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THE USE OF MORTALITY TABLES.

KINDS OF TABLES.

Various tables have been in use for insurance purposes. The early English companies relied chiefly on tables prepared by Halley,1693, by Süssmilch,1741,[1] by De Parcieux and others.[2] Subsequently the Northampton Table came into general use. It was constructed by Dr. Thomas Price, from the registers left in the parish of All Souls, Northampton, England, for the 46 years, 1735 to 1780. "For a long time however," says G. M. Low, Actuary, "this table occupied a foremost place as a base for life contingency calculations of all kinds, and even after the introduction of other tables, which are now recognized as more accurate, it continued to receive a large share of popularity. The rates of many asurance offices of high standing were calculated from it, and until a comparatively recent date [prior to 1881] it remained in use by not a few of them."[3]

THE CARLISLE TABLE.

The Carlisle Table was constructed by Mr. Joshua Milne from materials furnished by the labors of Dr. John Heysham. These materials comprised two enumerations of the population of

[1] 11 Internat. Encyc. 259.

[2] 13 Encyc. Brit. 169.

[3] 13 Encyc. Brit. 169. In Rundel v. Electric St. Rway Co. 33 Super. 233, Trexler, J. told the jury that the Carlisle tables were "based upon the experience of insurance companies." This was incorrect; but the instructions to the jury as to the use to be made of them, was thought to be substantially correct.

the parishes of St Mary and St Cuthbert, Carlisle [England] in 1780 and 1787 (the numbers in the former year having been 7677 and in the latter 8677) and the abridged bills of mortality of these parishes for the nine years 1779 to 1787, during which period the total number of deaths was 1840. These were very limited data upon which to found a mortality table, but they were manipulated with great care and fidelity. The close agreement of the Carlisle Table with other observations, and especially its agreement in a general sense, with the experience of assurance companies, won for it a large degree of favor. No other mortality table has been so extensively employed in the construction of auxiliary tables of all kinds, for computing the values of benefits depending upon human life. Besides those furnished by Mr. Milne, elaborate and useful tables based upon the Carlisle data have been constructed by David Jones, W. T. Thomson, Chisholm, Sang and others. The graduation of the Carlisle Table is however, very faulty, and anomalous results appear in the death-rates at certain ages.[4] "The Carlisle Table is still used by some English Companies."[5]

TABLES BASED ON SELECTED LIVES.

The tables heretofore referred to, were based "on the life experience of the general population,"[6] that is, upon the observation of the length of time that persons of certain ages lived beyond these ages, irrespective of their health, at these ages, their avocations, their habits, their exposedness to conditions tending to shorten or prolong life. The habit for a long time of insurance companies has been to insure only those who are exempt from certain diseases, or from liability, on account of certain vocations, habits, etc. to a shortening of life. "The Carlisle Table," concluded Paxson, C. J. from the description in the Britannica, of the method of its formation "is based upon general population, and not upon selected or insurable lives."[7] The statement of Latimer, J. in his charge to the jury, is hence inaccurate that "The Carlisle tables are based upon the mortality experience of insurance companies."[8] When the insurance companies began to limit their risks to persons exempt from certain diseases, or not

[4]13 Encyc. Brit. 169.
[5]11 Internat. Encyc. 260.
[6]11 Internat. Encyc. 260.
[7]Steinbrunner v. Railway Co., 146 Pa. 504
[8]Cambell v. City of York, 172 Pa. 205.

pursuing certain especially hazardous businesses[9] they began to acquire experience of the number of years that the assured persons lived beyond their ages at the time of the insurance, that is, of the length of life, after the insurance, of these selected persons. The experience of the Equitable Assurance Society, the pioneer of the modern system of insurance, has formed the basis of several tables. Two such, founded thereon, have been used to a considerable extent, by insurance companies, one computed by Davies and published in 1825, and another constructed by Morgan from the statistics of membership of the society from its commencement in 1762 down to 1829, and published in 1834.[10] Later 17 insurance companies contributed their statistics, embracing in all 83,905 policies, of which 44,877 were in existence at the time of giving in the returns, 25,247had been discontinued, and 13,781 had fallen by the death of the assured. Upon the data thus obtained, a table known as the Seventeen Offices' Experience Table, was composed and published in 1843 which came to be used to a considerable extent by insurance companies.[11] "It is still used" says the New International Encyclopedia,[12] "by many English companies, and is the authorized table for the calculation of reserves in most American States."

TABLES USED IN AMERICAN STATES.

The early American offices adopted English tables, first the Northampton, then the Carlisle, and later the Combined Experience, ie. the Seventeen Offices' Experience Table. Meantime several tables based on American experience have been worked out, but none of them has come into general use except the so-called American Experience Table, constructed by Mr Homans from the experience of the Mutual Life Insurance Company of New York. At the present time the two tables in general use among insurance offices in the United States, and authorized by the insurance department of the various states for the calculation of reserves, are the English Combined Experience Table, [the

[9]In Hartman v. Keystone Ins. Co., 21 Pa. 466 the effort was made to show that one engaged as a slave-catcher, or as a locomotive engineer, would not be insured.

[10]13 Encyc. Brit. 169.

[11]13 Encyc. Brit. 169.

[12]Vol. II, p. 260. Names given to these tables are the Actuaries' Table; The Combined Experience Table, and the Seventeen Offices' Table.

Seventeen Offices' Experience table, supra] and the American Experience table.

IMPERFECTIONS OF THE TABLES.

The tables made by the insurance companies, e.g. the Combined Experience [Seventeen Offices' Experience] and the American Experience table are known to be favorable to the insurance companies, that is, to indicate a higher death-rate than actually prevails and neither of them makes any attempt to classify risks according to any other factor than the age of the insured. Moreover, the numbers for the advanced ages are based almost entirely on *a priori* principles and not on actual observation, since historical data for these ages are very incomplete.[13] In one case, it was said not to be error, of which the defendant could complain, for the plaintiff to put in evidence annuity tables because, being made for the purpose of life insurance, "they fall short in most instances, of the actual duration of human life."[14]

THE TABLES USED.

If the table is based upon the observation of the lives of all classes without discrimination, as respects health, avocation, habits, place and circumstances of residence, etc., it is admissible in any case; yet it is evident that if the person whose life is in question is sicklier, feebler than the majority of men whose lives have furnished the data for the table, he will probably live less long than the average indicated by the table. If that person has better than the average physique he will probably live longer than the average age. This probable deviation from the average is no reason for excluding the table which furnishes that average. In Steinbrunner v. Railway Co.[15] Paxson, C.J. lays down the principle that if the table is based on selected lives, that is ,on lives that are insurable, "it would be of value only for life-insurance purposes, and utterly useless to apply to unselected lives or lives generally." He justifies the use of the Carlisle Table, in a case in which a widow sued a railroad company for the killing of her husband, by satisfying himself that that table was not based on selected lives. Yet the evidence apparently indicated that Steinbrunner was "an ordinarily healthy, strong man," so

[13] 11 New Internat. Encyc. 260.

[14] Mulcairns v. Janesville, (Wis.) 29 N. W. 565.

[15] 146 Pa. 504. The use of the Carlisle Table is again approved in McCue v. Knoxville Borough, 146 Pa. 580.

that, even had the table been based on observations of the lives of healthy, strong men, it ought to have been receivable. It can matter little, whether a man is examined by a physician, and reported by him to be found to be sound, or whether his soundness is proved in court. The physicians who examine are of unequal skill, and care and conscientiousness. They are unknown to the court. The reliability of their examination is not exposed by cross-examination. It is said by Dean, J.[16] that without evidence that the deceased was of good health, even the Carlisle table "can have but little weight."

