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INSURABLE INTEREST IN LIFE INSURANCE.

[Concluded from the November number]

CONTRACT FOR FUTURE SUPPORT.

A may agree with B to furnish B a support, to take B into his house, and B may take out a policy on his life, in A's favor. Is A to be treated as a creditor with an insurable interest? In two cases, he has been. B, having a certificate entitling his nominee to $2000 at his death, became sick, and helpless. A consented to take him into his home, on being named in the certificate the beneficiary, to give him necessary food, clothing, medicine, and attention; to bury him if he should die, and furnish a suitable tombstone. Four months later he died. In an interpleader between B's administrator, and A, it was determined that A had a right to the money. Says the supreme court; "The plaintiff below (A) had an indubitable insurable interest in the life of Blair (B). No question was raised in the trial as to the amount or extent of that interest. The right to recover any sum was denied." In that court B's administrator contended that A had a right only to a part of the $2000; probably to so much as the services in fact rendered to B were worth. The court says "The record does not permit a consideration of the restricted claim now attempted to be made."[71] In Batdorff v. Fehler[72] A had in the past furnished

[71]McArthur v. Chase, 5 Sadler, 67.

[72]6 Sadler 559; In Seigrist v. Schmoltz, 113 Pa. 326, it is conceded that Schmoltz having entered into an agreement with Seigrist to maintain him, might take a policy on his life in order to protect himself to the extent of that charge, even as a creditor may insure his debtor in order to protect

a home to B. He agreed to continue to do so, and B induced him to take out policies, to the extent of $3000 on her life. On these at B's death, A received $2900. In a suit by B's executor to recover this money from him, A was held to have had an insurable interest in the policies, to the extent of the value of the services rendered to B in her lifetime, with interest, and also the amount he was obliged to pay to protect that debt, with interest. The remainder belongs to the executor of B.

WHEN A CREDITOR MAY RETAIN THE WHOLE AMOUNT OF THE POLICY.

When a policy is acquired by a creditor, not as collateral security merely, but absolutely, in many cases, if he is allowed to retain the entire amount of the policy, which he has received from the insuring company, he will make a profit. The making of this profit will depend on the actual duration of the life of the insured, after the taking out of the policy. When the debtor is so young that his expectancy is 40 years, or so old that it is but five years, the chances of profit from taking out a policy of the same amount for the same debt are very different. In one case the creditor will probably get the money only after 40 years, in the other in five. In one case he will get it only if he pays 40 annual premiums, in the other, upon the payment of but five. Creditors having debts of the same size may acquire policies upon the lives of their debtors for various amounts. The debt beng $1000, A may take a policy for $1000; B, one for $10,000; C, one for$100,000; D, one for $1,000,000. Are all these policies permissible; and, if they are taken, will the creditor be allowed to collect from the company, or, having collected it, to retain from the administrator of the debtor the entire amount? If A, with a debt of $1000 owed him by B, takes out a policy on B's life for $1,000,000, and is allowed to retain the $1,000,000, when paid him, he is under a strong temptation to stop early the heavy premiums he must pay; that is to cause the death of B. The speculative instinct, too, would be unduly developed, even if no crime were attempted against the debtor's life. Is there any rule, by which the permissible magnitude of the amount

himself to the extent of his debt, for in that case he would gain nothing by Seigrist's death, though he might not be interested to maintain his life. Schmoltz, on a $3000 policy could retain what was necessary to cover the outlays he had made, in pursuance of his contract, and also for the money expended in taking out and maintaining the policy, and for interest on those sums. The excess belongs to the administrator of Seigrist.

of the insurance may be regulated, which the creditor will be allowed to retain? In some cases, the conception of a "proportion" between the debt and the amount obtained on the policy, appears. The latter must not be "grossly disproportionate to the debt."[73] Green, J. thought that if a creditor to the extent of $100 or $200 should take a policy for $10,000 on the debtor's life, "such a disproportion would make a wagering policy."[74] "To procure a policy for $3000" said Miller, J. of the Supreme Court of the United States. "to cover a debt of $70 is of itself a mere wager. The disproportion between the real interest of the creditor, and the amount to be received by him deprives it of all pretense to be a *bona fide* effort to secure the debt.[75] Paxson, J. thought[76] that "to take out a policy of $5000 to secure a debt of $5 would be such a palpable wager that no court would hesitate to declare it so as a matter of law." When a policy of $2000 was assigned to the creditor, the debt, then unascertained, was between $500 and $750 Clark, J. says, considering the character of their business relations, the unsettled state of their affairs, the age of the insured, and the probable amount of premiums that may have to be paid by the creditor, and the interest accumulating on the debt and premiums, he could not say, the assignment was in bad faith. The court on a bill in equity, properly sustained the right of the creditor, as against the administrator of the debtor, to the proceeds of the policy.[77] These are empirical and arbitrary statements. They furnish no test by which in any case it may be determined whether the amount secured by the policy, is too great, in view of the debt whose existence was the consideration for it.

THE PENNSYLVANIA TEST.

In 1887 Paxson, J. remarked, "Speaking for myself it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest [that would

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

[74]Brennan v. Franey, 142 Pa. 301.

[75]Cammack v. Lewis, 82 W. S. 643.

[76]Grant v. Kline, 115 Pa. 618. Simonton, J. thought that a policy for $3000 to secure a debt of $100, naming the creditor as beneficiary, would as matter of law be a wager, Schaak v. Meiley, 136 Pa. 161. The disproportion between a debt of $100 and a policy of $3000 was regarded by Sterrett, J. as so great as to make the policy a wager as matter of law, in Cooper v. Shaeffer, 20 W. N. 123.

