suggested by him, finally telegraphing the seller confirming the sale and ordering shipment, may be treated as the buyer's agent to sign a memo. Payment of the broker's commission by the seller, in accordance with

the custom of the trade, will not prevent him from acting as agent for both parties in executing the necessary memo.

The agent of a seller of goods need not have a written authority, as must the agent of a vendor of real estate by the terms of the Act of 1772, and the memo. need not state the agent's authority. It may be shown by parol. Franklin Sugar Ref. Co. v. Ellsworth, 3 D. & C. 681.

MEMORANDUM EXECUTED AFTER REPUDIATION

In the last mentioned case the defendant had himself telegraphed the plaintiff after the shipment had been refused but this was held to be of no effect, citing Lippincott v. Stringer, 80 Super. Ct. 162. In the latter case the order was given verbally. The seller confirmed it in writing. The buyer then cancelled it verbally and followed with a letter confirming his verbal cancellation. The court refers to the fact that "the defendant had a different purpose in view than the acknowledgment of the contract," but places the decision on the ground that no liability can arise by a recognition in writing of an agreement that has been ended by a cancellation made while it is still in such form that one has a right to cancel it.

AGENCY MUST APPEAR FROM THE MEMO.

In Franklin Sugar Ref. Co. v. Kane M. & G. Co., 278 Pa. 105, it was claimed that the broker was the agent of both parties in signing the memo. But the memo. said: "Sold by J. H. Huston Co., Inc." This was held to exclude proof that the broker signed for the buyer. "When brokers deal on behalf of both seller and purchaser, and undertake a joint mission, it must appear, in this class of cases, and the memorandum must show they signed for the purchaser or the contracts will not be binding."

ACCEPTANCE AND RECEIPT

The character of the necessary acceptance is that defined in paragraph 3 of Section 4 and must be distinguished from that defined in Section 48 of the act as sufficient for

other purposes under the act. Clegg v. Lees, Super. Ct. (not yet reported).

Dolan Mercantile Co. v. Marcus, 276 Pa. 404, contains a full discussion of the construction of the words "accept part of the goods and actually receive the same." Delivery to a carrier is not "actual" receipt by the buyer and, of course, acceptance normally does not precede arrival, since he only then has a chance to inspect them and he may reject them if they are not as ordered. Though the seller loses his lien by consignment by straight bill of lading, if the buyer is or becomes insolvent, the seller may stop the goods in transit. "Any right outstanding in the vendor, the assertion of which would be sufficient to cause title and possession to be re-established in him, would so operate on the sale as to exclude it from the exemption, and must be condemned." The right of stoppage in transit was held to be such a right.

In Wexenblatt v. Katman and Greenburg, 75 Super. Ct. 219, the buyer was the plaintiff and he averred his demands for delivery and his willingness to accept and so sought to meet the objection that the memo. exhibited was not signed by the seller. But the buyer cannot thus by waiver avoid the requirement of acceptance and receipt in fact.

In Northwestern Consol. Milling Co. v. Rosenberg, 287 Fed. 785, the seller, at the buyer's request, had permitted the goods to remain in a warehouse for a considerable time. But it appeared that the buyer was to pay a draft for the price before removing the goods. As in the Dolan case this retention of control by the seller was held to be incompatible with the "actual receipt" required by the statute.

ARGUMENTATIVE MEMORANDA

That a written acknowledgment of a prior verbal order will satisfy the statute, if made before cancellation, is not denied. However, in Southern Pines Sales Corporation v. Braddock Lumber Co., 81 Super. Ct. 309, the buyer wrote complaining of delay in shipment and cancelling the order on

the ground that shipment in ten days was the basis on which the verbal order had been given. The buyer had referred to the seller's written acknowledgment of the order. However, "the requirements of the statute are not complied with by a writing which acknowledges that an oral contract was entered into but disputes that its terms are correctly stated by the other party." * * * "The plaintiff could not use so much of defendant's letter as suited its purpose in order to make the requisite note or memorandum in writing of the contract, and reject a part which essentially modified or negatived the contract sued on. It was to avoid just such disputes as to the contract entered into between the parties, and the consequent temptation to falsify testimony concerning it, that the provisions of the Statute of Frauds and of our Sales Act, invoked here by the defendant, were enacted."

Where a verbal order is given to plaintiff's agent, and the principal sends a written confirmation containing new conditions, and the defendant writes "please cancel" across its face and his signature, this is not a sufficient memo., especially where it appears that the agent had no authority to enter into a binding contract. Consolidated Mining Co. v. Allebach, Super. Ct. (not yet reported).

MODIFYING AGREEMENTS

Producers Coke Company v. Hoover, 268 Pa. 104, decides that a contract may be modified by a subsequent parol agreement, if the latter has been so far performed that the statute would have been satisfied had it been an original agreement. It is recognized that the rule in sales of real estate requires not only that the original contract be in writing but that any new contract modifying it must also be in writing, and the same rule applies in sales of goods if the parol modification is not validated by part performance sufficient to satisfy the statute.