OTHER THAN CARLISLE TABLE.

Despite the intimations of Steinbrunner v. Railway Company, to the contrary, it is probable that even the tables founded on observations of lives that have been selected for insurance, and have been actually insured, are admissible, if they are accompanied by evidence that the person in question was in such health, was pursuing such vocations, had such habits, as that he *would* have been accepted by insurance companies. In Kerrigan v. Pennsylvania R. R. Co.,[17] a case in which damages for personal injuries were sought, both the Carlisle Table and certain tables made up "by actuaries of reputable insurance companies" were put in evidence. Of the latter tables, Dean, J. says "we have no doubt they furnish a fair expectation of life, in the selected lives on which they are based. There was scarcely any proof of facts which brought plaintiff within this class of selected lives * * * * The tables were not entitled to such weight [i.e. to be assumed as establishing the plaintiff's expectancy] unless, by precedent proof he had brought himself clearly within the class of selected lives tabulated, and this he had failed to do," i.e. he had not proved his habits or health. Probably, therefore, even the Combined Experience Table, and the American Experience Table, or some other table founded on selected lives, may be used, if the person in question has been insured by a reputable company, about the time of the accident or death, or if he is shown at that time to have been of such health as to have made him insurable. While Paxson, C. J. says that a table based on insurable lives, would be "utterly useless" if applied to "unselected lives, or lives generally" evidence that the decedent, or

[16]Kerrigan v. Penna. R. R. 194 Pa. 98.

[17]194 Pa. 98.

the person injured was healthy and strong, at once selects him, and may put him in the class of insurables. The same physician that, had he applied for insurance, would have examined him, may testify in court to his physical soundness. It would be hazardous, therefore to say that only the Northampton Table or the Carlisle Table or some other table founded on an undiscriminating observation may be used. In the large majority of cases, the Carlisle Table has been used[18] but sometimes a table computed for insurance purposes has also been used.[19] In some cases, apparently without error, the only tables employed have been "mortality tables in common use by insurance companies of this country"[20] the "American Tables of mortality."[21] In McKenna v. Citizens' Natural Gas Company[22] a witness testified to the life expectancy of the plaintiff from a life table, called the "Combined Actuaries' Experience" table. This was held erroneous. It is remarked by the court that it did not appear how the table had been constructed; whether it was founded on selected, insurable lives, or upon general population. It did appear that the table was used for "ascertaining rates." In this state of the evidence, the reception of the table would have been error. It was error to receive the testimony of the witness based upon the table. There is no case in Pennsylvania, in which the Northampton Table has been employed, although it has been in use in some other states.[23] There does not seem to have been any objection in

[18]Emery v. Philadelphia, 208 Pa. 492; Rummele v. Allegheny Heating Co., 2 Mona. 98; Iseminger v. Water & Power Co., 209 Pa. 615; Seifred v. Pa. R. R. 260 Pa. 399. Cf. Shippen's Appeal, 80 Pa. 391.

[19]Steinbrunner v. Railway Co., 146 Pa. 504. The Carlisle Table made the expectancy of a man at 46 years of age 23.81 years and the American Table almost exactly the same, viz. 23.8 years. Kerrigan v. Penna. R. R. 194 Pa. 98.

[20]Campbell v. City of York 172 Pa. 205; [It does not appear whether evidence of the good health of the plaintiff prior to the accident, was offered or not. It was unavailingly objected that the accident had itself reduced the expectancy.]

[21]Knaut v. Frankford etc. Rway., 160 Pa. 327. The expectancy "according to the tables of mortality" was shown in Bunting v. Hogsett, 139 Pa. 363.

[22]198 Pa. 31.

[23]Sauter v. R. R. Co. 66 N. Y. 50; Hinsdale v. R. R. 81 N. Y. Supp. 356; Wagner v. Schuyler, 1 Wend. 554; Schell v. Plumb, 55 N. Y. 592; Hunn v. Michigan Central R. R. 44 N.W. 502.

several states, to the use not merely of the Carlisle Table,[24] but even of tables constructed upon data furnished by insurance companies.[25]

PROOF OF TABLES.

The supreme court instructing itself from the Encyclopedia Britannica, has taken judicial notice of the method by which the Carlisle Table was prepared, and has affirmed its admissibility:[25] Whether any printed table purporting to be, or alleged to be, the Carlisle Table, is in fact a correct copy of such,[27] possibly the court takes judicial notice.[28] It has in no case insisted on proof. The court, apparently does not take judicial notice of the accuracy of the "Combined Actuaries' Experience" table, for it has insisted on evidence as to the material from which it was constructed; on evidence whether it was founded on insurable lives or on general population.[29]

MUST THE TABLES BE PUT IN EVIDENCE?

Sometimes printed tables purporting to be the Carlisle, or the American Experience, or some other accredited table, are put in evidence. Sometimes a witness, having before him the table, or having consulted it previously, is interrogated concerning the expectancy disclosed by it. In Steinbrunner v. Railway Co.[30] a life insurance agent, having stated that Wylie's, and Hohman's tables were in general use, that Wylie's have been published for

[24]Nelson v. Lake Shore etc. R. R. (Mich.) 62 N.W. 993. The plaintiff used the American Mortality tables, and the defendant the Carlisle table. Also, Walters v. R. R. Co. 41 Ia. 71; Roose v. Perkins, 9 Neb. 304; 2 N.W. 715;King v. Bell, (Neb.) 14 N.W. 141 and many others.

[25]Mary Lee Coal Co. v. Chambliss (Ala.) 11 So. 897; Gulf etc. R. R. v. Johnson, (Texas) 31 S.W. 255; Mulcairns v. City of Janesville, (Wis.) 29 N.W. 565; The Dauntless, 121 Fed. 420; Nelson v. Lake Shore R. R. (Mich.) 62 N.W. 993; Alexander v. Bradley, 66 Ky. 667.

[26]Steinbrunner v. R. R. 146 Pa. 504. The witness said that the Carlisle tables were based on selected lives in the city of Carlisle, but the court concluded otherwise.

[27]A copy found in Scribner on Dower was used in Kerrigan v. Penna. R. R., 194 Pa. 98.

[28]Knott v. Peterson, (Iowa) 125 Ia. 404; Scheffler v. Minneapolis etc. R. R. (Minn.) 21 N.W. 711; City of Lincoln v. Power, 151 W.S. 436; Carlisle table as found in Encyclopedia Britannica, was held admissible "without preliminary proof." Pearl v. Omaha etc. R. R. 88 N.W. 1078 (Ia.).

[29]McKenna v. Gas Co., 198 Pa. 31.

[30]146 Pa. 504.

many years and are used by all the life insurance companies, and that he had the tables with him, was asked to state [but not to consult the table and then state] what the expectation of a man of 46 years of age was. The tables were, seemingly, not put in evidence. In McCue v. Knoxville Borough,[31] a physician and surgeon, having testified about the injuries of the plaintiff, was allowed to answer the question as to the expectancy of life of a healthy man, of plaintiff's age, from the mortality tables, viz "the Carlisle Tables." He said that the expectation according to the tables was about 21 years. A life insurance agent testified from what purported to be the "Combined Actuaries' Experience Table." The table itself was not offered. It was said by Mestrezat, J. that "The competency of the witness and the weight of his testimony depended entirely upon the value of the table as evidence to establish the expectancy of life. Had the table itself been offered, under the facts disclosed at the trial, it would have been rejected."[32]

CASES IN WHICH LIFE EXPECTANCY MAY BE RELEVANT.

PERSONAL INJURY.

