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INSURABLE INTEREST IN LIFE INSURANCE.

NATURE OF THE CONTRACT OF LIFE INSURANCE.

A contract of life insurance is unlike one of fire or marine insurance. These are contracts for indemnity, contracts to reimburse for a loss of property that shall be actually suffered. The contract of life insurance is a contract to pay a definite sum of money upon the occurrence of the death of a certain person. The payableness of this sum is not contingent on the proof that by this death the claimant has suffered a loss measurable in money, equal to the money the payment of which the contract compels.[1]

OBJECTION TO WAGERING POLICY.

A contract of life insurance contemplates the payment of a sum of money to one, upon the death of another. The earlier the death, the sooner the money is to be paid. The earlier the death, the smaller the amount of money which the beneficiary must pay, when the contract assumes the ordinary form. In its ordinary form, the insured must pay premiums from time to time during his life, or he must pay assessments which are imposed from time to time during his life. The briefer the life, the smaller the number of the premiums or of the assessments will be. When then, A takes out a policy upon his own life, or that of another, he thinks of the possibility or probability that the *cestui que vie* will die sooner than the expiration of the term of his expectancy. In that case he will be a gainer. Should the death, however, not

[1]Elliott's Appeal, 50 Pa. 75; Scott v. Dickson, 108 Pa. 6.

occur until after the expiration of that term, he will pay into the insuring company, more than he will receive from it, and will be a loser. The taking out of a policy may be prompted by the instinct which leads to wagers generally and to lotteries, that of winning values upon the turn of chance, without proportional effort or expense. This objection however, to life insurance has not prevailed. "All life insurance" said Paxson, C.J., "is in one sense speculative. Yet within proper restrictions it has been found to be highly beneficent, and not in conflict with public policy. It enables a man in the days of his early struggles, to provide for his family in case of his death. It renders it possible for a business man to borrow the capital needed for success. It furnishes the means and the only means by which a creditor may sometimes secure a doubtful claim. Yet in all these cases, there is the element of speculation, for, if the assured dies shortly after the policy is issued, the beneficiary, whether he be a blood relation or a creditor, gets a sum of money greatly disproportioned to the amount paid. But in these cases the law does not regard the speculative element as a danger."[2]

TEMPTATION TO CRIME.

The effect of the contract of life insurance that has most excited the apprehensions of the law-makers, has been, not the tendency to develop the speculative habit; the cupidity for things as gifts of fate or chance, rather than as guerdons of thrift skill, and effort, but the tendency to lead to homicide. Since the earlier the death of the subject of the insurance, the less the cost of it, and the sooner the obtaining of the money secured by the policy, the beneficiary is under a temptation to hasten the death, in order to escape a part of the cost, and in order quickly to reap the benefit of the policy. There is a "tendency to create a desire" for the death of the subject.[3] Said Gordon, J. "We have within our own knowledge, a case in which a wager policy on a life, resulted in murder."[4] "The records of our court" says Paxson,

[2]Ulrich v. Reinoehl, 143 Pa. 238. An agreement by the insurance company not to set up the wagering character of the policy as a defense, would be void, Brady v. Prudential Ins. Co., 5 Kulp, 505.

[3]U. B. Mnt. Aid Soc. v. McDonald, 122 Pa. 324. Gilbert v. Moose, 104 Pa. 74; Cooper v. Shaffer, 20 W. N. 123; McDermott v. Prudential Ins. Co., 7 Kulp, 246;

[4]Gilbert v. Moose, 104 Pa. 74;

C.J., "show that it [speculative insurance] sometimes leads to murder."[5]

METHODS OF AVOIDANCE SELECTED.

Since the contract of insurance inevitably makes it *pro tanto* for the advantage of the beneficiary, that the insured should die soon, and so exposes the former to a temptation to compass the death of the latter, the risk will be reduced, if the number of possible insurances is restricted. If every body could secure the insurance of the life of every body, there might be a thousand insurances on each life. If enemies as well as friends, could insure a man, if those having no business or social interest in him, could insure him, as well as those who had such interest, the number of insurances on lives would be multiplied, and the danger of murder be correspondingly increased. It is evident that a rule that allowed only one or other small number of insurances, of the same man, or that allowed parents only, or children, to obtain insurances, would keep the number of insurances small, and *ipso facto,* lessen attempts at murder in order to accelerate payment of the policies. The law might also adopt the principle that no policy should be valid, except when it was in favor of a person who would have probably a desire for the prolongation of the life of the assured, despite the interest in his early death, which the policy would tend to engender. The latter principle is the one which the courts have adopted, in order to lessen the occasions for crime; furnished by the insurance of lives. The holder of the policy, they say, must have an "insurable interest," a phrase which means an interest independent of insurance itself, in the continuance of the life of the insured. "It is not easy" says Justice Field[6] "to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of, or as surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance

[5]Ulrich v. Reinoehl, 143 Pa. 238. Church, P. J. said that murder has been committed to get the insurance money, and persons have been hung for it; McArthur v. Chase, 5 Sadler 67. The object of the rules against wagering policies, has been to prevent fraud and crime: Brennan v. Franey, 142 Pa. 301.

[6]Warnock v. Davis, 104 U. S. 775.

of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously to protect the life of the insured than any other consideration."[7]

RELATIONS OF BLOOD OR MARRIAGE.

The mere relation of father and son furnishes no obstacle to the murder of the former by the latter. Parricides; the killing of sons, are not unknown to the history of crime. But it is ordinarily accompanied, in the father, by a strong affection; in opposition to which, money, property, appeals but feebly. In the son there is usually a filial respect, deference, and love in face of which no pecuniary gain, however great, would furnish a temptation to the killing of the parent, to say nothing of the horror of homicide, in any form, so dominant among modern races of men. But, there are parents who do not love their offspring; who would with not extreme reluctance, witness, nay even cause, their death, if by so doing, they could enrich themselves. There are sons who prefer their own present advancement in life, to the continuance in being, of their parents. Will the courts say that a policy, in behalf of a son, and a father, is unenforceable, unless that son loves his father, or that father the son to a normal degree? They have never done so. No case appears in Pennsylvania, in which the effort was made to have the policy declared a wager, because of defect of natural affection of the beneficiary for the insured. Were the effort made it would probably be unsuccessful. It must also be remembered that policies are not all for the same amount. The chance of getting $100,000 by the death of a father, might influence a son with a desire to kill him as a means, while the chance of obtaining $100 or $1000 would leave him uncorrupted. Yet, there is no case in Pennsylvania which considers the size of the policy as an element to be weighed, in determining whether, when it is in favor of a son, or father, it is to be deemed a wager or not. A son can take out a policy of $1,000,000, upon his father, and enforce it.

[7]Corson's Appeal 113 Pa. 438; Cooper v. Shaeffer, 20 W. N. 123.

THE RELATIONS WHICH NEGATIVE WAGER.

It is interesting to know what are the relations the mere existence of which preserves policies upon one in favor of another bearing such relations, from being condemnable as wagers.

HUSBAND, WIFE.

A wife is ordinarily bound to her husband by a strong tie of affection. The feeling is more or less strongly reciprocated. She may expect aid and support from him, when he is able to render it. His own love instigates him to render them. The law likewise impresses upon him the duty of giving them. Her love embraces the desire for the perpetuation of her intercourse with him, that is, of his continuance in life. A policy on his life, payable to her is not a wager.[8] If B, a woman, marries A, of whose earlier marriage to a woman who is still living, and from whom he has not been divorced, she has no knowledge, she has an insurable interest in his life.[9] The cessation after the issue of a policy of the marital relation by divorce, does not impair it.[10] The situation of a husband is not precisely like that of a wife. She is under no legal duty to furnish him a support. His affection for her is apt not to be as vivid and self-forgetting as hers for him. Nevertheless, a policy upon her life, originally payable to him,[11] or made payable to him by a subsequent assignment,[12] may be enforced by him.

PARENT.