PLEADING THE STATUTE

Franklin Sugar R. Co. v. Lykens M. Co., 274 Pa. 206, decides that if it is intended to deny the enforceability of a contract sued on, because of the fourth section of the Sales Act this should be averred in the affidavit of defense, either by a reference to the section itself, or by such a statement as makes certain that the defense is founded upon it. "Non constat but that the statement would have been adequately amended if the point had been squarely presented; indeed we cannot know from this record that defendant did not deliberately choose, if the other defenses made were unavailing, to be among those whose 'word is as good as his bond.'" The court below had given judgment for the defendant on an affidavit of defense in the nature of demurrer. Reversed.

In Josephson & Sons v. Weintraub, 78 Super. 14, "the plaintiffs declared on a book account, which predicated a delivery, not on a contract of sale. They stated nothing as to any contract of sale, whether it was written or verbal. The defendant denied delivery of the goods." The evidence showed a verbal contract of sale. The affidavit of defense had not referred to the Sales Act and it was contended by the plaintiff that this precluded the defendant from relying thereon. It was held that while a defendant is bound to present every defense, upon which he relies, to the claim as set forth in the plaintiff's statement, and he can introduce no new defense to that claim so presented that is not set forth in his affidavit, he is not bound to refer to every general act of assembly which the testimony, as it is unfolded, may make applicable to the facts in evidence."

In American Products Co. v. Refining Co., 275 Pa. 332, plaintiff's statement averred an oral contract and the affidavit of defense denied that any contract was ever entered into. A jury found for the plaintiff but the court sustained a motion for judgment n. o. v. because of section 4 of the Sales Act. Prior to the filing of the opinion so deciding, plaintiff offered to amend, averring a partial delivery

and receipt and the judgment was reversed for the refusal to permit this amendment. It was held that it was permissable to invoke the statute of frauds, though it was not invoked in the pleadings nor at the trial. It should have been raised by statutory demurrer, but the denial of the making of the contract made the statute an available defense. Failure to affirmatively plead the statute is not to be treated as a waiver of it, as in case of the statute of limitations, since the one contract is "unenforceable" from the beginning and the other was enforceable until the statutory period had elapsed. But if a defendant invokes the statute only after trial, the plaintiff must be given a fair opportunity to meet it by an amendment to his statement and proof at the new trial of such additional facts as may take the case from the ban of section 4.

JOSEPH P. McKEEHAN.

Note. Sinse the foregoing was written the report of the decision in Franklin Sugar Ref. Co. v. John, 279 Pa. 104, has appeared. While recognizing that a sufficient memo. may be made out by means of a letter referring to an earlier unsigned writing, decides that such earlier writing must show all of the terms of the agreement and the letter must acknowledge the obligation. The previous paper must be clearly identified by the reference and the letter must admit the making of the contract. A letter disclaiming responsibility may do, but only so, if it clearly appear that there was a closed agreement and that its terms are recognized and the alleged original is authenticated.

MOOT COURT

HILLMAN, RECEIVER V. WILSON

Corporations—Subscription to Stock—Payment in Property—Burden of Proof—Evidence—Equity.

STATEMENT OF FACTS

Wilson subscribed for ten shares in a corporation to be formed. It was then incorporated, but shortly thereafter, became insolvent and Hillman was appointed receiver. This is a bill to compel payment of a subscription. Wilson alleges payment by delivery of an engine, worth in the opinion of the witnesses $600. No evidence that any one having authority, had agreed to accept the engine in payment or that the engine was adapted to any corporate use. The court has entered a decree for $500, with interest from time when the subscription should have been paid.

Stepchincas, for Plaintiff.

Warrick, for Defendant.

OPINION OF THE COURT

Walker, J. As early as Bell's Appeal in 115 Pa. 88, the rule was laid down that the obligation on the part of a stockholder to pay his stock is not statutory obligation; but an obligation in Equity arising out of the consideration that the capital stock of a corporation is a trust fund for the payment of debts. As soon as the company was incorporated, Wilson was liable for the amount of stock that he subscribed. The above rule was followed in 139 Pa. 217; 144 Pa. 45; 198 Pa. 75, and 212 Pa. 180.

Wilson endeavors to show payment on his subscription by de livery of an engine. This delivery was not authorized by any one having authority to bind the corporation, nor was the engine used for corporate uses. If the contract to exchange the engine for stock was made by a promotor to induce Wilson to subscribe, the contract is not binding on the corporation. In Bell's Gap R. R. Co. vs Christy 79 Pa. 54 the rule was established that a corporation is not liable upon a contract made by its promotor before its organization, though made in its name, unless it has expressly or impliedly adopted the same since its organization or unless liability is im-

posed upon it by its charter or by some statue. This was reaffirmed in 254 Pa. 152 and in 276 Pa. 496.

The corporation did not authorize the payment of the subscription by the engine; neither did it appropriate it to corporate uses. It is not liable under an implied contract. The payment for the stock in property was never the subject of contract or agreement between the defendant and the corporation.

The finding of the court below in entering a decree for the price of the subscriptions, with interest from the time it should have been paid is AFFIRMED.

OPINION OF SUPREME COURT

Payment of a stock-subscription may be enforced by the receiver of an insolvent corporation by a bill in equity. Bole v. Murray, 233 Pa. 589.

The court below has properly held that the subscription has not been paid. The delivery of the engine was not payment, because no agent of the corporation is shown to have agreed to accept it as payment. It is not necessary to decide that a subscription prior to incorporation could be paid in something other than money.