An injury to a man's body, while not killing him, may affect his earning power. The pecuniary loss involved in the reduction of his earning power depends in part, upon the length of his life. If he dies ten years after and his earnings are reduced, annually $500, he will throughout his life, suffer the loss of $5000. If he lives 20 years, other things being equal, his loss would be twice as great. Hence if only one action is allowed him, for the injury, and in that action his whole damage must be assessed it becomes necessary to forecast his life, and to learn how long he will probably live. Hence in actions for personal injuries, the plaintiff may show what his expectancy of life is, and he may employ the appropriate table, in order to do so.[33] The effect of the injury may be not merely to lessen the working power, but to shorten the life. Apparently, the plaintiff may recover for the diminished earning power through what

[31]146 Pa. 508. It does not appear that the table was offered.

[32]McKenna v. Gas Co., 198 Pa. 31.

[33]Campbell v. City of York, 172 Pa. 205; Kraut v. Railway, 160 Pa. 328; McCue v. Knoxville Borough 146 Pa. 580; Dooner v. Canal Co., 164 Pa. 17; Rummele v. Allegheny Heating Co. 2 Mona 98; McKenna v. Gas Co., 198 Pa 131; Iseminger v. Water & Power Co., 209 Pa. 615; Bunting v. Hogsett, 139 Pa. 363; Seifred v. Pa. R. R. 206 Pa. 399.

would have been his life if he had not suffered the accident. Hence the expectancy at the time immediately preceding it, is sought after. The expectation of a healthy man[34] is sought after. The injury tending to shorten his life, and even to result in sudden death, the expectancy of life prior to it was nevertheless relevant.[35] Apparently then the plaintiff may recover the present worth of the probable results of his earnings during a number of years after his death, that death having been hastened by the injury.

COMPENSATION FOR DEATH.

The death of a husband, or son, or father, may cause pecuniary loss to the wife, or father or mother, or son or daughter. The amount of that loss will depend in part on what would have been the duration of the deceased's life, had the fatal injury not been inflicted upon him. What would have been this duration is a matter of conjecture, an aid to which is a knowledge of the length of the period over which men who have already reached the age of the deceased on the average continue to live. This average, and the tables that manifest it may therefore be considered in actions founded on death.[36] As the plaintiff would annually have received benefits measurable in money, from the deceased only during his, the plaintiff's life; as well as only during the decedent's life , it would seem evident that if in the action the present worth of the benefits is to be recovered some evidence of the probable longevity of the plaintiff is as necessary as that of the longevity of the deceased. X was killed by a steamboat collision when he was 21 years old. His life expectancy was 27½ years. Those dependent upon him were, his mother, 72 years old, his father, 73 years old, and a sister, 22 years old. The admiralty court considered the life expectancy of the father, mother and sister, who had spinal disease.[37] A son aged 27 years was killed. The father was at the trial 53 years old. It was necessary to consider the father's expectancy, viz 17 years, in order to learn the damages to which he was entitled.[38] In an action by a widow for the killing of her

[34]McCue v. Knoxville Borough, 146 Pa. 580. Cf. Bunting v. Hogsett, 139 Pa. 363.

[35]Campbell v. City of York, 172 Pa 205.

[36]Steinbrunner v. R. R. Co., 146 Pa. 504; Emery v. Philadelphia 208 Pa. 492; McKenna v. Gas Co., 198 Pa. 31.

[37]The Dauntless, 121 Fed. 420.

[38]Galveston etc. R. R. Co. v. Leonard, (Texas) 29 S.W. 954.

husband by furnishing him intoxicants, it was held proper, not merely to discover his expectancy but hers also.[39] The act of April 26th 1855, stating that persons entitled to recover, for the death of another, are the husband, the widow, the children, or parents, and no other relative, directs that the sum shall go to them in the proportion they would take his or her personal estate in case of intestacy. In Emery v. Philadelphia,[40] an action by the widow, although it did not appear that there were any children, and that therefore any damages, other than to the widow, were recoverable, it was held that the probable length of life of the widow was irrelevant. The reasons assigned are not convincing. (a) The doctrine that the length of the widow's life is relevant, has not appeared tenable to the professional mind. But surely since every point is made for the first time, much weight cannot be given to the fact that it was not made before. (b) C. J. Mitchell concedes that the widow is "entitled now to compensation for what she has lost by her husband's death." But how has she lost the earnings her husband would, had he not been killed, have made, after her own death?

PRESENT WORTH OF A LIFE ESTATE.

It may become necessary to ascertain the present worth of an annuity, or of a life estate, whether in personalty or realty. Dean, J. said, in Kerrigan v. Pennsylvania Railroad Co.[41] that he could see how, from a mortality table "the present worth of a widow's dower can be computed. Hers is a fixed annual payment, affected not by age, health or ability to earn, but only by her death. Her age being known and her probable longevity being shown by the table no other fact is necessary." If the value of a dower could be computed by means of the table, there is no apparent reason for disputing the computability by the same means, of the present worth of a curtesy. A curtesy is the right to receive the rents and profits of the land for one's life. These rents and profits will vary directly with the length of life.

[39]Hall v. Germain 14 N. Y. Supp. 5. So in action for death of husband in a railroad accident; B. & O. R. R. v. State, 33 Md. 542; Cf. Baltimore etc. Turnpike Co. v. State, 71 Md. 573. The probable length of the widow's life must be considered; Jones v. McMullan, 88 N.W. 207 (Mich.) As to likelihood of widow's remarriage, see Rafferty v. Buckman, 46 Ia. 195.

[40]208 Pa. 492.

[41]194 Pa. 98.

Yet in Shippen's Appeal[42] the court refused to concede that the present worth of a curtesy could be ascertained by an estimate of the probable length of the life. It adopted the rule that a life estate, any life estate, is worth one third of the fee The life estate of X, when he is 20 years old, is worth no more than it is when X has become 90 years of age. Allowing that insurance companies may usefully employ mortality tables in determining whether to accept certain risks, and at what rates of premium to accept them, the court says, "But an individual case depends on its own circumstances, and relative rights of the life tenant and remainderman are to be ascertained accordingly. A consumptive or diseased man does not stand on the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact," an excellent reason for a conclusion diametrically opposite to that reached by the court. If the value of the earning power of a man, dependent as it is, in part, upon his length of life, may be ascertained by reference to the average ages of men, and the appropriate tables, why is not the value of the earning power of a piece of land, during X's life, to be ascertained in a similar way?

IN DETERMINING INSURABLE INTERESTS.

The rule has been laid down in Ulrich v. Reinoehl,[43] that when a creditor insures the life of his debtor, the policy may provide for the payment of a sum of money that shall equal the debt, plus the interest upon it for the period of the debtor's life expectancy, and the sum of the premiums that will be payable during that period, plus the interest thereon. The use of this rule compels the ascertainment of the period of expectancy, and, in ascertaining it, resort may be had to the Carlisle Tables.

UNRELIABILITY OF THE TABLE.

In various inquiries, it becomes important to know how long a person, who has died from a certain cause, e.g. a railroad accident, the excessive potation of intoxicating liquor, etc., would have lived but for that accident; that potation, etc.; or how long a person who has suffered a bodily injury, will survive it.

[42]80 Pa. 391. The court refused to consider the expectancy as exhibited by the Carlisle tables.

[43]143 Pa. 238. Cf. Grant v. Kline, 115 Pa. 618; Cooper v. Shaeffer, 20 W.N. 123. Shaffer v. Spangler, 144 Pa. 223.