A parent has a right to effect an insurance upon his or her child's life, so as to obtain a sum of money as a solace for it's departure from this sublunary sphere.[13] Maintenance of a father or mother, unable to work, is a legal duty [towards the public at least] of the child,[14] and the parent therefore, has a selfish basis for the wish that the child may live. He usually has the parental affection for the child, which would abhor its killing.

[8]McDonald v. Gibbons, 14 Dist. 668; Corson's Appeal 113 Pa. 438. It is said that a single woman has an insurable interest in the life of her intended husband; 113 Pa. 438.

[9]Mueller's Estate, 32 Pitts, L. J. 326; Hawkins, J. The question was not decided in Overbeck v. Overbeck, 155 Pa. 5.

[10]Life Co. v. Schaffer, 94 U. S. 457; Corson's Appeal, 113 Pa. 438; Scott v. Dickson, 108 Pa. 6.

[11]Speck v. Hettinger, 2 Sadler, 474; Wegman v. Smith, 16 W. N. 186.

[12]Wheeland v. Alwood, 192 Pa. 237.

[13]Corson's Appeal, 113 Pa. 438..

[14]Mut. Ins. Co. v. Kane, 81 Pa. 154.

A CHILD.

A daughter[15] or son[16] has an insurable interest in the father. A son[17] or daughter has the same interest in the mother. In justification of a policy on a father, in favor of a son, the supreme court said.[18] "By the 28th section of the Poor Law of June 13th, 1876, the father and grandfather, and the mother and grandmother, and the children and grand-children of every poor person, not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct." Maintenance of a father or mother unable to work is therefore, a legal liability. When we add to this, the feelings of natural affection and the desire produced by these feelings to provide for the comfort of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. "As the father may become poor, or may die, leaving his wife to survive, the son may, reasons the court, have to provide for both. Why then should he not be permitted to make a provision by insurance, to reimburse himself for their outlays past or future? What injury is done to the insurance company? They have received the full premium, etc."

INSURED IN LOCO PARENTIS.

A man or woman, not the parent of X, may conceive an interest in X; desire to support X, and variously assist X; may send him or her to school, paying the expenses. If such man or woman, in addition takes out a policy upon his own life, for $2000, payable to himself or herself, and, a few days later, assigns it to X, seals the policy and the assignment in a package, and delivers it to X, with the injunction not to open it until after his or her death, and X is ignorant of the contents of the package, until after the death, the policy is enforceable against the insurance company by X. X has an insurable interest. "It does not matter" says Dean, J. "that this interest was one without legal obligation on the part of the insured; it was a relation in every other respect parental; pecuniarily and otherwise, he assumed a parent's part towards her, and she was justified in expecting the continuance of

[15]Brennan v. Franey, 142 Pa. 301.
[16]Mut. Ins. Co. v. Kane, 81 Pa. 154.
[17]Hoffman v. Hoke, 122 Pa. 377.
[18]Mut. Ins. Co. v. Kane, 81 Pa. 154.

it."[19] As X had no knowledge of the policy, it ought not to have mattered whether she had received other benefits or not. They would have led her to expect a continuation of them, possibly, and would thus have counteracted the desire, awakened by the fact that, at her benefactor's death, she would get $2000, for his early death. But, if she did not know of the policy, it could not have wrought in her such a desire. In McGraw v. Life Ins. Co.[20] the father of the plaintiff (niece of the insured) had died when she was two and a half years old; her mother had married again; the insured, her uncle, had raised her and been a father to her all her life; she had lived with him until her marriage, and since her marriage had lived next door to him, where he resided with his sisters. The niece always helped to support them; [i.e. the uncle and aunts] "Upon this evidence," says Reeder, J. "the case was properly submitted to the jury, and they would have been justified in determining the question in her favor," a suit against the insurance Company. It is not said whether the niece was aware of the policy during the uncle's life-time. How the fact that she had "helped to support" was relevant, is not said. It would show affection for him, but beyond the special relations of parent and child, husband and wife, affection of the beneficiary towards the insured is unimportant. So far as it appears, the aid and services of the uncle may have ceased before the issue of the policy, or he may have grown so poor as to extinguish in the niece's mind, the expectation of any continuance of them.

ONE IN LOCO PARENTIS THE BENEFICIARY.

Possibly when A. (an aunt,) has assumed the relation of parent to B. (a nephew) who is 19 years of age, she may take out a policy for $190 payable to her, upon his life, and enforce it against the company.[21]

BROTHER AND SISTER.

It has been decided by the supreme court of the United States[22] that a sister, married, not living with her brother, not

[19]Carpenter v. U. S. Life Ins. Co., 161 Pa. 9.

[20]5 Super. 488. It does not appear whether the policy was payable to the niece or had been assigned to her.

[21]Weber v. Life Ins. Co., 172 Pa. 111. The policy was taken out 26 months before death of the nephew. Some time before and after he had been living and continued to live, with the beneficiary. The stress of the contest, was concerning alleged misrepresentations to the company about the health of the insured. A judgment for the plaintiff was affirmed by an equally divided supreme court.

dependent on him for support, although her husband was of small means, and was earning his living as a ladies' shoemaker, had an insurable interest in her brother's life, although he was intending to marry, and in fact married the day after the issue of the policy, which named her as beneficiary. "Where, as in this case" says Bradley, J. "a brother takes out a policy on his own life for the benefit of his sister [here for $10,000] it is wholly immaterial what arrangements they choose to make between them about the payment of the premiums. The policy is not a wager policy. It is divested of these dangerous tendencies which render such policies contrary to good morals. And, as the company gets a perfect *quid pro quo* in the stipulated premiums it cannot justly refuse to pay the insurance when incurred by the terms of the contract." A sister who was named as beneficiary in a policy upon her brother's life, and who paid the premiums, was allowed to recover against the insurance company.[23] Possibly a brother has no such interest in his sister's life, that *qua* brother, he may enforce a policy on her life against the company.[24] He may have to her, however, the relation of creditor to debtor, and for that reason have an insurable interest. If he is supporting and maintaining her in his family so as to become her creditor, he may enforce a policy in his favor on her life.[25]

SON-IN-LAW—STEP-SON.

A son-in-law hes no insurable interest in the life of his father-in-law[26] or of his mother-in-law.[27] A step-son[28] or step-daughter[29] has no insurable interest in the step-father's or step-mother's life.

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[22]Aetna Life Ins. Co. v. France, 94 U. S. 561. Cited without disapproval; Corson's Appeal 113 Pa. 438; Keystone Mut. Assn. v. Beaverson, 16 W. N. 188.

[23]Early v. Life Ins. Co., 10 York, 13.

[24]Mullen v. Ins. Co., 182 Pa. 150; 7 Kulp, 422; Mut Assn. v. Beaverson, 16 W. N. 188.

[25]16 W. N. 188; 7 Kulp 422. In 182 Pa. 150, Fell, J. declined to consider whether a brother, as such, has an insurable interest in the life of his sister, although the question was in the case.

[26]Ramsey v. Myers, 6 Dist. 468.

[27]Stoner v. Line, 16 W. N. 187; Stambaugh v. Blake, 22 W. N., 407; The question was not decided in Mut. Benefit Assn. v. Norris, 115 Pa. 446.

[28]U. B. Mut. Aid Soc. v. McDonald, 122 Pa. 324.

[29]Chidester v. Yard, 155 Pa. 480; Blake v. Metzgar, 150 Pa. 291.

OTHER RELATIONS.

Neither the nephew[03] nor niece[31] has as such an insurable interest in an aunt's life or an uncle's. The son of the wife of A (i.e. A's step-son) A being a son of X, has no interest in the life of X.[32] A and B being husband and wife, the father of A has no insurable interest in the life of the mother of B,[33] nor has the brother of the wife of X, in X's life,[34] or generally, a brother-in-law in the life of a brother-in-law.[35] Cousins have no insurable interest in the lives of each other,[36] whether their parents are full brothers and sisters or only half brothers and sisters.[37] The daughter of X has no interest in the life of the wife of the first cousin of X[38]

HEIRS, DISTRIBUTEES.