The value of the engine could not be set off against the subscription for it does not appear that it was adapted to any corporate use, or had been received by any authorized agent of the corporation. The appeal is therefore DISMISSED.

O'DONNELL VS RAILROAD

Workmen's Compensation—Railroads—Master and Servant—Death—Interstate Commerce—Presumption'—Burden of Proof—Evidence.

STATEMENT OF FACTS

Defendant carried on both inter and intra-state commerce. O'Donnell a flagman was mortally injuried while flagging a train. It does not appear whether this train was engaged in inter or intra-state operation. The widow had obtained compensation from the Pennsylvania Workmen's Compensation Board. The Federal Act of 1908 makes provision for compensation in inter-state traffic cases. On appeal from the state board's decision the railroad company alleges that; (a) if the Federal law is applicable the state law is not; (b) since the railroad was engaged in both sorts of commerce, the one

who alleges the applicability of the state law must show that the injury arose in the doing of intra-state commerce.

Goodman, for Plaintiff.

Scott, for Defendant.

OPINION OF THE COURT

Perlstein, J. The question to be determined is; Which courts have jurisdiction over the case? This question of jurisdiction hinges on whether the defendant was engaged in inter-state or intra-state commerce. If the former, the Federal law applies, and the state law has no effect; if the latter, the Pennsylvania act applies, and the case is properly brought in our Pennsylvania courts.

We must properly determine the character of commerce the defendant is engaged in. The nature of the emplyment of a railroad emplyee is by the work in hand at the immediate time of the accident, and as such, work often shifts rapidly from one class of employment to the other; each case must be determined in the light of its particular facts, and governed by the purpose of the operation. If the work in hand is inter-state, or so closely related thereto, as to be practically a part of it, then it falls within the act of Congress, otherwise it is within State act.

In Philadelphia & Reading R. R. Company vs Di Donato 256 U. S. 327. which came up to the Supreme court of the United States from our own courts, (having been decided in 226 Pa. 412), the facts were somewhat similar to those of the case at bar. A flagman employed by a railroad company, which engaged in both inter-state and intra-state commerce, was fatally injured by a train which he was flagging. The widow of the deceased was awarded compensation by the Workmen's Compensation Board, after an investigation by a referee. This award was affirmed. in the Common Pleas Court and Supreme Court of Pennsylvania, both of which held, "that there is no presumption that the train was an inter-state train. It is not a matter governed by presumption, but by proof, the burden of which rests upon the railroad company alleging it. If no evidence is offered upon the question, the defence fails."

The defendant appealed to the Supreme Court of the U. S., and alleged that it is considered as being engaged in inter-state commerce, and that the Workmen's Compensation Act of Pennsylvania did not apply.

The Supreme Court held that the deceased was employed in inter-state commerce at the time, and cited as its authority its earlier decisions in Pederson vs Deleware R. R. 229 U. S. 146, "that where humans were instruments of inter-state as well as intra-state

commerce, they were to be considered as employed in inter-state commerce." Numerous other cases so hold.

Having decided that the deceased was engaged in inter-state commerce, the court held that no presumption could arise as to burden of proof resting on the plaintiff, and that neither the Pennsylvania courts nor the Workmen's Compensation Board had jurisdiction. This case was upheld in Philadelphia & Reading R. R. Company vs Polk 256 U. S. 332, and in Scanlon vs Payne 271 Pa. 391.

The old rule in Pennsylvania having been set aside by the opinion of the Supreme Court of the U. S., we feel constrained to follow this more recent trend in the decisions and hold that it is upon the party who alleges that the defendant was engaged in intra-state commerce to prove his allegations. If such proof fails, then the state law cannot apply.

It does not appear in which kind of commerce the defendant was engaged, and it is not within our province to presume it is intra-state. On the contrary, the leaning is entirely toward the presumption of inter-state commerce. But we do not here attempt to decide this question, no testimony having been offered which might clear this point.

In conformity with the views of the Supreme Court of the United States, and in view of the acceptance of the doctrine by our own States Supreme Court, the judgement of the Workmen's Compensation Board is reversed, and the record remitted to the Workmen's Compensation Board for the purpose of definitely finding the nature of the deceased's employment, that the question of jurisdiction be finally determined.

OPINION OF SUPREME COURT

The well written opinion of the learned court below makes discussion of the case by us unnecessary.

AFFIRMED.

CURTISS V. HENRY

Real Property—Rule against Perpetuitie's—Option's—Construstion—Intiution—Cloud on Title—Equity.

STATEMENT OF FACTS

Curtiss conveyed to Henry and his heirs a house. At the same time Henry made a convenant with Curtiss to reconvey the house at any time within twenty five years on Curtiss' demand, he repaying the price plus any addition for any improvements made. Fif-

teen years elapsed and Curtiss demanded a reconveyance. The court below dismissed the bill on th ground that the convenant for reconveyance was void.

Abrahams, for Plaintiff.

Baratta, for Defendant.

OPINION OF THE COURT

Barna, J. This is a bill in equity for the specific performance of a convenant to reconvey a house, which was executed at the same time that the deed was. The lower court held that the convenant for reconveyance was void and in order to decide whether the lower court was right we must first decide what is the nature of the transaction and what force is to be given to the convenant.