The future is impervious to human sight, and guesses are made as to the probable longevity of a given man, from past experiences of the longevity of men more or less similarly situated with respect to age, occupation, habits, freedom from disease, etc. If we had observed that all men 46 years of age, and then in good health, or even that the majority of them ıd lived 23.8 longer, we would have reason to expect X, now 46 to live 23.8 years longer, or that Y, who was killed at 46, would have lived 23.8 longer. But do the mortality tables give us this postulated information? By no means. They give us only the average of the years beyond 46 years, through what those who have attained that age have survived. But that average is possibly not the period of survival of any single person. Let us suppose that we have known but two persons A and B to pass beyond 46 years. Of these ages one lived to be 47, the other to be 67. The combined excess is 22 years, the average is 11. The question is, how long will C, now 46, live. Could we safely say that he will live 11 years? Is there any appreciable probability that he will live 11 years? A has not lived so many. B has lived nearly twice as many. Why should C be supposed destined to live to the median point? Let us suppose we have had experience of six lives of persons who have survived 46. A has lived one year, B 2 years, C 9 years, D 11 years, E 13 years, and F 14 years. The combined excesses beyond 46, are 50 years, the average excess is 8.33 years. The question is , how long will a seventh man, G, who has reached the age of 46, live. Have we any warrant for thinking that he will live 8.33 years? Not one of his predecessors has lived that time; not one has struck the average. What reason is there for suspecting, much less for believing, that he will attain that average? As half his predecessors, he may fall short of it; as half his predecessors, he may transcend it. The same infirmity would attach to a vaticination founded on the experience of 1000, or of 10,000, or of 100,000 lives. If we know that the average excess beyond 46, attained by those who reach 46, is 23.8 years, we have not the slightest warrant for supposing that the 100,001st man, who reaches 46, will live just 23.8 years more. Not more than ten of the 100,000 struck that average. All the rest have fallen within it or beyond it. Why then guess that this 100,001st man is going to repeat what but one in 10,000 has done? It is not only not probable, it is excessively improbable, that the candidate for future years is going to live the average time.

Perhaps, in the long run as many men have lived beyond the average, as have fallen below it. But does the fact that half have lived the average and more, justify the inference, in any particular case, that X will live at least that average? If 99 men out of a hundred, are sane, we will be justified in thinking that any particular man, of whose sanity we know nothing, is sane. The burden of proving that he is insane, would, even in a criminal prosecution of him, rest upon the party alleging it. But, suppose one half of all men were insane and the other half sane, with what cogency could it be believed of any particular man, of whose sanity nothing was directly known, that he was sane? It would seem then, that knowing the average age ultimately attained by those who have already reached a certain age,would be of no appreciable value, in attempting to ascertain what age X, who has already reached that certain age, will ultimately reach.

ADMISSIBILITY OF EVIDENCE OF AVERAGE AGE.

Notwithstanding the objections to evidence that men of a certain age have reached ages, the averag of which is so and so, as a means of ascertaining to what age X, a particular man, would have lived, or will live, its competence has been recognized by many courts and for a long period of time.

CONSIDERATIONS LESSENING VALUE OF EVIDENCE.

The weakness of the average, as a means of ascertaining how long a particular person is going to live,or would, but for the accident, or crime, have lived, is already indicated. He may not attain that average. "A man" says Paxson, C.J. "may die in a day, or he may live [to earn wages] for 20 years. It follows that there must always be an element of uncertainty in every such case."[44] White, J. told the jury that the plaintiff, who had suffered an injury which reduced his earning power, "may live to be 90 or he may die at 21."[45] When it appears that at 47 the expectancy of life is 23 years, "that does not mean to say that a man is going to live 23 years. He may die the next day; he may live to be ninety."[46]

SUFFICIENTLY VALUABLE, DESPITE OBJECTIONS.

The court frequently insists that the average age attained is unsatisfactory, as evidence of the age which X would have

[44]Steinbrunner v. Railway Co.; 146 P. 504.
[45]Rummele v. Heating Co., 2 Monaghan, 98.
[46]Emery v. Philadelphia, 208 Pa. 492.

attained or will attain. "It is far from satisfactory evidence," says Mitchell, C.J.[47]

DANGER OF THE EVIDENCE.

The evidence of average age is considered dangerous, because of the tendency of juries to readily assume that the person in question would have reached, or will reach, that average.[48]

INDICATIONS THAT LESS THAN THE AVERAGE WILL PROBABLY BE ATTAINED.

There are certain facts which indicate that less than the average longevity will be attained in the particular case. If the average is that of all persons without regard to their health the existence of certain life-shortening sicknesses in the case of X may justify the opinion that X will not reach the average age. "If a man is in poor health," says Paxson, C.J. "especially if he is suffering from some organic disease which necessarily tends to shorten life, his expectancy is much less that that of a man of robust health."[49] Hence it is relevant to show by the testimony of a physician, or otherwise, that the man, whose probable longevity is in question, was, at the time of the accident, afflicted with Bright's disease and to refer to the jury the effect of the disease upon his probable length of life.[50]

HABITS.

A man may have habits at the time of his injury or death, that would be likely to continue, and that, if continued, would probably shorten his life. The value of the average age as evidence will, in the particular case, says Paxson, C. J. depend very much on the "habits of life" of the person in question.[51] That a man was frequently intoxicated, may doubtless be shown, to lessen the probability of his attaining the age given in the Carlisle table,[52] though in a case in which a man died from in-

[47]Campbell v. City of York, 172 Pa. 205.

[48]Steinbrunner v. Railway Co., 146 Pa. 504; Kerrigan v. Pa. R. R. 194 Pa. 98.

[49]Steinbrunner v. Railway Co., 146 Pa. 504; Mansfield Coal Co. v. McEnery, 91 Pa. 185; Campbell v. City of York, 172 Pa. 205.

[50]Bunting v. Hogsett, 139 Pa. 363. Evidence by the plaintiff that his disease was the result of the accident could be receivable. That deceased had varicose veins was shown in Hunn v. Michigan C. R. R. 44 N.W. 502.

[51]Steinbrunner v. Railway Co., 146 Pa. 504; Seifred v. Penna. R. R. 206 Pa. 399.

ebriation, the admissibility of the Carlisle table was doubted.[53]

SOCIAL SURROUNDINGS.

The social surroundings of a man, if likely to continue, may abridge his life,and therefore, may be shown.[54]

CARE WITH WHICH TABLES SHOULD BE USED.

Reference is frequently made to the care with which the tables of mortality should be submitted to the jury.[55] Paxson, C.J. in 1891 though of opinion that the evidence could not be excluded, claimed to be allowed to "express the fear that it may prove a dangerous element in this class of cases, unless the attention of juries is pointedly called to the other questions which affect it.[56] But what are the questions that affect it? One would be as to the care with which the computations of the tables and the observations on which they are based,were made. But the jury has never been invited to consider such questions. The only other relevant question arises out of the fact that the table gives only an average, and that in no particular case, is there any likelihood that the average would have been or will be, exactly reached. This is occasionally commented on. Thus Stow, P.J. told the jury, "one may die to-day, another to-morrow, and another the next day, **** and therefore it does not do to assume that I am going to live that long." In Kerrigan v. Pennsylvania Railroad Co.,[57] Dean, J. remarks that "Experience has demonstrated however, that what was merely apprehended by Paxson, C.J. has since (i.e. in 1899, eight years) been realized." How this could have occurred it is difficult to see, for not a single case was in the supreme court, between 1891 and 1899, in which the average age as indicated by tables, was employed, that was not affirmed.[58] The ouly specific objection to the instruction of the

[52]Roose v. Perkins, 9 Neb. 304; 2 N.W. 715; Kerig v. Bell, 14 N.W. 141 (Neb.).