A man can insure his own life, naming his executor or administrator the beneficiary. He may direct that the money be paid, at his death to his devisees or, if none, to his heirs. Even though those who prove to be his "heirs"[39] are his widow, and his brothers and sisters, or nephews and nieces, they will be entitled to rereceive the money as against the executor;[40] that is, apparently an insurable interest is not necessary when the member of a beneficial society has directed in the certificate that the money be paid to devisees, if any, if none, to distributees.[41]

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[30]Corson's Appeal 113 Pa. 438.

[31]Crone v. Prudental Ins. Co., 11 Dist. 433. A niece, probably, has, as such no insurable interest in the uncle's life; McGraw v. Ins. Co., 5 Super. 488.

[32]Gilbert v. Moose, 104 Pa. 74.

[33]Batdorff v. Fehler, 6 Sadler, 559.

[34]McHale v. McDonnell, 175 Pa. 632.

[35]Grant v. Kline, 115 Pa. 618.

[36]Brennan v. Prudential Ins. Co., 148 Pa. 198.

[37]Brady v. Prudential Ins. Co., 5 Kulp, 505.

[38]McDermott v. Prudential Ins. Co., 7 Kulp, 246.

[39]Understood to be equivalent to distributees.

[40]Masonic Aid Assn. v. Jones, 154 Pa. 99. The policy was issued in Illinois, but the member being domiciled in Pennsylvania, the law of this state designated the distributees of his personal estate and therefore the "heirs" in the sense of the certificate. The executor was not entitled, although there were creditors. The Association paid the money into court and filed an interpleader bill.

[41]It is even said that a person has an insurable interest in his own life, and that his right "to insure it for his heirs or even for a stranger, cannot be questioned," citing Scott v. Dickson, 108 Pa. 6.

OTHER FACTS WHICH ARE EQUIVALENT TO INSURABLE INTEREST.

Besides the domestic relations there may be relations which will support a policy of insurance on the life of one, in favor of another, bearing to each other one of these relations. Dean, J. mentions a "moral obligation" as sufficient to support a policy; the relation of partners, the relation of superintendent or manager of a business concern to his employer as sufficient to give one partner, or the employer, an insurable interest in the life of the other partner, or of the superintendent or manager.[42]

THE BENEFICIARY"S OR ASSIGNEE'S IGNORANCE.

If the beneficiary or assignee of a policy, has no knowledge of its existance, he can not be influenced by it, either to develop the habit of gambling and speculation, or to scheme for the early death of the insured. The insured is allowed by law to give his property to another, at his death, and even to leave in existence a written memorial of the gifts; e.g. a will; a bond payable at death, There is no reason that, allowed to give specific chattels at death, he shouud not be allowed to give choses in action. Nor, if he may contract with X to pay him, that is, to pay his executor or administrator, a sum of money at death, is there any good reason for prohibiting his contracting with X to pay anybody else, provided that in so doing, he does not furnish a motive to Y to commit a crime. "It would" says Paxson, J. "be denying a man's right to do what he will with his own, to say that he could not in any form insure his life for the benefit of an indigent relative, or a friend to whom he felt under obligation."[43] "This right" says Paxson, C.J. "results from the right which a man has, to dispose of his own property."[44]

THE BENEFICIARY'S PASSIVITY.

There are cases which hold that, since a man may do what he will with his own, he may pay for a policy, and make another,

[42]Carpenter v. U. S. Life Ins. Co., 161 Pa. 9.

[43]Scott v. Dickson, 108 Pa. 6. The first notice the beneficiary had of the policy was after the death of the assured. Cf. also, Masonic Aid Assn. v. Jones, 154 Pa. 99; Overbeck v. Overbeck, 155 Pa. 5.

[44]Hill v. United Life Ins. Assn., 154 Pa. 29. But here, the ignorance of the assignee or beneficiary did not exist, and was not adverted to. Ten persons, having severally obtained policies for $10,000, payable to their administrators, concurrently transferred them to a trustee to be held by him for the benefit on the death of any one, of the survivors of the ten. The survivors had a right to the money.

irrespective of any insurable interest, his beneficiary, and the beneficiary will be entitled. A man already married, married X, and lived with her from January 1881 to May 1889. On June 14th, 1886, he effected an insurance on his life, payable to X, or to his heirs. He showed the policy to her and told her it was hers. Not deciding that X had an insurable interest in his life, the court held that she was nevertheless entitled to the money, and not the first wife. "It was held" says the Court, "in Scott v. Dickson, 108 Pa. 6 that a man may insure his own life, *paying the premiums himself* for the benefit of another, who has no insurable interest, and that such transaction is not a wagering policy."[45]

IMPORTUNITY OF BENEFICIARY.

If A can spontaneously insure his life for the benefit of another who has no insurable interest, may he do so if the suggestion comes from that other? B persuades A to give him the fruits of a policy, that is to apply for it, to pay the initial and all subsequent premiums, or assessments, and to designate B as the recipient of the money. Can B obtain and retain the money? How can we distinguish between the case in which A. without suggestion or entreaty from B, insures for B, and the case in which his interest in B is so tepid, as to require some stimulation from B? Would it not be absurd to hold a policy in the latter case unavailable for B, while holding it available for him in the former case? In both cases, A is doing what he will with his own contracting power, and money. He is using them to secure a gratuity for B. In both B is aware of the existence of the right to receive the money conditioned upon the death of A. In both, B might be tempted to procure the early death of A.

PREMIUMS PAID BY BENEFICIARY.

It is imaginable that the initial and all later premiums should be paid by the beneficiary, or that the initial be paid by the assured and all later by the beneficiary, or that several of the earlier premiums be paid by the insured, and the later by the beneficiary. What will be the effect of these payments of the premiums, all or some, by the beneficiary, who has no insurable interest? In such a case, the money ultimately paid on the policy is only in part the money of the insured. It is in part that of the beneficiary. Apparently, if

[45]Overbeck v. Overbeck, 155 Pa. 5. Cf. Carpenter v. U. S. Ins. Co., 161 Pa.

A cares enough for B to pay all the premiums on a policy and yet designate B as the beneficiary, B has an enforceable right to the money; but if A cares so much less for B that he is simply willing to allow B to take out the policy, bearing the whole expense of it, B will not be able to enforce the policy.[46] The fact that B is sufficiently desirous to have the policy, to be willing to pay the premiums, seemingly indicates a mind that might be betrayed into murder, or, at least, an unamiable willingness to speculate upon the length of the insured's life. For either or both reasons, the policy will not avail him.

NAMING BENEFICIARY AND ASSIGNING,

One who has no insurable interest in A's life, may be made interested in it, or rather its quick termination, either by being named as beneficiary in the policy, or in the certificate of membership of a beneficial society, or by becoming the assignee of such policy or certificate. There may be an understanding, at the taking of the policy, that it shall be at once assigned, and it may be thus assigned;[47] or, the intention to assign may be formed later. There is probably no difference in effect, between the naming of X a beneficiary,[48] and the making him such, by a subsequent assignment. If the former would not be able to enforce the contract for his own benefit, neither would the latter, and *vice versa.* In Gilbert v. Moose[49] a certificate for $2000, on A's life was made payable to B, who two weeks later, assigned it for $28 to C. C thus became liable to pay the assesssments, and paid them to the amount of $81. A died eight months after the issue of

[46]Chidester v. Yard, 155 Pa. 483. If B, the beneficiary, gives the money to A unconditionally, which A uses in paying the assessments, B may enforce the policy. If B gives it to A in order that A may use it in paying the assessments, B may not enforce the policy. If B, without the knowledge of A, takes out a policy on A's life, in which B is named as beneficiary, and subsequently B, himself without insurable interest, assigns the policy to one having an insurable interest; e.g. the wife of A, on her promise to pay him ½ of what she shall get upon the policy, this promise will not be enforced. It has no consideration. Mc Donald v. Gibbons, 14 Dist. 668.

[47]If there is no insurable interest in the assignee, he will not be entitled to the money, Corson's Appeal, 113 Pa. 438; Keystone Mut. Ben. Assn. v. Norris, 115 Pa. 446.