The counsel for the plaintiff contends that it is a mortgage and that the convenant was a defeasance. This contention the court refuses to affirm although some cases seem to hold to the contrary. It has repeatedly been held by early Pennsylvania cases that a deed and an agreement to reconvey constitute a mortgage and that such presumption is conclusive. But on examining the cases cited for this proposition it will be seen that in every case there was either a debt or obligation existing between the parties. It is well settled that in order to convert a conveyance of land into a mortgage there must be some debt due or obligation existing between the parties. In the case at bar there is no such debt or obligation.

Justice Paxton, in Emory v. Marshal, 42 Legal Intelligencer 935 unequivocally states that a court of equity may decree a deed absolute on its face to be a mortgage, but equity cannot declare an absolute conveyance to be a mortgage unless it appears that the relation of debtor and creditor existed between the parties; without this there can be no mortgage.

In deciding whether a conveyance is a mortgage or not one must consider the effect of other clauses in the transaction, the intention of the parties, and the obligation to repay the purchase money.

Hooncker vs Merkey 102 Pa. 462.

Helfenstein's Estate 135 Pa. 293.

Haines vs Thomson 70 Pa. 434.

The cases cited by the attorney for the plaintiff are different from the case at bar as there is a clear intention to create a mortgage. In Colwell vs Woods, 3 Watts 188, there was an agreement by the vendor to pay interest on the money paid for the purchase of the property, the vendor remained in possession of the premises after the conveyance and the court held that conveyance was a

security for a loan. In Harper's Appeal 64 Pa. 315, the facts also disclosed that the actual intent was to create a mortgage.

Since there is no relation of debtor and creditor or obligor and obligée, nothing from which we can presume an intention that there should be a mortgage, and the fact that Curtiss was not bound to return the money within a definite time, we are of the opinion that there is no mortgage in this case.

The convenant to reconvey was an option. An option is a unilateral agreement binding upon the optionor from the date of its execution, but does not become a contract inter partes in the sense of an absolute contract to convey on one side and to purchase on the other until exercised by the optionee.

Barnes vs Rea, 219 Pa. 279.

Being an option it is void as the rule against perpetuities prohibits the creation of contingent interest in real or personal property, either legal or equitable, which must vest within a life or lives in being and twenty one years thereafter.

Tiffany on Real Property, page 344.

Curtiss did not mention any life or lives in being merely adopted the twenty five year term therefore the term cannot extend over twenty one years.

Johnson's Estate. 185 Pa. 179.

Perry on Trusts, page 349.

Williams on Real Property, page 317.

The estate of Curtiss is a future one and not vested as it depends on his demanding a reconveyance. The event upon which it was to arise is uncertain as he might demand reconveyance within twenty five years or he might never demand it. A mere privilege of exercising a future right to purchase cannot be deemed a present vested interest in land.

Barton vs Thaw, 246 Pa. 348.

The fact that Curtiss demanded reconveyance fifteen years later is immaterial as the convenant was void from the day of its making. Every executory limitation is too remote, and is therefore void under the rule, unless at the date when the instrument creating it goes into effect, it is apparent that the future estate thereby created, must vest within the limits prescribed by the rule. The mere fact that the estate may possibly vest within the period, or even in all probability, do so, is not sufficient, in fact the slightest possibility that the period preceeding the vesting of the estate will continue beyond the limits prescribed by the rule is sufficient to invalidate the limitation.

16 Pepper & Lewis Dig. of Decisions 27020.

Barton vs Thaw, 246 Pa. 348.

Lilley's Estate, 272 Pa. 143.
Gerbers Estate, 196 Pa. 366.

The case of Barton v. Thaw, supra, is similar to the case at bar. There was a conveyance of land in fee simple and a covenant was made to reconvey the land at any time whenever the vendor demanded it to be reconveyed. It was held to be an option and such an option was void under the rule against perpetuities.

As the covenant to reconvey was an option to purchase the house within twenty five years and since such option was void, the bill was properly dismissed and the judgment of the lower court is affirmed.

OPINION OF SUPREME COURT

But little needs to be said by us in view of the clear opinion of the trial court.

There can be no mortgage, without a debt or obligation, on the part of the mortgagor, of which the mortgage is intended to enforce the payment, or performance. When Curtis conveyed the house, there was no duty on his part to pay his grantee anything. No debt existed.

The learned court below has properly regarded the transaction as a conveyance of the house, and the assumption of a duty by the grantee to reconvey it at any time in 25 years on certain conditions if Curtis should demand such reconveyance. Curtis was under no duty to demand it. There was no absolute duty in Henry to reconvey. If the agreement to reconvey is valid, the estate of Henry is contingently defeasible. He cannot convey an absolute estate. For 25 years it remains uncertain whether he shall have a fee or not. By the act, within that time, of Curtis, the defeasible estate may be in fact defeated, if the reservation of the right to a reconveyance was valid. Suspension of a complete vesting, would have been tolerated for 21 years, but, no longer. The contingency must be such that it must pass to a certainty within that period. Since the period here named was 25 years, the provision for divesting the estate of Henry by a demand for reconveyance is void ab initio Barton v. Thaw, 246 Pa. 348, is a sufficient authority, as the trial court has found. Its judgment therefore is AFFIRMED.