[53]Rafferty v. Buckman, 46 Ia. 195. "The tables" says the court "were made to show the ordinary prospect and no other," but the habits of the deceased deprived him "of the ordinary prospect of life." The Carlisle table was *not* made to show the "ordinary prospect."

[54]146 Pa. 204; 206 Pa. 399.

[55]McKenna v. Gas Co., 198 Pa. 31.

[56]Steinbrunner v. Railway Co., 146 Pa. 504.

[57]194 Pa. 98.

[58]Dooner v. Canal Co., 164 Pa. 17; was reversed, but tables were not used in it.

court in Kerrigan's case, is that the habits and health of the deceased were not proved, and that the court's language might have left the jury under the impression that the tables were not only "some evidence of the plaintiff's expectancy but that they established it." Dean, J. proceeds to say that they were not entitled to such weight, unless, by precedent proof he had brought himself clearly within the class of selected lives tabulated; i.e., the table being based on insurable lives, unless the plaintiff had proved that his life was insurable.[59] It seems enough then, for the court to pointedly show to the jury that, knowing the average age to which men generally live is not knowing the age to which the person in question would have lived, or will live; to insist on evidence of health, habits, social relations, and to instruct the jury as to the significance of those facts, with regard to probable longevity. Commending the trial judge, Potter, J. says[60] "But the jury were not left to infer that the plaintiff's expectancy of life was definitely established by the tables. On the contrary, the trial judge in his charge, told the jury that the result set forth in the table was not to be taken as a fact in this case, but only as an aid in arriving at what might be the continuation of life of the plaintiff. Attention was called to the absolute uncertainty of life, and the fact that in any event the duration of her life would depend largely upon her condition of health and upon her habits and her conduct." The trial judge was commended in Campbell v. City of York[61] for having been governed in his instructions, by the decision in Steinbrunner v. Railroad Co. and other cases, when he in substance told the jury that the Carlisle tables were based on insurable lives, (they were not) on people who had passed a medical examination; at 47, the expectancy is 23 years, but that does not mean that a man who is 47 is going to live 23 years longer. He may die the next day; he may live to be ninety. The duration of any particular life cannot be predicted. It will depend largely upon his health, upon his acts and conduct, upon the liability to contract disease, and matters of that sort. "I

[59]In Emery v. Philadelphia, 208 Pa. 492, Mitchell, C.J. says that the restriction under which the tables should be received and submitted to the jury are clearly and authoritatively set forth by our Brother Dean in Kerrigan v. R. E. Co.,and see also McKenna v. Citizens Nat. Gas Co., 198 Pa. 31.

[60]Iseminger v. Water & Power Co., 209 Pa. 615.

[61]172 Pa. 205.

say this because I do not want you to assume that because the expectancy of life at 47 years is 23 years, that this man will live 23 years. He may live twice that; he may die tomorrow." In Seifred v. Pennsylvania Railroad,[62] Mestrezat, J. says that "It is not sufficient to say, as the court did, that the tables were some aid, but not conclusive in determining the probable life of the plaintiff. All the circumstances affecting the probable duration of the plaintiff's life as disclosed by the evidence or concerning which there was testimony, should have been called to the attention of the jury. Unless this was done and in a very pointed and direct way, by the court, mortality tables are very likely to have more weight with the jury than should be given evidence of that character."

USE OF TABLES UNNECESSARY.

The mortality table is not the only evidence from which the probable length of life of X, may be inferred. A legitimate inference of it may be made although the table is not offered.[63] In an action for the death of a husband, the supreme court of Virginia said that it was unnecessary to put in evidence the "mortality tables." "Those tables were made for the purpose of life insurance and annuities, where the very shortest time is fixed as affecting pecuniary risks. They are regarded as falling short in most instances, of the actual duration of human life."[64] A plaintiff, mother of the deceased, suing for his death, did not put in evidence of her probable length of life by the testimony of experts in the life insurance business. The court said the jury might conclude from her age, and physical condition, what her longevity would probably be.[65] In Dooner v. Canal Co.[66] a man 30 years of age suffered an injury. He furnished no evidence explicitly upon his probable duration of life. It apparently appeared that he was in good health. The trial court's observation to the jury that they would probably be warranted in acting upon the rule that a man in good health will live to the ordinary age of 65 or 70 years, was censured by Dean, J., who remarked, doubtless after consulting the mortality tables, that the average expectancy of life of 1000 men in good health at 30 years of age

[62] 206 Pa. 399.
[63] Haines v. Pearson, 75 S.W. 194.
[64] Norfolk & W. R. R. v. Phillips' Adm. 41 S.E. 726.
[65] Gulf etc. R. R. v. Compton (Texas) 13 S.W. 677.
[66] 164 Pa. 17.

falls short of 35 to 40 years more. "Without referring to carefully compiled life-tables, any man 65 years of age, from his own observation, will hesitate to say that at 30, the probability of suvivorship is 35 or 40 years longer. In looking back 35 years to his acquaintances of that period whose age then, was about the same as his own, he will realize that he has survived a large majority of them and that no such probability is to be deduced from his own observation. It may be there is such probability as to this plaintiff's life, but if so, we have failed to discover any evidence in this record tending to establish it. Without evidence of such a probability, the adoption of it, as suggested to the jury by the court, was an error." The error was not in allowing the jury, in the absence of the table, to determine the probable longevity but in suggesting a longevity which there was no evidence to support. In Catawissa Railroad Co. v. Armstrong,[67] a widow recovered damages for the death of her husband, although no table was in evidence. The jury might consider his age (40 years), and the fact that he was in good health. Whether the long life of the ancestor can be shown has been variously decided. It was admitted to show that the deceased would probably have lived longer than the average indicated by the table[68] or to show the probable length of life, in the absence of the table.[69]

[67]52 Pa. 282. In Emory v. Philadelphia; 208 Pa. 492, a widow recovered for the loss of her husband, although no table indicating her probable longevity was put in evidence.

[68]Nelson v. Lake Shore etc. R. R. (Mich.) 62 N.W. 993.

[69]Rincicotti v. Contracting Co., 77 Conn. 617; Chattanooga R. R. v. Clowores 90 Ga. 258, *Contra;* Hinsdale v. N. Y. etc. R. R. 81 N. Y. Supp. 356, where it is said that evidence that the father lived to be 72 years old, was "too speculative."

MOOT COURT.

ADMINISTRATOR OF SOLOWAY vs. JOHN TATE.

Donatio causa mortis. Delivery of Personalty to Third Person.

STATEMENT OF FACTS.

Solloway fatally ill asked his attorney how he might effectually dispose of his personal property without a will. The attorney advised him that he might make a gift of it causa mortis, but that delivery would be necessary. Solloway then drew up a list of the articles: a safe, a piano, a gold watch, silver plates, etc. and a list of the respective donees, the names of the latter being set opposite those of the former.

He then put the articles and the list in the possession of the attorney with directions that the latter should hand them to the respective donees at Solloway's death.

After Solloway's death, before delivery to the donees, the administator brought replevin against the Attorney John Tate.

COOK, for Plaintiff.

GROVER, for Defendant.

OPINION OF THE COURT.

KING ,J.—Gifts causa mortis are said to be a sort of off-shoot of the right to make oral testaments of chattels, enjoyed at common law, which have survived the statutory prohibition of verbal wills.

To be valid, they must be made by the donor in expectation of death from a present illness, or from a present, external,and apprehended peril, and death must accordingly ensue of the particular ailment or peril without revocation; the gift must be conditioned to take effect only upon the death of the donor, from his then existing disorder or apprehended peril; and it is revoked by the death of the donee in the lifetime of the donor. The conditions attending such gifts, namely, that the donor may revoke them, and that they are revoked by his recovery or by the predecease of the donee, need not be expressed, being always implied.