[48]Cf. Mut. Aid Society v. McDonald, 122 Pa. 324; Scott v. Dickson, 108 Pa. 6.

[49]104 Pa. 74. If a stranger is named as beneficiary, he paying the original cost of securing the membership in the society, and the future assessments, the certificate is a wager, Seigrist v, Schmoltz, 113 Pa. 326.

the certificate. Neither B nor C had an insurable interest. It was held that neither B nor C could retain the money obtained from the Relief Association, upon the certificate. The policy may name the insured as payee, and he may immediately assign it to X who pays the expense of effecting it. The same principles would regulate X's right as if he had been named as beneficiary.[50] Boas having been named as beneficiary in the certificate, and having paid the assessments for three years, transferred, for $65, the certificate to Downey, being unable longer to pay the assessments. Says Sadler, P.J. "He became the beneficiary instead of Boas. His bargain was a better one than if he had taken the policy at is inception, because the assured had paid $185.20 of assessments, and received but $65 for the policy from him. Surely the fact that he took the policy by assignment, gave him no greater interest in the preservation of the life of the assured than if the policy had been at first made payable to him. Boas's speedy dissolution would be his gain in either case."[51] Generally it may be said that an assignee of a policy must have an insurable interest, to entitle him to obtain and retain the whole of the money upon the policy.[52]

BUYING AN INTEREST IN THE POLICY.

It has been said that, since A can do what he will with his own, he can buy from an insurance company a right to receive at his death, a sum of money and give this right to another. The other can enforce it. However, A not being able or disposed to pay for a policy on his life, except by the aid of B, cannot, seemingly, induce B to furnish this aid, by giving to him a share of the fruit of the policy. A, 63 years old, solicited B to agree to support him when he should be unable to work, and to take out a policy on A's life. B agreed to pay the expense on a policy for $3000, to be taken out by A; to support A, when he should be unable to work, and to pay from the proceeds of the policy $200 for funeral expenses. The policy was taken out, and all the assessments on it paid for over two years, when A died. B being neither a relative nor a creditor of A, when the policy was taken out, could retain, of the money paid on the policy, only what he expanded in supporting and burying A, with interest thereon; and the assessments paid with interest thereon. The rest belonged to A's admin-

[50]Shaffer v. Spangler, 144 Pa. 223. An insurable interest was discovered.
[51]Downey v. Hoffer, 110 Pa. 109.
[52]Vanormer v. Hornberger, 142 Pa. 575; Scott v. Dickson, 108 Pa. 6.

istrator.[53] A man is thus prevented from providing for his own support and proper burial, by means of a policy upon his own life which will probably yield at his death, more than the actual expenses of the person whom he tries to induce to furnish them. He is solicitously prevented from exposing himself to murder, at the expense of continuing exposed to death by starvation; so kind are the judges! "The question" they say "is not one of good faith, but of public policy,***. The intention of John Schmoltz (B) in obtaining this policy may have been innocent and pure, but this cannot be regarded, for the fact remains that he was in no way interested to maintain the life of Jacob Seigrist (A) and it is certain, the sooner that life was extinguished the better it was, in a pecuniary point of view, for the beneficiary." Nor, does it help the matter but rather the contrary, that the defendant had charged himself with the support of Seigrist, for all the more would his pecuniary interest be advanced by the termination of Seigrist's life."

BUYING AN INTEREST IN ONE POLICY BY GIVING AN INTEREST IN ANOTHER.

If A has a policy of $10,000 upon his life, and 9 other persons have each, a similar policy on his life, they may assign to a trustee these policies, in such a way that the survivors shall be entitled to the proceeds of each policy; that is, A may assign to B, C, D, etc. the right to receive the money upon his policy, in case they survive him, in consideration of their assigning to him the right of receiving the money on their policies, should he survive them. On the death of A, before any of the others, his heir at law or administrator is not entitled to the money from the company, if it has paid it to the trustee.[54]

ABSOLUTE ASSIGNMENT TO CREDITOR.

When the policy is given either originally, by naming him as the beneficiary, or by a subsequent assignment of it, to a creditor, the intention may be that the creditor shall receive and retain on the policy, at the debtor's death, only so much as shall equal the debt and interest, and the expenses incurred by the creditor

[53]Seigrist v. Schmoltz, 113 Pa. 326.

[54]Hill v. Ins. Assn. 154 Pa. 29. Paxson, C. J. says the transaction was not a gambling one; that A had a right to dispose of his policy as property. He inconsequently suggests that possibly A's heirs could recover the money from the trustee. How, on the principles announced is not apparent.

in the procuring and maintaining of the policy. The policy is then held as collateral security. But the intention may be that the money obtained on the policy shall belong, all of it, to the creditor. The policy is taken, virtually, as a substitute for the debt. It may be taken formally, also, as such substitute, e.g. when a judgment is satisfied by the creditor, as a consideration for the policy.[55] The interest which the creditor had, prior to receiving the policy, was thus extinguished by that reception. Yet the cases are treated as if the creditor's desire for the early death of the insured, is checked by his desire for the continuance of the paying power of the insured, a palpable error. How can it matter whether the consideration paid for a policy, is paid by one not heretofore a creditor, or is paid by one heretofore such; whether it is paid by something else than an existing debt or by an existing debt? Plainly it cannot. Yet when for an assignment of a policy, $28[56] or $65[57] was paid by one not a creditor to that extent, the assignment was held without circumlocution, to be a wager, whereas when the price paid for the policy was a pre-existing debt, the wagering quality of the transaction was held determinable only by a rule, hereafter to be discussed. If the policy is assigned absolutely to the creditor, apparently, the subsequent payment of the debt does not destroy the assignee's right to receive and retain the money.[58]

WHAT ARE DEBTS.

The debt for which a policy can be assigned need not be strictly such. A was indebted to B, and B took out policies on A's life as security. After making payments of the premiums on these policies, they were abandoned, because of the insolvency of the insuring company. Later, another policy was taken out upon A's life. In deciding whether the policy was for too great a sum, proportionate to the debt, the money paid to procure and

[55]Ulrich v. Reinoehl, 143 Pa. 238. The judgment was for $99.51. With interest it amounted to $110.02, when the policy for $3000 was taken. In Wheeland v. Atwood, 192 Pa. 237, a debt of $1900 was satisfied for the assignment of a policy for $5000.

[56]Gilbert v. Moose, 104 Pa. 74.

[57]Downey v. Hoffer, 110 Pa. 109.

[58]Corson's Appeal, 113 Pa. 438. But, the only consideration for an absolute assignment of a policy would be an extinction of the debt. If it is extinct a later payment would be a solecism. In Elliott's executor's Appeal, 50 Pa. 75, it is said that the cessation of the insurable interest after the acquirement of the policy will not make it a wagering one.

sustain the abandoned policies, could be counted as debt if A consented, as against his administrator. "We do not" says Paxson, J., "regard it as either unusual or wagering for Kline (B) to attempt to secure the sums he had already fruitlessly paid in premiums on Grant's (A's) life, and if Grant had no objection thereto, and assisted him therein, I do not see that any one could object to this but the company ."[59] A owing B $500, assigned to him a policy for $2000. Fourteen months later, A suggested to B, that as the company was not paying in full, the policy was probably insufficient. Since the first policy he had become indebted to the extent of $250. He proposed the taking out of a second policy for $2000, B promising to give him a respectable burial, and to pay the expense of it. It was held that the two policies were to be united. If $4000 would not be too large a sum to protect all the debts, those before the issue of the first and those arising after, B would have a right to retain all the money received by him from the company, he having paid the expense of the burial.[60]

The debt may have began to exist before the acquiring by the creditor of an interest in the policy, or it may begin simultaneously with the acquiring; or the policy may be for debts already in existence and debts then begun. Thus, a debt for $400 already existing ; when the policy was assigned, an additional loan was made of $100 at the time.[61] A debt arising from the payment of the funeral expenses of A, to whom a policy, payable to his administrator has been issued, does not give the person paying an insurable interest.[62]

CREDITORS.