HICKS v. ADDISON

Attachment execution—Proof of Debt of Garmishee—Payment by promissory note—Evidence.

STATEMENT OF FACTS

After obtaining a judgment for $250 against Addison, he (Hicks) learned that Hendricks had given Addison a negotiable note for

$300. He has made Hendricks garnishee in execution attachment. Hendricks and Addison testified that tfter the service of the attachment, Addison transferred the note to Pitney, who had no knowledge of the attachment for $275. The special verdict of the jury found the transfer and the ignorance of Pitney. Court nevertheless ordered judgment against Hendricks as garnishee.

Sporkin, for Plaintiff.

Sharp, for Defendant.

OPINION OF THE COURT

Le Viness, J. The facts in this case call for the application of an attachment execution. This question has received statutory regulation and we will turn our attention to such regulation and determine its applicability to the case.

The Act of June 16, 1832, P. L. 767, also found in 2 Purdon's Digest page 1532, section 35, provides: "In the case of a debt due to the defendant or of a deposit of money made by him, or of goods or chattels pawned, pledged or demised as aforesaid, the same may be attached and levied in satisfaction of the judgment in the same manner allowed in the case of a foreign attachment, but in such case, a clause, in the nature of a scire facias against a garnishee in a foreign attachment, shall be inserted in such writ of attachment, requiring such debtor, depository, bailee, pawnee or person holding the demise aforesaid to appear at the next term of the court, or at such other time as the court from which such process may issue shall appoint, and show cause why such judgment shall not be levied on the effects of the defendant in his hands."

The question which arises for our disposition is whether or not a judgment creditor can reach and apply on his judgment a promissory note held by the judgment debtor by means of attachment execution against the maker, after a transfer of the paper to the third person.

It is well settled in this state that a negotiable note not due may be attached in the hands of the maker, at the suit of a creditor of payee or holder. And it is equally well settled that such attachment is worthless as against a holder to whom the note had been negotiated before its maturity without actual notice of the attachment, even though the attachment preceeded the endorsement.

Hill vs. Kroft 29 Pa. 186.

A case similar to the one at bar is that of Holliday vs Patter et al, 80 Superior Court, 194. It was there held by Judge Gawthrop:

"It is well settled in this state that a promissory note not due is liable to attachment execution under the Act of June 16, 1836., P. L. 767, but the attachment is unavailing against a bona fide holder

endorsee for value before maturity without actual notice of the attachment, even though the attachment preceeded the endorsement. The negotiable character of the note is not destroyed by the service of an attachment upon the maker, at suit of a creditor of the payee, and the rights of a bona fide holder for value, who takes title without actual notice must prevail against those of the attaching creditors—Cases there cited.

The judgment is reversed and the record is remitted to the court below with directions to enter judgment for the defendant.

OPINION OF SUPREME COURT

The debt in this case was a promissory note for $300 negotiable in form. After its attachment, it was endorsed to Pitney for $275. Pitney was a purchaser without notice of the attachment, and before maturity. From the paying of but $275 for a note of $300, no inference can be drawn that Pitney was aware of the attachment.

The learned court below has properly decided that the right of an endorsee, in such circumstances, is superior to that of an attaching creditor. Day v. Zimmerman, 68 Pa. 72; Ball v. Phila. Binding, etc. Co., 10 Super. 38; Colonna v. Morrissey, 72 Superior 200.

The judgment is AFFIRMED.

HOOVER'S ESTATE

Wills—Failure in working instrument—Residuary bequests—Dependent relative—Revocation—Construction.

STATEMENT OF FACTS

Hoover left a will in which he devised certain property toX. Learning this property was more valuable than he had supposed he made a codicil in which he revoked the gift toX, and gave it to a home for aged men. He did not have this codicil witnessed by two subscribing witness. X insists that since the gift intended to take the place of the gift to him has failed, the gift to him continues to have effect.

Detwiler, for Plaintiff.

Devers, for Defendant.

OPINION OF THE COURT

Einhorn, J. The first question for our consideration is whether or not the dispository clause of the codicil is valid. Sec. 6 of the Wills Act of 1917 provides in substance that no property can be devised or bequeathed to religious or charitable organizations, except the same be done by will and attested by two credible and disinterested witnesses at least thirty days before the decease of the testator. Construing Act of 26 April 1855, which is practically identical in terms with Sec 6 of the Wills Act, except that the period of one calendar month has been changed to thirty days, the Supreme Court of Pennsylvania held in Arnold's Estate, 249 Pa. 348 that "the provisions relating to attestation and execution of wills containing bequests for chartiable uses are mandatory, and the failure to comply with the provisions of the Act renders a disposition to charitable uses void." In this case there were no attesting witnesses and in the light of this settled law, we hold the dispository clause to be void.

The second question before us concerns the revoking clause of the codicil. The facts clearly show that the revocation was express and absolute, and that it was induced by the rise in value of the property. This therefore disposes of the contention that the revocation was only of effect because of the later inconsistent will to the Home. Melville's Estate 245 Pa. 318.