Three essentials must appear in every valid donatio causa mortis: (1) the gift must be with a view to the donor's death; (2) there must be an express or implied intention that the gift should only take effect on the donor's decease by his existing disorder; (3) and there must be a delivery of the subject-matter of the donation to the donee, or to some one on his behalf. Since it has been found as a fact that Solloway was "fatally ill" dying of his then existing disorder, and that Solloway expressly directed Tate to deliver over the property on his demise, the first two requisites are seen to have been fulfilled.

But it is contended that the third essential—delivery—is lacking. The Court is of the opinion, however, that a sufficient delivery was made.

In Well's administration of Craig v. Tucker, 3 Binney 366, the action was trover against defendants to whom two bonds had been delivered by the widow of the deceased after his death. The court said: "The delivery was not to the donee but to the donee's wife to be by her

delivered over. There is no objection to this mode of delivery. Whether made to the donee immediately, or to another for his use, is immaterial." Michener v. Dale, 23 Pa. 59, was assumpsit brought by the donees against the administrator of the donor who had received and converted the property. In this case, there was a delivery of gold dust and coin to the purser of the ship by a seaman for his brother and sister in Philadelphia. It was held; "Delivery was indespensible, but whether made to the donee immediately, or to another for him, was held immaterial."

It will be noticed that the cases hold that the final delivery—delivery to the donee himself—may take place either before or after the donor's death. And if the donor can invest the legal title in someone else for the use of the donee, a fortiori he may make a voluntary declaration of trust and hold the property himself for the donee. Thus in Austin v. Mead, Brett's Leading Cases in Equity, American ed. 212, it appeared that Mead had in his possession two bills of exchange, payable to himself or order, and that two days before his death he had handed them, unindorsed, to his wife. There was no transfer of the legal title to the bills, but there was language coupled with the conduct, viz. the delivery of the bills, which was equivalent to a declaration that the donor was a trustee for the donee, and a trust enforceable against the personal representatives of the donor was created.

In the present case, Solloway "put the articles and the list specifying as to whom they should go" into the possession of Tate. The subject-matter and the beneficiary are designated with legal certainty, and a present intention to part with both the possession and the property in the things given was shown. This was sufficient to constitute a valid delivery. And since some of the articles were heavy and cumbersome, not admitting of actual delivery possibly to Tate under varying circumstances, the delivery of the list only, accompanied by a parol declaration, would have been a sufficient manifestation of Solloway's intention. Such declaration, with a writing clearly designating the property and the beneficiaries, would be an assignment by the giving over of the best evidence which the nature of the articles admit of. The reason why the delivery was invalid in Walsh's Appeal, 122 Pa. 177, was that no assignment in or without the book was made of the fund claimed as a donatio by the mere handing of the deposit book to another for the donee. The property being in possession of one other than the donor, no legal or equitable title became vested. Under the same circumstances, the gift or delivery would have been good if the property had been in the possession of the donor.

No creditors of Solloway appearing to set aside the gift, the same was a valid donatio causa mortis, and replevin by the administrator does not lie. Judgment is hereby directed to be entered for the defendant that the distribution such as was intended and manifested by the donor may be made.

OPINION OF SUPERIOR COURT.

The opinion of the learned court of common pleas sufficiently supports the judgment. The possession of the articles was given to the attorney, in order that he might deliver them, after the donor's death, to the designated

beneficiaries. The donor retained no power over them. The attorney became a trustee for the donees; 20 Cyc. 1232. All the qualities of a valid *donatio mortis causa* inhere in the transaction.

Judgment affirmed.

COMMONWEALTH vs. JONES.

Homicide—Intent—Malice.

STATEMENT OF FACTS.

Jones being a boarder in the house of Gibson, told Gibson, his landlord not to go near his trunk and try to open it, as he had fixed a spring gun so that one opening it would be killed. Gibson attempted to open and force the trunk and was killed. Lower court gave a verdict of murder against Jones for murder. This is an appeal.

McWHINNEY for Commonwealth.

ZERBY for Defendant.

OPINION OF THE COURT.

DAY, J.—The question before the court is whether the facts of this case will support a verdict of murder. To determine this we must conconsider the elements that are essential to make a homicide murder, and what ones are essential for the crime of manslaughter; and then apply them to the facts and circumstances of the case before us.

Murder, by the statute in Pa. (Act. Mar. 31, 1860) has been divided into murder of the first and second degree. The statute provides that:—"All murder that shall be perpetrated by means of poison or by lying in wait or by any other means of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds shall be deemed murder of the second degree."

As the killing in the case before us was not in the perpetration of or attempt to perpetrate any of the four enumerated felonies, to hold the prisoner guilty of first degree murder we must find that the killing was wilful, deliberate, and premeditated. "The intention to kill is the essence of the offense. Therefore if an intention to kill exists, it is wilful, if the intention be accompanied by such circumstances as to evidence a mind fully conscious of its own purpose and design, it is deliberate; and if a sufficient time be afforded the mind fully to frame the design to kill and to select the instrument or to frame the plan to carry the design into execution, it is premeditated." Com. v. Drum 58 Pa. 9.

As the statute provides that all other murder shall be murder of the second degree, it is necessary for us to go to the Common Law to discover what constitutes murder of the second degree. At common law murder is described to be when a person of sound memory and discretion unlawfully kills any reasonable creature in being, and under the peace of the commonwealth, with malice aforethought expressed or implied. Malice

aforethought comprehends not only a particular will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequnce, and a mind regardleess of social duty, although a particular person may not be intended to be injured. Murder therefore at common law embraces cases where no intention to kill exists but where the state of mind termed legal malice in its legal sense prevails. (Trickett's Pa. Law of Crimes 837). Second degree murder includes all unlawful killing under circumstances of depravity of heart and a disposition of mind regardless of social duty; but where no intention to kill exists or can be reasonably and fully inferred. Therefore in all cases of murder if no intention to kill can be inferred or collected from the circumstances the verdict must be second degree murder. (Com. v. Drum.) In determining whether a homicide is murder of the second degree, it is necessary to discover that there was malice and that there was no intention to kill, and that the killing did not result from the perpetration of any of the four felonies. (Trickett's Pa. Criminal Law, 818.)

Manslaughter is defined to be the unlawful killing of another without malice expressed or implied; which may be voluntary in sudden heat or involuntary but in the commission of an unlawful act. The difference between manslaughter and murder is this:—manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind before spoken of, exhibiting wickedness of disposition, recklessnes of consequence, or cruelty. To reduce an intentional blow or stroke, or wounding resulting in death to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion, without time to cool, placing the prisoner beyond the control of his reason and suddenly impelling him to the deed. If any of these be wanting;—if there be provocation without passion, or passion without sufficient cause of provocation or there be time to cool and reason has resumed its sway, the killing will be murder. (Comm. v. Drum.)

Having set forth the elements of the various homicides, before we apply them to the case before us we must determine what effect the fact that Gibson was a trespasser and had knowledge of the danger had upon the act of Jones.

In 14 Conn. 1, L.R.A. Vol. 29 p. 153, the court held "that one who proposes doing an unlawful act, by which the life of a fellow being may be taken, can not excuse himself from the consequences thereof by giving notice of his evil intent, or of the danger which he himself has created, and this is true although the person killed thereby may have received notice and was a trespasser at the time of the injury." In 31 Am. Dec. 306, it was held a person is not permitted for the protection of his property in his absence, against a mere trespasser, to use means endangering the life or safety of a human being, whatever he may do, whether the entry on his premises is to commit a felony or a breach of the peace.