Creditors desire the continuance of the life of their debtors sometimes. If a debtor is young, healthy, industrious, saving he will probably produce money enough to repay the debt. The creditor will then believe himself benefited by the prolongation of his

[59]Grant v. Kline, 115 Pa. 618. The insurance company had paid the money to creditor. The action was by the administrator of the debtor, to recover from him a portion of this money.

[60]Shaffer v. Spangler, 144 Pa. 223. Though the funeral expenses were not a debt existing when the policy was assigned, B contracted to pay them. He ultimately did pay them. The policy is valid, unless disproportioned to the debt, counting the funeral expenses ($65) a part of it.

[61]Shaffer v. Spangler, 144 Pa. 223.

[62]Crone v. Prudential Ins. Co., 11 Dist. 433.

life. But suppose he is old, that he has lost his earning power from physical or mental debility; that he is dishonest. The creditor may have little or no prospect of being benefited by the protraction of his life. In the former case, the creditor takes out a policy on the debtor's life. If the policy is treated as sound, and the company is solvent he gets the money when the debtor dies. That money may or may not be equal to the debt and the interest. If it is only equal to the debt and the interest, he is still a loser, if he has paid the premiums or the assessments. He is a loser, unless the amount be finally realized from the policy is equal to the debt and interest, plus the premiums or assessments and the interest thereon. On the other hand he is a gainer ot the extent to which the amount realized on the policy exceeds these sums. It must be clear that in almost every case, when a creditor takes out a policy upon his debtor's life, he diminishes his interest in the continuance of the life of the debtor. The sooner the debtor dies, the sooner will the debt be paid; the fewer likewise, will be the premiums which must be paid in order to maintain the policy. Nevertheless, the courts have been willing to allow creditors to take out insurance upon the life of debtors, saying that they have insurable interests.[63]

COLLATERAL SECURITY.

A policy may be taken out as collateral security for a debt.[64] The debtor may agree to pay and pay the premiums; or a creditor may pay them. Of the money obtained at last upon the policy can be retained only so much as equals the debt and the interest thereon, and the premiums or assessments, and the interest thereon, which the creditor has paid.[65] If the debtor has paid them the creditor may retain only the debt and interest.[66] As the administrator of the debtor will have a right to the excess beyond the debt and interest, etc. the debtor after assigning to the creditor as security. may assign his residual interest as security for a debt, to another creditor, or absolutely, as payment of the debt.[67] In

[63]Life Ins. Co. v. Robertshaw, 26 Pa. 189; Cunningham v. Smith, 70 Pa. 450; Corson's Appeal, 113 Pa. 438; Mut. Assn. v. Beaverson, 16 W. N. 188.

[64]McHale v. McDonnell, 175 Pa. 632.

[65]Schaak v. Meiley, 136 Pa. 161; Grant v. Kline, 115 Pa. 618.

[66]Cunningham v. Smith, 70 Pa. 450. In a suit between the creditor who has received the money on the policy and the administrator of the debtor, the creditor must show what the amount of the debt is.

[67]Schaak v. Meiley, 136 Pa. 161.

a suit against the company, the debt being the insurable interest relied upon, the creditor must prove that he was such.[68] Should the debt be paid, for which the policy had been assigned as security, and should the premiums have all been paid by the debtor, the proceeds of the policy will belong to the latter. Cf. Corson's appeal; 113 Pa. 438.

BEING SURETY.

If one is merely a surety for another, he may take an insurance on the life of that other, although no breach of the contract completing the liability of the surety, has occurred.[69] In Scott v. Dickson[70] the company had paid a policy to Scott, and the administrator of Dickson, the insured, sought to recover the whole of it from him. Scott, at the time of becoming interested in the policy, was a surety, on an official bond for Dickson. This bond had never been broken by Dickson so that Scott never fell under a perfected liability. It was alleged against Scott's right to the money, that he had no insurable interest. Paxson, J. maintains that there was such an interest; and the fact that it had become extinct before or by the death of Dickson, did not impair the right of Scott. He supposes that A is a creditor of B to the extent of $1000; and insures B's life to that extent. He continues the policy until he has paid in premiums $1100. B then pays the debt. If, he says, the policy ceases as soon as the debt is paid, A loses all he has paid, and in reality is out of pocket $100, although he has received his debt in full. The supposition was entirely irrelevant. Scott paid none of the premiums. Dickson owed him nothing. Then why was he allowed to keep $4011, the sum which he had received from the company? If instead of being in danger of having to pay money for Dickson, Scott had actually paid for him $400, he could not ,according to the rule of the court, be entitled to retain more than the $400 plus the interest on it for the expectancy of Dickson, since not he but Dickson had paid all the premiums.

[68]Brady v. Prudential Ins. Co., 5 Kulp. 505. Facts inconsistent with the plaintiff's belief that he was a creditor and with his present testimony, may be elicited on cross examination; Mullen v. Ins. Co., 182 Pa. 150.

[69]Warnock v. Davis, 104 U. S. 775; Corson's Appeal, 113 Pa. 438.

[70]108 Pa. 6.

Concluded in next issue.

MOOT COURT.

BOPP vs. TIMLER.

Accommodation Note. Parole Evidence to Show Fraudulent Use.

STATEMENT OF FACTS.

Bopp executed a promissory note to Timler, payable in three months. for $300. Bopp contends that the note was made for the accommodation of Timler to enable him to get it discounted.. The Court rejected the evidence because it contradicted the writing. Motion for a new trial.

COLLIER for Plaintiff.

HESS for Defendant.

OPINION OF THE COURT.

EASTER, J.—In this case presented to us we find that Timler being in need of money, evidently to meet some obligation, applies to Bopp, his friend, for a loan of $300. Bopp no doubt has been unable to loan Timler the cash, but he has a financial standing in the community by which, if he makes a promissory note payable to Timler, he (Timler) will be able to ward off his creditors for the time being. At the end of three months Timler calls on Bopp to pay the note given for his accommodation. Bopp of course refuses to pay or accede to such a demand. Timler sues, and the trial judge refuses to admit evidence which would show the true relations of the parties, and in this we think there was error.

Generally, parole evidence is not admissible to explain or change the terms of a written instrument, the courts holding that, what the parties intended to be embodied in the agreement was in fact placed there. Exceptions are made in case of fraud, accident, or mistake.

In this case, however, there is the making of an instrument without consideration, with no expectation of its being enforced, the maker relying on the party accommodated to be able to meet his obligation and never to make use of the instrument.

An accommodation bill is an instrument to which the accommodating party, be he acceptor, drawer or endorser, has put his name, without consideration, for the purpose of benefiting or accommodating some other party, who desires to raise money on it, and is to provide for the bill when due. Wood's, Byles' Bills and Notes, p. 223.

Between the parties to an accommodation note, an agreement that the payee shall not call on the maker is wholly unnecessary and it is unusual for the maker to demand any assurance on this point. He need only show the real character of the note and the law relieves him from such obligation, and also from liability to a third party who receives the note after maturity. Louck v. Lightner, 11 Sup. 499.

The English courts recognize the doctrine that parol evidence may be introduced to show a want of consideration and those courts apply the general rule more strictly than the American courts. In Thompson v. Clubley, 1 Mees. & W. 212, there was an action brought by the indorsee

against the acceptor of a bill of exchange. It was held that the acceptor might show that the acceptance was for the accommodation of the plaintiff and that the defendant had received no consideration from the drawer; and also that it was agreed, when due, the bill should be taken up by the plaintiff.

The view of the Federal Courts on this question is in these words,-- "The true relation of parties to a negotiable instrument may, as between the parties themselves, be proved by parol evidence, whenever it is necessary to a correct determination of the right or liability of either of them thereon, and this may be done to give jurisdiction to a Federal Court." Goldsmith v. Holmes, 36 Sup. 484.

Turning to the Pennsylvania Courts we find numerous cases supporting this doctrine. We shall cite several to show how firmly the doctrine is established.