Although the dispository clause is void, it does not necessarily follow that the revoking clause is void. Sec. 20 of the Wills Act together with Section 4 state in substance that no will shall be repealed except by a nuncupative will, committed to writing in the lifetime of the testator, signed by him and proved to be so done by two or more witnesses. No attesting witnesses are required. Since it appears that the validity of the codicil has not been attached on any of these grounds, we therefore find that the requirements of the above Sections can be presumed to have been carried out; and the revoking clause has been made with all the necessary formality.

In 12 Dickinson Law Review 187 (1907) in an article by Dr. William Trickett, the law is stated to be: "While a second will or codicil which is not executed as the law requires for wills, generally, cannot even revoke an earlier will; if complying with the general law of wills, it is vulnerable merely because of giving property for charitable or religious uses, it will revoke the earlier will though its provisions for charities cannot be carried out "In support of this rule is cited:

Price vs. Maxwell, 28 Pa. 23.
Hoffner's Estate, 161 Pa. 331.

Appeal of Lutheran Cong. 113 Pa. 32.
Teacles Estate, 153 Pa. 219.

Looking through and examining this line of cases, we find that the testator in each instance died within thirty days of the making of the codicil, the defect thus being one of an extrinsic nature. The question then arises, is this rule applicable in the case at bar where the defect in the codicil is intrinsic? We think it does, for were we to hold otherwise, the testator's intention would thereby be defeated bv the strict construction of the rule.

When the revocation is merely by implication, the authorities recognize a clear distinction between failure of the dispositive part of the revoking instrument because of a defect in the instrument and failure because of extrinsic circumstances; in the former case revocation is inoperative, while in the latter it prevails. However, if the later will contains an express clause of revocation, as in this case, the earlier will is thereby rendered invalid, irrespective of the disposition of the property in the second will. This is the rule laid down in Page on Wills. 271, which was later affirmed in Melville's Estate 245 Pa. 318, and which we now feel constrained to follow.

The sum and substance of the plaintiff's whole argument amounts to the doctrine of dependent relative revocation; that is, the revocation is conditional and dependent on the efficacy of the admitted new disposition, and that failing, the revocation also fails. This rule, however, is not in force when the revocation is express and absolute and it was so held in Melville's Est. 245 Pa. 318.

The authorities, to which others of like effect may be added, compel a conclusion adverse to the plaintiff's contentions and judg-

OPINION OF SUPREME COURT

The bequest to X, was revoked by the codicil. What the reason of the revocation was, is not disclosed by the testator. In the revoking codicil, there is a gift of the same property to a charity. This gift is invalid because of the want of a proper attestation. Does the inability of the substituted gift to take effect, involve the re-establishment of the bequest to X? What we need to know, is the purpose of the testator. He has expressed the purpose that the formerly contemplated gift to X, should not have effect. He has not stated that tsis purpose is conditioned on the accomplishment of the alternative gift to the charity. The will clearly expresses the intention to revoke. It does not clearly or otherwise express that this intention is conditional. Why shall we invent a condition for him? He may have intended the condition. He may

not have intended it. It is hazardous to dispose of his estate on the mere possibility that he did not distinctly express his will, in omitting to say that his recall of the gift to X was only in order that the gift to the charity might take effect.

The absence of attestation does not vitiate the whole of the codicil. It is only the charitable disposition in it, that is void. The purpose to revoke X's gift remains effectively expressed.

The Act of 1917 (Wills Act) directs that "all dispositions of property contrary hereto, shall be void and go to the residuary, legatees or devisee, heirs or next of kin according to law." Of a similar clause in the Act of 1856, Lewis, C. J., remarked, Price v. Maxwell, 28 Pa. 23. 40. "This clause excludes all idea of permitting the property to pass under any former will."

We cannot say that the testator would have preferred that X should have the property, if, for any reason, the charity did not get it. Cf. Melville's Estate, 245 Pa. 318.

APPEAL DISMISSED.

HAMMOND V. SHARPLESS

Wills—Vested and contingent remainders—Construction—Intiution.

STATEMENT OF FACTS

William Hammond devised his farm to his wife for her life and "after her death to my son John, his heirs and assigns, but should John die before his mother then over to his heirs." The widow and John conveyed the farm to Sharpless. John died while his mother was living, leaving his son James to survive. This action is brought by James against Sharpless.

Reed, for Plaintiff.

Walker, for Defendant.

OPINION OF THE COURT

Mask, J. The question to be determined in this case is whether or not John took a vested estate in the remainder under the will of his father, Wm. Hammond.

The learned counsel for defendant contends that when the will became operative John Hammond had then a present absolute right to the posession and enjoyment of the estate the instant the particular estate terminated. We concede that if he had such right, of course the remainer due to him was vested but he has overlooked the fact that the limitation over to John was to take effect only in

case he was living at the death of the life tenant, a result not derived from the rules of construction but from the language of the will itself.

A life estate was given by the wiul of Wm. to his widow. He then created two alternative remainders, one to his son John in case he should survive his mother, the other to the heirs of John, should he die before his mother. These remainders were contiingent until the death of the widow. Then one of them became a Nullity and the other a vested fee. Before the contingency was resolved John and his mother conveyed their estate to defendant. But, such conveyance could not change its quality nor could it transmute it from contingent to vested. Sharpless obtained only what his grantors had, a vested life estate and a contingent fee.

Smith v. Piper 231 Pa. 378.

Raleighs Estate 206 Pa. 451.