The wrong or guilt of the trespasser or thief if not such as to justify the injury if inflicted directly cannot be justified because inflicted indirectly and by the assistance of the wrong doer. If the defendant could not, if present, have discharged the gun which he placed in his shop, by his own agency, against a thief who had broken and entered for the pur-

pose of stealing, he could not place and leave it there so that the thief if he entered would discharge the gun against himself. (31 Conn. 479.)

The Am. & Eng. Encyc. of Law vol. 21 p. 153 holds:—"A homicide may be murder when it is committed by the indirect use of deadly agencies such as spring guns and other contrivances set or laid on premises whereby trespassers may be killed or seriously injured. The degree of criminality is to be determined in such cases in the main by the same consideration that would have applied had the accused struck the blow with his own hands."

From the above cases we think it is plain that Jones can not excuse himself by showing that Gibson was a trespasser at the time he was killed and had notice of the danger. Jones would have had no right to kill him if he had been present, and he can not do indirectly what he was not justified in doing directly.

We learned that all unlawful killing, with malice, was murder; and all unlawful killing without malice was manslaughter. To determine to which class Jones' crime belongs we must find whether the killing was with malice, expressed or implied or without malice. We think the act of Jones in placing the gun in his trunk in such a manner as to cause death to any person lifting the lid, showed such a wickedness of disposition, recklessness of consequences, and a mind so regardless of social duty, as to show legal malice in the killing. This is sufficient to make the crime murder.

To determine the degree of murder it is necssary for us to find whether it was wilful, deliberate, and premeditated, or only malicious killing without the intent necessary to make it first degree. Jones had no intention to kill Gibson as he gave him notice of the danger; he may have even hoped that no person would be caught in his trap. But even if we hold that he had a general intent to kill whoever opened his trunk, we think it could not be construed to be wilful, deliberate, and premeditated murder within the meaning of the statute. Therefore we hold the facts of this case will support a verdict of second degree murder.

OPINION OF SUPERIOR COURT.

The defendant told Gibson that he had fixed a spring gun in his trunk so, that one opening it would be killed. From this might be inferred that he intended, not simply that the gun should be discharged, if one attempted to open the trunk, not simply that its contents should enter the body of such a one, but that such a one should be killed by them.

That Jones had no right to prevent the inspection of the contents of the trunk by means of the death of the curious person, or their theft by means of the death of the intending thief, hardly needs explicit assertion. A man can defend himself from grave bodily injury, and cause the death of the aggressor in doing so; he may exclude an intruder from his house by force that shall be fatal to the intruder, if the need of so much force is necessary. But he cannot prevent all species of inteference with his property by conduct so drastic. It does not appear that Gibson intended to steal anything found in the trunk. He may have been actuated by mere curiosity. The spring-gun discharges itself, when a certain movement occurs, without respect to the motive or ultimate intention of the person who originates the movement. If the intention of Jones can be

descried in his act, it must have been to kill persons who opened the trunk, when their purpose was simply to discover what was in it; as well as when their purpose was to steal it.

The willingness to cause the death or grave bodily harm of a person simply to prevent his seeing things, must be deemed malice. If the killing of Gibson was done by Jones, it was a malicious killing, that is a murder. Was it done by Jones? It is not necessary that Jones should have done the last act done by an intelligent agency, in order to justify his being deemed the doer. A may put a gun into B's hands and direct B to shoot X. B's shooting will be deemed A's shooting. A may put poison into B's hands with direction that B shall swallow it. Although the swallowing is B's act, and is done with knowledge that the thing swallowed is poison, the poisoning is attributed to A.

The setting of the gun within the trunk did not alone cause the shooting. Not followed by the effort to open the trunk, it would not have shot anyone. Gibson's act was necessary to the discharge. If Gibson, taking advantage of the situation made by Jones, had opened the trunk in order that he might shoot and kill himself, we should hesitate to say that Jones might be deemed causally related to the death. So far as appears, Gibson did not believe that there was a gun in the trunk, or he did not believe that, though there was, it would shoot him if he opened the trunk. He did not consciously concur with Jones' wish. On the contrary it was clear that Jones desired that he should not tamper with the trunk. But since Gibson's act was done, not with the intention to cause his death, but in disbelief that it would cause his death, we think Jones may be said to have caused the death. When A produces a situation from which he knows and intends that, if B does a certain act, B's death will result, and B does that act expecting, desiring or intending that result. A may justly be deemed the author of it.

As then Jones arranged the gun with the knowledge and intention that one attempting to open the trunk, would, thereby discharge it into himself and kill himself, he is guilty of murder.

State v. Marfaudille, (Wash.) 92 Pac. 939, is not inconsistant with this view. A conviction of murder of the second degree was disapproved because the statute of that state requiring "both malice and intent" to constitute murder of the second degree, there was no proof of the existence of such intent.

That one who by a spring gun set in his garden to prevent depredations upon it, causes the death of a depredator may be guilty of criminal homicide, is affirmed in Simpson v. State, 59 Ala. 1. In State v. Moore, 31 Conn. 479, it is said that one who sets a spring-gun to prevent the consummation of a burglary, is not guilty of the death of a burglar, who in breaking into the building, is shot, although if the gun were so arranged that it might, if discharged, shoot persons innocently passing on a highway, the maintenance of it might be a criminal nusiance. A goose house was put under the protection of this principle in United States v. Gilliam, 1 Hayw & H. 109; and a warehouse containing valuable property, in Gray v. Combs, 7 J. J. Marsh, 478. But it is only when the placing of the gun is intended to prevent an act which is deemed specially bad and

dangerous, such as arson, murder, burglary, etc., that an ensuing death is a non-malicious killing.

Judgment affirmed.

AMOS JERROLD vs. THOMAS EMMONS.

Contract—Acceptance.

STATEMENT OF FACTS.

Emmons ordered a suit of clothes from Jerrold, a tailor. The goods were selected, Emmons' measure was taken. The clothes were to be sent to his house, and he was to try them on. Any necessary changes were to be made by Jerrold. The clothes were to be accepted and paid for, when satisfactory to Emmons. The price was $40. The clothes were made tried on and certain changes suggested by Emmons. Jerrold was to send for them from Emmons' residence, to make the changes. Before he did so (the next day) a fire occured in Emmons' house which destroyed the clothes. This is an action for the $40.

MAUCH for Plaintiff.

OPINION OF THE COURT.

McCLINTOCK, Judge.—

Emmons, the defendant, entered into a contract with Jerrold, the plaintiff, for a suit of clothes, to cost when completed, $40. The tailor was to make a suite and send it to Emmons' house, and if it was not satisfactory, to make any necessary alterations. When the suit was delivered, it was not entirely satisfactory. Accordingly Jerrold was to send for it, make some changes, and then it was to be accepted and paid for. Before he sent for the suit, the next day,—Emmons' house burnt, destroying the clothes.

A bailment for mutual benefit was here created. The benefit to the tailor was his expected payment for the suit; to Emmons, the ownership of the new suit. The law does not determine the adequacy of the consideration. That is left to the parties to the contract, who are the sole judges of the benefits and advantages to be derived from the contract.

Hale on Bailment, 10 Gray, 366.

A bailment of this class may exist when the workman furnishes the materials and preforms the work on them. The contract is in that case entire, and he cannot recover until the work is completed. If the thing perishes, he must bear the loss. "Res perit domino." Goddard's Outlines of Bailment ,pp. 52 and 53.

When Jerrold sent the suite to Emmons, the bailment became a *locatio custodiae,* for which, as this is a bailment for mutual benefit, ordinary care is required. No negligence is imputed to the defendant, and he can not be held liable on that ground. The negligence, if any, is with the plaintiff, for not sending for the suit before.