Where a note is drawn and accepted without consideration, and although the burden of proving such want of consideration is on the drawer, yet when established it is unquestionably an available defence to the drawer. Grubb v. Cottrell, 62 Pa. 23. As against the accommodated party, the accommodating party may set up the want of consideration. Peale v. Addicks, 174 Pa. 543. 38 W. C. N. 101.

In Abraham v. Mitchell, 112 Pa. 23, the court holds, "In an action against an endorser upon a promissory note an affidavit of the defense is sufficient that avers that the defendant endorsed the note at the plaintiff's request, without consideration, and solely for the plaintiff's accommodation." This same doctrine is held in 174 Pa. 543.

The cases in this state in which parol evidence has been allowed to contradict the terms of written instruments, may be classed under two heads: 1st, where there has been fraud, accident or mistake in the creation of the instrument itself, and 2nd, where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or an agreement made at the time the instrument was signed, and without which it would not have been executed. The English rule excluding parole evidence to vary a contract, has not been adopted in this state in all its stringency. Gundy v. Weckerly, 220 Pa. 292. This case also holds that where a person is induced by a contemporaneous parol promise, a subsequent breach of the promise is a fraud upon his rights, and he may set up the breach as a defence to the note and prove the promise by parol evidence. Where the defendant sets up in his affidavit of defense the promise and the breach thereof and avers that he expects to prove the facts avowed, the presumption is that he will do so at the trial.

Parol evidence is admissible to show a verbal contemporaneous agreement which induced the execution of a written obligation, though it may vary or change the terms of the written contract. Juniata Building Association v. Hetzel, 103 Pa. 507. The courts hold that it is plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms regardless of the

contemporaneous agreement without which it would never have been signed at all. Keough vs. Leslie, 92 Pa. 424; Martin vs. Freedenber, 169 Pa. 447; Coal & Iron Co. vs. Willing, 180 Pa. 165.

In view of the doctrine held out in the cases cited, we hold that we were in error in not allowing the defendant to introduce the parol evidence. A new trial is granted.

OPINION OF SUPERIOR COURT.

Timler, in writing promised to pay to Bopp $300 He offered to prove that the promise was made, in order that Bopp might negotiate it; and for no other purpose; that, in fact, Timler really promised to pay $300 to any endorsee of Bopp, but not to Bopp himself. If this were so, the promise would be unenforceable by Bopp. It would not really have been made to pay him. Nor would there have been a consideration for a promise to pay him.

That the evidence offered contradicted, or essentially varied the promise expressed in the instrument, is clear. It was not for that reason to be rejected. The real intention of the parties may not be expressed in a writing, and, when that is so, the attempt to enforce the writing according to its tenor, would be a fraud. To prevent the court's being made instrumental in giving effect to such fraud, evidence of the real intention of the parties must be admitted. Cf. Barnet v. Offerman, 7 W. 130; Bower v. Hastings, 36 Pa. 285; Peale v. Addicks, 174 Pa. 543; Fidelity Co. v. Harder, 212 Pa. 96. 6 P. & L. Dig. col. 10255.

The opinion of the learned court below, when granting a new trial, sufficiently vindicates its action.

Judgment affirmed.

JOHN HUNTER v. HORACE HAMMOND.

Usury—Status in Pennsylvania of Usurious Contract Made Elsewhere.

STATEMENT OF FACTS.

Hammond in Arkansas made a bond for $1000, "payable 3 years after date to Hunter in the city of Philadelphia, at 8% interest per annum until paid." Suit was brought on it one year after maturity in the city of Philadelphia. The court refused to allow the jury to give more than 6% interest. Motion for a new trial.

BELL for Plaintiff.

MILLER for Defendant.

OPINION OF THE COURT.

WOODWORD, J.—This record does not disclose whether the action was brought in a state court, or in a court of the United States. It is a case over which the United States Courts have constitutional jurisdiction. Art. 3, Sec. 2, U. S. Cons. Were we to choose the course of least resistence and treat the appeal as directed to a federal court, the

question presented would involve no difficulty. Under a long line of decisions the plaintiff would be clearly entitled to recover the rate of interest stipulated.

But considering the action as brought in a Common Pleas Court of the Commonwealth of Pennsylvania, and appealed therefrom, we are confronted with an array of confusing and conflicting decisions and dicta. The Am. Encyc. of Law summarizes thus, "It must be stated generally that the validity of a contract as affected by the laws of the various jurisdictions against usury is to be determined by the place where the contract is made, if that place is also the place of performance. But there is much confusion of the authorities as to what law will control if the place of the contract and the place of performance are different. In some places it is held that the law of the place where the contract is to be performed is to be applied. In other places the question is held to be settled by the law of the place where the contract is made and consideration paid. But, according to the weight of authority the question is dependent upon the express or presumed intention of the parties. According to this rule, where a contract is entered into in one jurisdiction to be performed in another, at least if the contract is between the citizens of each, and it in express terms provides for a rate of interest lawful in one jurisdiction but unlawful in another, the parties will be presumed to contract with reference to the laws of the state where the stipulated rate is lawful, and such terms will control until overcome by proof that the stipulation was intended as a means to defeat the law against usury, and to support a contract otherwise usurious." Vol. 22, p. 1331.

Two Pennsylvania cases are cited as upholding the proposition that the place of performance governs. Bennett v. Building & Loan Assn., 177 Pa. 233; Nat. Building & Loan Assn. v. Riley, 4 D. R. 663.

Passing these cases for the moment let us examine the cases cited as being the weight of authority supporting the opposite theory, viz, that the intention of the parties is the criterion. The decisions of the federal courts seems to rule this class.

In an early case we find the following principle laid down by Chief Justice Taney, "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the place of performance, is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." Andrews v. Pond, 13 Pet. 64--1839.

The case cited as the earliest authority for the converse proposition, that the parties may stipulate for interest according to the law of the place where the contract is made, and that this rate will control, is Depeau v. Humphreys, 8 Mart (La.) 1. Of this case a New York Chancellor, Wolworth, says "The question was very fully and ably examined in the supreme court of Louisiana, and the court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of the state of Louisiana, although the rate of interest thus agreed to be paid was higher than that

which could be taken upon a loan, by the laws of the state where such note was made payable." Chapman v. Robertson, 6 Paige (N. Y.) 634--1834.

This doctrine was adopted by the federal court in Miller v. Tiffany, 1 Wall. 298. Mr. Justice Swayne in delivering the opinion adverts to the statement made by Chief Justice Taney in Andrews v. Pond, and quoting the statement which we have given supra, he adds, "The converse of this proposition is equally well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." In support of this rule he cites Depeau v. Humphrey, 20 How. 1, and Chapman v. Robertson 6 Paige 634.

The next case in which this doctrine is commented upon is Scudder v. Bank, 91 U. S. 411, in which Mr. Justice Hunt collates and reviews the authorities. "The rule is often laid down that the law of the place of performance governs the contract.**** For the purpose of payment, and the incidents of payment, this is a sound proposition, **** Matters bearing upon the execution, the interpretation, and the validity of the contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, and statutes of limitations, depend upon the law of the place where the suit is brought." Scudder v. Bank, 91 U. S. 406.

The case of Cromwell v. Co. of Sac., 96 U. S. 51--1877, affirms the rule laid down in Miller v. Tiffany and Scudder v. Bank.

A still later case is Sturdivant v. Memphis Nat. Bank, 9 C. C. A. 256 --1894, which adopts in toto the rule as laid down in Miller v. Tiffany as quoted supra.

By this review of the decisions of the United States Courts it is evident that in a federal court the ruling excepted to would be erroneous, and the contention of the appellant would have to be sustained.