The fee has since been extinguished by the death of John before his mother. A vested fee attached to James, who, therefore is entitled to recover the possession from his fathers grantee.

The case of Frazier v. Scranton Gas and Water Co. 249 Pa. 570 is one similar to that before us for consideration. In that case the court said that when a life estate is given to A, with the remainder to B, but if B should die during A's life time then to B's heirs, the estate in B is contingent because it can take effect only if B is living at the death of A. The son took a contingent not a vested remainder, and upon the son's death during the life time of the life tenant (the mother) the remainder vested in his heirs. See also 27 D. L. R. 166, let judgment be entered for the plaintiff.

Affirmed.

BLACK V. DELANCY

Promissory Notes—Evidence—Cross-examination—Non-suit.

STATEMENT OF FACTS

A note for $400 which purported to be signed by Delancy, is is sued upon. A witness was called by Black, who proves the execution of the note by Delancy. Delancy then cross-examines both with respect to its execution and also the payment of the note. The witness states that the note has been paid. Thereupon the court enters a non-suit, the plaintiff having offered no other evidence. The court has refused to take off the non-suit.

Auker, for Plaintiff.

Hallen. for Defendant.

OPINION OF THE COURT

Halliday, J. From these facts two questions present themselves before us.

First: Was there sufficient evidence to jusify giving the case to the jury?

Second: Was the court justified in entering a non-suit because of plaintiff's failure to prosecute the suit with due diligence or offer sufficient evidence?

We find in Bellman v. Pittsburg and Allegheny Valley Railway Co. 31 Superior Court 389, that the court held as follows:

"A peremptory non-suit is in the nature of a judgment for the defendant on demurrer to the evidence and hence in testimony the validity of such non-suit, the plaintiff is entitled to every benefit of every inference of fact which might have been, fairly drawn, by the jury from the evidence before them." Also from the same case we learn that; "It is immaterial that the evidence in support of plaintiff's claim may be very slight, provided that it amounts to more than a mere scintilla. If there is any evidence which alone would justify an inference of the disputed facts on which his right to recover depends, it must according to a well settled rule be submitted to the jury.

The Act of March 11, 1875 reads: "When the defendant upon the trial of a cause in any court of common pleas in this commonwealth, shall offer no evidence it shall be lawful for the judge presiding at the trial to order a judgment of non-suit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave nevertheless to move the court in banc, to set aside such a judgment of a non-suit, the plaintiff may remove the record by a writ of error into the Supreme Court, for revision and review in like manner and like effect as he might remove a judgment rendered against him upon a demurrer to evidence.

As to whether the court was justified in entering a non-suit because of plaintiff's failure to prosecute suit with due diligence or offer sufficient evidence. We believe that plaintiff was negligent in calling no more witnesses and also in failing to contradict his own witness' admission of payment of the note.

It has been held in 169 N. Y. 129, "that failure to prosecute a suit with due diligence, or failure to offer sufficient evidence are grounds to grant motion for a non-suit.

The same rule was held in 240 Pa. 569 and 189 Pa. 489.

In view of the foregoing, we discharge the rule to strike off the non-suit and enter judgment for the defendant.

OPINION OF THE COURT

The cross-examination of the witness pertained, not merely to the execution of the note, about which his examination in chief had concerned itself, but also to the payment of the note. Payment was a matter about which it was unnecessary for the plaintiff to give evidence. Non-payment is presumed, till proof of payment is tendered. The party to tender this proof is the defendant. In allowing the cross-examination as to payment, the rule which obtains in Pennsylvania, which confines such examination to the themes of the examination in chief, and to matters casting light on the credibility of witnesses was departed from.

The rise of this rule is curious. It seems to have been the unconscious invention in 1827, of C. J. Gibson, who in laying it down departed, as if unaware that he was doing it, from old and voluminous precedents. See a long and instructive discussion in 3 Wigmore, Evidence 2488. As a rule of the order of putting in evidence it seems to have little importance except for the circumstance that the trial court, thinks it important. In 1869, Sharswood, J., while stating the rule, says "Yet I have not been able to find a single case in which this (the Supreme Court) has reversed on that ground" (i. e. that the trial court allowed a party to put in his own case by cross-examination of the opposite party's witnesses). Jackson v. Litch, 62 Pa. 451. In 1883, Trunkey, J., observed, "This court (the Supreme Court) has rarely, if ever, reversed for an error in permitting a violation of the rules relating to cross-examination, which did not result to the prejudice of a party." Hughes v. Westmoreland Coal Co., 104 Pa. 207. This observation of Trunkey, J. is quoted as expressing a fact, by Justice Stewart, in 1911, in Catanzaro v. Pa. R. R. Co., 230 Pa. 305. For "rarely, if ever," these justices might have said "never." Would it not indeed, be puerile to set aside a judgment because the trial court had allowed a violation of the prescribed order of putting in evidence, which did not prejudice a party? Mere departure from the order can hurt no one but the pedant who believes in the inviolability of forms.

The courts more freely allow the use of leading questions in cross-examination, than in examination in chief. It is conceivable that an undue advantage ought be obtained by the defendant, in eliciting from the plaintiffs witness, the facts that are useful to him by leading questions. But appellate courts very rarely reverse for allowing leading questions. One instance is Thomas & Sons v. Loose & Co., 114 Pa. 35, 47. In the case before us, there is no allegation that the question which elicited from the witness, the state-

ment that the note sued on had been paid, was a leading one. There can be no reversal, therefore, on that ground.