The work was not completed, and therefore title had not passed to

the defendant when the suit was destroyed. He had not accepted and paid for it.

In as much as the suit was unfinished, altho in Emmons' house to be tried on, and as the bailment still existed, and as no negligence is imputed to the defendant, the plaintiff can not recover.

Judgment for defendant.

OPINION OF SUPERIOR COURT.

The contract between these parties was that the clothes were to be made, sent to Emmons' house, there tried on; if necessary, altered so as to become satisfactory to him. They were in fact sent to his house, but being tried on, were found to need some alterations. Emmons was not bound to keep them, in that state. They had not became his, by being made, or sent, or tried on. Acceptance by Emmons or facts operating as would acceptance, must occur, in order to make them his. Tiffany, Sales, (2 Ed.) 160. He did not accept them. He did not retain them an undue time, so as to forbid his denying that he had accepted them. They may have been received late in the evening of the day prior to that on which the fire occurred, and the fire may have destroyed them early the next morning. No court would properly allow a jury to say that in so short a time, the right of refusal of the clothes had been lost.

The risk of loss generally attaches to the ownership of the goods; Tiffany, Sales (2d Ed.) 141. No negligence of Emmons appears, to make him responsible for the destruction of the clothes. He is not an insurer of goods of others found in his house, nor, in particular of these clothes.

Neither then as buyer who has accepted the goods, nor as buyer whose negligence has caused the destruction of them while they were in his custody, preliminary to his decision to accept them, is Emmons liable for the $40 their value.

Judgment affirmed.

CORNMAN vs. WALKER

Breach of Contract.

STATEMENT OF FACTS.

Walker contracted to deliver to Cornman 1000 bushels of wheat on Nov. 1st, 1908, at 95 cents per bushel. On October 1st, Cornman received a notice from Walker that he would not be able to perform his contract. Cornman on October 15th, bought elsewhere 500 bushels at 90 cents per bushel, and on November 1st he bought 500 bushels at $1.00 per bushel. The general market price charged for wheat by dealers on November 1st was $1.02 per bushel, but Cornman received his from a neighbor at $1.00 per bushel.

This is assumpsit for non-delivery. Walker contends that Cornman has suffered no damage.

COLLINS for Plaintiff.
BELL for Defendant.

OPINION OF THE COURT.

McCLINTOCK, J.—It is conceded in this case that there was a valid contract between the litigants and that there was a non-performanace by Walker, who notified plaintiff a month before delivery of the wheat that he would be unable to perform. Cornman elected to treat the contract as broken from the date of this notice, as evidenced by his immediate purchase of half the amount of wheat contracted for. This he had a right to do, for it has been declared by the Supreme Court of this and other states that upon notice by one party of an intention not to preform, the other may treat the contract as broken and may bring suit at once or may wait until the expiration of the time as expressed by the contract. Hubbard v. Borden, 6 Wharton 79; Hampton v. Specknagle, 9 S. & R. 212; Zuch v. McClure, 98 Pa. 541.

Having concluded that the contract was broken by the defendant and such breach was acted upon by the plaintiff, the next question is what damages, if any, is the plaintiff entitled to?

The general rule as to the measure of damages is the difference between the contract price and the market value at the time and place of delivery, in other words, compensation in money for the actual loss sustained. But this is a very general rule and is subject to exceptions. Kuntz v. Kirkpatrick & Lyons, 72 Pa. 376; Bussy v. Donaldson, 4 Dallas 206. The market value of a commodity for which one person is responsible to another is its value to the latter. Burns v. Brown, 130 N. Y. 372; Commonwealth v. Allen, 30 Pa. 49; Stauffer v. Miller, 151 Pa. 330. In applying this general rule as to breaches of contracts, the party sustaining the loss is to be placed, in so far as money can do it, in the position he would have occupied had the contract been preformed. 8 Am. & Eng. Encyc. 545. The rule is to give actual compensation, by graduating the amount of damages exactly to the extent of the loss. Forsyth v. Palmer, 14 Pa. 97.

As soon as he received notice, the plaintiff purchased five hundred bushels at ninety cents, which was five cents less than the contract price, and later purchased the remaining five hundred bushels at a dollar, or five cents above the contract price. So, the price paid was exactly the price to be paid under the contract, and there was no actual loss sustained. Cornman is in exactly the same position he would have been in had the contract been preformed.

In Theiss v. Weiss, 166 Pa. 9, when the plaintiff endeavored to recover damages for the non-delivery of goods contracted for, the court said that the damages should be measured by the difference between the contract price and the real price for which he obtained the goods which the plaintiff failed to deliver. In as much as there has been no actual loss and the plaintiff is in precisely the same position he would have occupied upon performance, the only question to be considered is whether or not nominal damages can be awarded.

As soon as he discovered the fact that he would be unable to make the delivery, Walker notified the plaintiff, thus giving him a month in which to secure the wheat elsewhere, which was done. In doing this he was acting fairly, honorably and equitably in giving Cornman an opportunity to treat the contract as at an end and to go elsewhere for his wheat, so as to sustain no loss. In view of all this it would be unjust and

inequitable to impose damages upon the defendant for his actions, which were all that could be expected—and to allow anything to Cornman, who has appeared to have suffered no loss at all. Therefore this court decides in favor of Walker.

Judgment for the defendant.

OPINION OF SUPERIOR COURT.

That Walker's notice to Cornman that he would not perform his contract, justified Cornman in obtaining wheat elsewhere cannot be doubted. Nor did Cornman's obtaining wheat elsewhere so far discharge the contract, as to exempt Walker from liability for damages. The question is what damages have been suffered.

It does not distinctly appear that the wheat purchased by Cornman on October 15th and on November 1st, was purchased as a substitute for that which Walker should have delivered to him. It is conceivable that Cornman acquiesed in Walker's retraction of his contract, and that his subsequent purchases had no reference to that contract. We shall assume however, that the latter purchases were made to take the place of the one previously made from Walker.

It is clear then that on the purchase of October 15th there was no loss; but a gain. On the purchase of November 1st there was a loss of five cents per bushel. Can this loss be recovered? We think not. The contract was a unit, and if both purchases, i.e. that of October 15th and that of November 1st were made in order to supply the default of Walker, they must be combined, and if thus combined, there is no loss, no loss can be recovered for.

The market price for wheat on November 1st was $1.02 per bushel, but Cornman obtained the 500 bushels for $1.00 per bushel. We do not think he can insist on obtaining as damages the difference between 95 cents and $1.02.

The learned court below has directed a verdict for the defendant. It is clear, we think, that Cornman has suffered no money loss, no substantial damages. It does not follow that he was not entitled to nominal damages. "Nominal damages, at least, should be recovered for breach of contract." 3 Page, Contracts, 2393. "Nominal damages may be recovered even if it is shown affirmatively that the party complaining of the breach was gainer and not a loser by reason of such breach." Id. 2393. "A failure to preform a duty or contract is a legal wrong, independent of actual damages to the party for whose benefit the performance of such duty or contract is due. The omission to show actual damages and the inference therefrom that none have been sustained, do not necessarily render the case trivial." 1 Sutherland, Damages 31. "The act complained of may produce no actual injury; it may be in fact beneficial by adding to the value of the property or by averting a loss which would otherwise have happened, yet it will be equally true in law and in fact that it was in itself injurious if violative of a legal right." 1 Sutherland, Damages, 27. When Walker announced his intention to repudiate his contractual duty, he he could at once have been sued, and nominal damages could have been recovered. He did a wrong, for which the good fortune of Cornman in subsequently obtaining wheat at no greater price, was no atonement.

The learned court should have directed the jury to allow nominal damages.