A very lucid statement of the points involved is found in a Vermont case, in the opinion of Mr. Justice Redfield. "I consider the following rules in regard to interest and contracts to be well settled. 1. If a contract be entered into in one place to be performed in another, and the rate of interest differs in the two countries, the parties may stipulate for the rate of interest of either country, and thus by their own express contract determine with reference to the laws of which country that incident of the contract shall be decided. 2. If the contract so entered into stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear that the parties intended to contract with reference to the laws of the other place. 3. If the contract be so entered into, for money at a place or on a day certain, and no interest shall be stipulated, and payment be delayed, interest by way of damages shall be allowed according to the law of the place of payment. Peck v. Mayo, 14 Vt. 33; see also Butler v. Olds 11 Ia. 1.

Let us examine the Pennsylvania authorities. An examination of the two cases cited by the Encyclopedia by no means convinces us that they establish the unqualified proposition for which they are cited. Both were cases

in which contracts were made by a New York corporation with a citizen of Pennsylvania, for money payable in New York. The contracts reserved the New York rate of interest, and the cases decide merely that where the contract reserves a rate of interest legal at the place of performance, though higher than that allowed under the laws of Pennsylvania, the law of the place of performance will govern. Nat. Building & Loan Ass'n v. Riley, 4 D. R. 663; Bennett v. Building & Loan Ass'n, 177 Pa. 233. But this is the doctrine laid down in Andrews v. Pond, the converse of which was deduced by Justice Swayne in Miller v. Tiffany, 1 Wall. 298. And there is nothing in these Pennsylvania cases to indicate that the Pennsylvania courts would not extend the rule in the same manner if the case were presented. It is interesting to note in this connection that the court in deciding the case of Nat. Building & Loan Ass'n v. Riley, cited as authority the portion of the opinion from Miller v. Tiffany which we have quoted supra, thus clearly establishing the coincidence of the views of that court with the doctrine of the federal courts.

In so far therefore, we do not find the decisions in conflict with the prevailing rule.

It is the case of Burnett v. Ry. Co., 176 Pa. 45, which to our mind governs this case, and the principle there laid down is disastrous to the contention of the appellant.

The plaintiff therein was an employee of the defendant company. On application, he received two passes for free transportation, one from Trenton to Philadelphia, the terms of which did not appear in evidence, the other an employee's pass from Philadelphia to Elmira. He was injured at Harrisburg through the admitted negligence of the company. Under the laws of New Jersey, where the passes were issued and the contract made, the contract by which the plaintiff, in consideration of free transportation assumed the risk of accident was valid, and in that state he could not have recovered. Under the law of Pennsylvania the contract exempting the company from liability was invalid. The court held that the place of performance governed and that the plaintiff could maintain his action.

It is true that the defendant was a Pennsylvania corporation and that the transportation was almost wholly through this state. These facts may have influenced the court, but, looking at the decision as an abstract principle of law, it establishes the following proposition. A contract valid in the state where made, but invalid in Pennsylvania where it is to be performed will not be recognized or enforced by a Pennsylvania court.

Applying this doctrine to the facts at hand, the ruling of the court below was correct. The contract as it stands is invalid in so far as it stipulates for a rate of interest in excess of six per centum. Act May 28th, 1858, P. L. 662. Were it wholly invalid under the statute, controlled by the ruling in Burnett v. Ry. supra, we would feel constrained to refuse to consider it. In so far as it is invalid therefore, the plaintiff cannot invoke the assistance of Pennsylvania courts to aid in its enforcement.

We are well aware that there is certain language in the opinion handed down in the decision of the above case upon which an argument may be based that the intention of the parties is paramount, but we cannot reconcile such a statement with the decision reached.

It would be as logical to say that the intention of Burnett and the company was that the New Jersey law should govern, as to say in the present suit that the intent of Hunter and Hammond was that the law of Arkansas should control their contract. In either case the natural presumption would be that the parties intended that law to govern under which their contract was valid and enforceable.

We have carefully examined the cases cited in support of the decision of Burnett v. Ry. Co., viz: Brown v. Ry. Co., No. 83 Pa. 316; Waverly Bank v. Hall, 150 Pa. 446; Mullen v. Morris, 2 Barr 85; Allshouse v. Ramsey, 6 Whart. 331, yet none of these cases seem to lay down the principle so broadly as the case which we have considered as ruling. It is noteworthy that in Brown v. Ry. Co. the opinion cites as authority Scudder v. Bank, 91 U. S. 411, to which we adverted above, and which if followed here would compel a decision in favor of the appellant. We have noticed also that Burnett v. Ry. Co. was cited with approval in Musser v. Stauffer, 192 Pa. 198.

It may be that the supreme court when the question is squarely presented will hold that the case of usurious interest does not properly come under the ruling of Burnett v. Ry. Co., but we are unable to avoid such a conclusion. Therefore the decision of the lower court is, affirmed.

OPINION OF THE SUPREME COURT.

The conclusions of the learned court below must be affirmed for two reasons. (a) It does not appear whether the law of Arkansas differs from that of Pennsylvania, with regard to usury. That being so, we must treat the case as if there were no difference. Musser v. Stauffer, 178 Pa. 99; Bennett v. Caldwell, 70 Pa. 253; Van Auken v. Dunning, 81 Pa. 464. Harper v. Young, 112 Pa. 419. If then the Arkansas law and the law of this state are the same, there is no pretext for allowing more than six per cent interest to be recovered.

(b). The learned court below has satisfactorily shown that, in this state the validity of a contract, which contemplates that performance, in whole or in part, shall be in this state, must be decided by the law of this state. The bond was for the payment of $1000 "in the city of Philadelphia." Our courts have not accepted the principle that the law of the place where a contract is made, or where the loan or other consideration passes to the obligor (*Vide* Minor, Conflict of Laws, 433) is to prevail, when performance is to be made here. The clear discussion of this question in the opinion below, dispenses us from the necessity of further consideration of the question.

Judgement affirmed.

JOHN MANNERS v. IGNATIUS ATMORE.

Landlord and Tenant.—Liability of Lessee After Assignment of Term.

STATEMENT OF FACTS.

Manners let a house to Atmore for five years, at a rental of $250 per year. At the end of the first year, Atmore assigned the lease to one Watkins, who agreed to pay the rent to Manners and fifty dollars per year additional to Atmore. Manners when not paid the second year's rent sued Watkins for it and recovered it. The third year's rent was paid by Watkins. At the end of the fourth year Watkins vacated the house, which remains unoccupied. This is a suit for the fourth year's rent. During the third year, Watkins made some repairs, at the demand of Manners; repairs which a tenant should make.

BRENNAN for Plaintiff
DIPPLE for Defendant.

OPINION OF THE COURT.

FELTON, J.—The first question in the case before us seems to be, whether Manners accepted Watkins as his tenant, so as to exempt Atmore from liability for the rent.

In this case Watkins accepted the lease with the same covenants that Atmore had and also went into possession. So that from his acts it appears he intended to take the place of the original lessee. Now if his acts were sufficient to relieve Atmore from responsibility, it would seem reasonable he should be bound by the covenants in the lease, provided however that Manners expressly or impliedly accepted him as tenant, thus releiving the original lessee from his duty to Manners.

The facts show that Manners brought suit against the assignee for the rent that accrued the first year he was in possession; and also accepted the second year's rent from him, which we believe to be sufficient evidence, that Manners intended to accept the assignee as his tenant, and to release the lessee from his responsibility.

It is well settled that covenants to pay rent run with the land and the assignee of a lease of land is liable to the lessor for the payment of all rents which accrue while he holds the assignment of the lease. 139 Pa. 341.

In the case before the court the assignee still held the lease when the rent became due, as neither Manners or the lessee had done anything to release him from responsibility.

Suppose A, the original lessee is to pay $300 rent per year. He leases for five years, but at the end of the first year he assigns his lease to B, because he, A, can rent another property for $100. We think it would be absurd that in the case supposed the lessor could not hold B for the rent. 12 Ind. 408; 5 Wis. 600; 14 Wis. 295.

While it may be argued there is no express covenant in this case, there is surely no doubt as to its being an implied one. As such the liability of the tenant is founded on privity of estate, and determines upon the assignment of the lease to another, and does not survive the

acceptance of rent by the lessor from the assignee. 13 Iowa 42.