The fiction has obtained, that, when a party calls a witness, he makes him "his own," and a further principle is adopted that what one's own witness says or fails to say, that is harmful, unless counteracted by what other witnesses say, may be taken as true, by the trial court, without submitting it to a jury, and that, in the case of a plaintiff, a compulsory non-suit can be founded upon it. On the other hand if this same witness, certified by the plaintiff to be trustworthy by tendering him, is called by the defendant, only what he said in the examination by the plaintiff is to be deemed said under this certificate. What he says, when called by the defendant, is to be deemed certified, not by the plaintiff who first used him, but by the defendant.

But, if while on the stand at the call of the plaintiff, the defendant, subjecting him to cross-examination, cross-examines with regard to matters of defence, the court must consider the testimony thus educed as if it had been educed, after the witness had left the stand, and later been recalled by the defendant, in the role of his witness. Said Trunkey, J., in Hughes v. Westmoreland Coal Co., supra, (quoted in Catanzaro v. Pa. R. R. Co. supra). "Where the defendant is improperly allowed to cross-examine the plaintiff's witness and educe matter of defence, the jury should consider the testimony so drawn out as if the witness had been called, and examined in chief on the part of the defendant." So, as the jury should not receive the evidence as if from the plaintiff's witness, and so give it the weight of a formal admission by him, the court should not treat it as a conclusive admission by the plaintiff, and enter a non-suit, because of it.

The error of the trial court in this case, was in treating the witness' statement that the note had been paid, as emanating from the witness with the authority of the plaintiff; as being virtually an admission or concession by the plaintiff, which the court could treat as rendering a submission to the jury superfluous.

No reversible error occurred then till the entry of the non-suit which was virtually on the testimony of the defendant's witness. Catanzaro v. Pa. R. R. Co. supra; Hughes v. Westmoreland Coal Co., supra; Hopkinson v. Leids, 78 Pa. 396.

The trial court should not have entered the non-suit, and, on application, should have taken it off. Reversed.

HODGSON v. TATNALL

Trusts and Trustees—Trusts ex Maleficio—Fraud—Equity — Weight of Testimony

STATEMENT OF FACTS

William Hodgson, brother of John, devised his estate of $200,000 to his wife in fee. After his death, the widow, now remarried and (Mrs. Tatnall) said to several persons that she induced the devise to her by promising Hodgson (the deceased) that she would see that after her death the property would go to John, the testator's brother. She has since denied this and declared that she could do with the (property) estate what she chose.

Lillienfeld, for Plaintiff.

Lerch, for Defendant.

OPINION OF THE COURT

Monheit, P. This is a bill in equity to have her declared a trustee as to the remainder, after her death for John Hodgson.

The material issues involved in the case are:

1st. Are the defendants declarations admissible to prove a trust?

2d. Is the testimony of several persons sufficient to overcome the written intention of the testator?

3d. May oral testimony be introduced to establish a trust?

The law in regards to declarations against one's own interest are admissible. This is one of the exceptions to the hearsay rule and is so held in C. J., 22nd volume, page 232 (note). In 95 Pa. 203, and 26 Super. 203, it states that the parol evidence rule does not preclude the reception of parol evidence with reference to a matter evidenced by a writing where such evidence is of a character that does not tend to vary or contradict the written instrument.

We are fully convinced from the facts stated, that the testimony of several witnesses is sufficient to overthrow the written intention of the testator. This is so held in 234 Pa. 261, where the testimony of three persons was considered clear, concise and indubitable and overthrew the written intention of the testator.

The remaining questions to be determined by this court, is whether a writing is necessary to establish a trust. The doctrine which is laid down by the court and in many previous cases is that where a testator has been induced by the promise of the devisee to make a devise, that it should be applied to the benefit of another, a trust is thereby created, that may be established by pa-

rol testimony and we find that this is not contrary to the Statute of Wills nor within the Statute of Frauds and Perjuries. So held in 234 Pa. 261.

It is the element of fraud appearing in the case at bar that gives us the jurisdiction to inquire into it, not with the view of enforcing a parol trust but to relieve against fraud by raising a constructive trust. The Act of 1856, does not apply to constructive trusts and is so held in 93 Pa. 462. (Stafford v. Wheeler). The fraud alleged here was that the defendant (Mrs. Tatnall) procured the testator to devise the estate in fee to her, that upon her death the property should go to John, the testator's brother. She has since devised this and declared that she could do with the estate as she chose.

In view of the above conclusion the prayer for a bill in equity, that a trust relationship should be declared is granted.

OPINION OF SUPREME COURT

But little need be said by us, in support of the decision of the learned court below.

If a testator devises to X, on the inducement of X's promise that Y shall obtain an estate in the thing devised, a trust affects the devise, which may be enforced by a court of equity.

That the devise was so induced, may be proved by the oral admissions of the devisee.

Authorities may be seen collected by Endlich, J., in Hollis v. Hollis, 254 Pa. p. 94; Cf. Blich v. Cockins, 234 Pa. 261.

The appeal is DISMISSED.