If this rent had accrued before the assignee obtained title, it is clear he would not have been liable, as there would have been no privity of estate. But here the rent accrued while assignee held the lease and he is liable. 123 Penna. 576; 3 W. & S. 531

We do not think there would have been any doubt as to who is liable for the rent, if the lessor had consented by express words to accept the assignee and thereby release the lessee. But in the absence of express words it seems evident by his actions, that he intended to accept the assignee as his tenant. 30 Ohio State, 569.

It is a well settled rule that by the privity of estate between assignee of a leasehold and the lessor, such assignee becomes personally liable to the lessor, while he holds the estate as assignee, for the performance of the lessee's covnants which run with the land. The question of liability of the assignee of a leasehold has arisen chiefly where it has been sought to enforce against the assignee the liability for rent accruing during the assignee's tenancy and he has been held personally liable. Vol 18, A. and E. Encyc. of Law, pp. 668-669.

The majority of the cases seem to hold that an assignment of a term and entry into possession creates privity of estate between the lessor and assignee, and thus makes the latter liable for the rent. Some authorities hold he cannot divest himself of the legal title and right of possession after he has taken possession of the leased premises. 66 Cal. 223; 91 Cal. 223.

The fact that Watkins only occupied the premises for two years, and then abandoned them before the whole term of the lease had expired; does not relieve him of his responsibility to the lessor for rent. 1 Gray (Mass.) 332; 22 Pick. (Mass.) 565.

Here the assignee received an absolute assignment of the lease from the lessee, because he assigned all his rights and interests in the premises to Watkins. So the assignee would seem liable for the rent. 50 Mo. 319; 17 Mo. 148; 55 O. State 161.

Some courts have gone much farther than this and held the assignee liable for rent, where he purchased at sheriff's sale. 2 Wend. (N. Y.) 518; 15 O. State 186.

According to the decisions of the cases cited, we think the assigne should be liable for the rent, and the suit should be against him.

Judgment accordingly.

OPINION OF SUPERIOR COURT.

We are unable to sustain the judgment of the learned court below. A lessee cannot discharge his obligation to pay the rent, by assigning the term. The assignee assumes a collateral liability for such rent as falls due during his ownership of the term, but that of the lessee continues likewise. It follows that the landlord may sue either or both, for rent. His suit of one is not an election to discharge the other, as respects the rent sued for, even; still less for other rent. When Manners sued Watkins, he did not deprive himself of the right, should his suit be abortive, to pursue Atmore for the *same* rent. He is not suing Atmore for the *same* rent, but for rent accruing subsequently.

The learned court below has discovered in Manners' action against the lessee's assignee, and in his receipt of a year's rent from the assignee, a release of the lessee. We cannot find it there. He had a right to get two years' rent from Watkins, and the fourth year's rent from Atmore; doing the former cannot be tortured into a waiver of the right to do the latter. Consult cases cited in Trickett, Landlord and Tenant, p. 374. Shand v. McClosky, 27 Super. 260; "The assignment of a lease does not annul the lessee's obligation or his express covenant to pay rent, even though the lessor has assented to such assignment and collected rent from the assignee, unless the lessor has accepted the surrender of the lease, and released the original lessee." 24 Cyc. 1177.

Judgment reversed with *v. f. d. n.*

COMMONWEALTH v. CLARENCE VERNON.

Violation of Liquor Laws by Agent. Indictment of Principal.

STATEMENT OF FACTS.

Vernon licensed to sell liquor, as a hotel-keeper,gave strict instructions to his bartender to sell to no minor, habitual drunkard, on Sunday or election days, etc. This instruction was observed, until six (6) months afterwards, a minor offered him a dollar ($1) if he would furnish him a drink ordinarily costing fifteen (.15) cents, the minor also paying the fifteen (.15) cents. The object was that the bartender keep the($1) one dollar for himself and not account for it to Vernon. This purpose was carried out.

This is an indictment for the sale of liquor to a minor.

ORCUTT for Commonwealth.

UMBENHAUER for Defendant.

BUCKLEY, J.—It appears that Vernon, as a hotel keeper was licensed to sell liquor. He gave strict instructions to his bartender not to sell to any minor or habitual drunkard, nor on Sunday, election day, etc. The bartender for the sum of one dollar and fifteen cents (the fifteen cents being paid for the drink) sold liquor to a minor on Sunday.

It seems that the defendant in this case acted in good faith when he gave such instructions to his bartender. In civil actions, generally speaking, a master is liable for the wrongs of his servant whether authorized by him or not, which are done in the course of the servant's employment and of the master's business. Burdick on Torts, p. 130. If the principal, in fact as well as in form, forbids his employes to sell illegally, he will not be guilty for a sale made by them against his will or in violation of his will. Trickett on Criminal Law, p. 338.

In Zeigler v. Commonwealth, 22 W. N. 111, it was held that if a sale be made by an agent against the authority of his landlord and without his knowledge, he would not, of course, be criminally responsible.

Altho there is no doubt in our minds that a master is liable for the

wrongs done by his servant in civil actions, whether authorized by him or not, yet it is not the rule in criminal actions.

The law is very well laid down in the case of Commonwealth v Junkin, 170 Pa. 195 where the court held that whatever may be the answerability of the principal for the wrongful acts of his agent in civil actions, he is not answerable criminally, when the act is in positive disobedience of his explicit orders.

There is no question here but that the defendant acted in good faith and it was held in Commonwealth v. Johnson, 2 Super. 317, that every lawful instruction from principal to agent is considered to be given in good faith until the contrary is shown.

Ordinarily, the principal is not held criminally responsible for the acts of his servant or agent, unless he in some way participates in, countenances, or approves the criminal act of the agent. Nor can a principal be held criminally liable for the acts of his agent in opposition to his will and against his orders. Commonwealth v. Johnson, 2 Super. 317.

The fact that the bartender took the dollar and did not account for it to Vernon, shows that the act was his own and not that of Vernon.

The defendant is indicted under the 17th Sect. of the Act of May 13, 1887, but we cannot see in what manner he has violated the statute and therefore, we think there can be no conviction.

The verdict must be for the defendant.

OPINION OF SUPERIOR COURT.

Under the influence of a bribe, offered by a minor, the agent of the defendant sold to him some liquor. The bribe, $1.00, was retained by the agent. For the price of the liquor, 15 cents, he properly accounted. Sales to minors had been expressly and in good faith forbidden by the defendant, and the agent exhibited his belief in the good faith of the prohibition, by actually refraining from such sales through the period of six months. The question then is, is the principal criminally liable for the, by him, forbidden act of his agent? The learned court below has decided that he is not. We are satisfied with its reasoning and with the authorities cited by it.

Judgment affirmed.

BOOK REVIEWS.

Constable's Guide; The Law of Constables in Pennsylvania, by WILLIAM F. DILL. Second edition by D. CLARE GOOD, 1909. T. and J. W. Johnson Co., Philadelphia.

This is a small, but an exceedingly good book, It exhibits the whole law concerning the duties and power of constables; their election and term of office; writs and their service; levy and sale in execution; duties in distress proceedings; in elections; in respect to various crimes, etc. The principles are clearly stated, and the authorities in support of them, cited. The aim

of the editor of the second edition is declared by him to be "to make the book not only useful for constables, but also services able to the legal profession." It can be said that this aim in well realized. The book is a very convenient one for lawyers no less than for the officers.

Practical Suggestions for Drawing Wills and the Settlemet-of Estates in Pennsylvania, by JOHN MARSHALL GEST, of the Philadelphia Bar. 1909. T. & J. W. Johnson Co.

This little book, of 150 pages, is one of the most fascinating and, at the same time, instructive and serviceable books that we have encountered. It makes many practical suggestions which are of value, not merely to the testator, but to his legal counsel. The first part deals with the drawing of wills; the second, with the settlement of estates. More wisdom and wit, in the same space, it would be difficult to find in any legal or quasi-legal work. All important statutes are referred to, and practical warnings and admonitions expressed in the most striking and piquent way appear on every page. We most heartily recommend this book to every lawyer and to almost every layman.