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

accrue during the life expectancy of the debtor] and the amount of premiums with interest thereon during the expectancy of life as shown by the Carlisle tables. This view however, has never yet been adopted by this court in any adjudicated case, nor do we feel compelled to define the disproportion now, in view of the particular facts of the case in hand."[78] The same year Sterrett, J. said of Justice Paxson's suggestion " This appears to be a just and practicable rule."[79] In 1890 this rule, thus experimentally laid down, is distinctly adopted by the Supreme Court. "We have now reached a point" says Paxson, C.J., "when it is necessary to lay down some fixed rule by which such cases can be disposed of in the future, otherwise the rulings of the courts and the verdicts of juries upon such questions will be arbitrary, and where there is nothing in a case but the amount of insurance and the amount of debt it is impossible for either a court or a jury to arrive at a correct result." "In order to ascertain whether an insurance is disproportioned to the debt; regard must be had to the age of the assured, his expectation of life, and the cost of carrying the insurance, with interest thereon, as well as upon the amount of the debt." Hence says the court the age of the debtor may be shown, and his expectancy, at the time of the assigning of the policy or the naming in it of the creditor as beneficiary, and if the amount of the policy does not exceed the debt plus the interest thereon, during the period of expectancy, and the sum of the premiums which the creditor will have to pay [when he undertakes to pay them] during the period of expectancy, plus the interest thereon, the transaction will not be a wager; if it does exceed these sums, the transaction will be a wager.[80] In 1891, Paxson, C. J. observed "Whether the insurance was so disproportioned to the debt as to make it a speculative or gambling transaction must be determined according to the rule laid down in Ulrich v. Reinoehl, 143 Pa. 238."[81] When the amount of the policy does not exceed the amount allowed by this rule, the whole of the money belongs to

[78]Grant v. Kline, 115 Pa. 618. He refused in a contest between the administrator of the insured and the creditor to say that as a matter of law, a policy for $3000, securing a debt of $743.56, was a wager.

[79]Cooper v. Shaeffer, 20 W. N. 123.

[80]Ulrich v. Reinoehl, 143 Pa. 238.

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

the creditor, if it was understood by the debtor and him, that he should have it. [82]

WHEN THE RULE IS NOT APPLIED.

The application of the rule thus announced is made possible only when the age and life expectancy of the debtor at the time of the transaction which interests the creditor in the policy and the size of the premiums payable are revealed. If they are not shown, the court, in some cases will arbitrarily say that the transaction was a wagering one; e.g. the debt being $100, the acceptance of a policy for $3000 is a wager.[83] The debt being for $214 a policy for $3000 was apparently conceded to be a wager, though it would not have been, had the debt been for $743.[84] In other cases it will refuse to say so as matter of law; Thus, where the debt was $743.56 and the policy was for $3000, the court refused to declare that it was a wager, the debtor being 65 years old, and an unusually good risk, the court knowing that an annual premium for a man of that age, "must have been a considerable sum," and "with the annual interest [on the premium, or the debt, or both, perhaps] would roll up rapidly."[85] The court declined to pronounce a wager, a policy for $2000 assigned to a creditor for a debt of $700, where apparently the age of the debtor, his expectancy, the size of the premiums, were not shown.[86]

THE RULE ABSURD.

The court has taken judicial notice of the manner in which the Carlisle Tables have been formed, and of their accuracy. It judicially knows that the premiums required upon a policy on a

[82]The debt was $110.02. The debtor was 42 years old, when the policy was assigned to the creditor. The payments that would be made during the expectancy would amount to $2436.13. The interest thereon would increase it to $4336.31. The policy was for $3000. Although the debtor died in four years, the whole of the $3000 belonged to the creditor; Ulrich v. Reinoehl, 143 Pa. 238. Cf. Wheeland v. Atwood, 192 Pa. 237.

[83]Cooper v. Shaeffer, 20 W. N. 123; Schaak v. Meiley, 136 Pa. 161.

[84]Grant v. Kline, 115 Pa. 618, A policy of $2000, the debt being $500, was pronounced by the court not a wager in Shaffer v. Spangler, 144 Pa. 223. but one of $2000, for a debt of $250 plus the expenses of the funeral, was pronounced a wager by the trial judge.

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

[86]McHale v. McDonald, 175 Pa. 632.

man who is 65 years of age is "a considerable sum."[87] Why then did it not judicially know that an insurance company, in determining the premiums payable assumes that every insured will live throughout the period of his expectancy, and adopts a rate of premium so high, that the sum of the premiums payable throughout the expectancy, plus the interest upon them will be greater than the amount of the policy?[88] Why did it not know that if a policy of $1000 issued at a given time on a given life, would cost an annual premium of $50, a policy for $2000 would cost substantially twice as much, and one for $4000, four times as much? but that in every case, the sum of the premiums plus interest, must be greater than the money which the company contracts to pay, when the policy matures? Why did it not know that the sum of the premiums must always thus exceed the amount of the policy, whether there is a debt due by the insured or not? If it had known these facts, it would have discerned, with a little reflection, the futility and ineptitude of the rule formulated with so much solemnity. If in every case the premiums are determined by the face of the policy, as well as by other matters; if in every case they must, added together, with the interest on them, exceed the face of the policy, it is clear that every policy must, according to the rule laid down, be permissible and free from wagering element. B owes $10 to A. A takes an insurance on B's life for $100,000. But on this policy the premium will be 100 times as heavy as on a policy of $1000: a thousand times as heavy as on a policy of $100; and 2000 times as heavy as on a policy of $50, and the sum of them will exceed $100,000. Then, for a debt of $10, A may take out a policy of $100,000! or one million dollars! It is never necessary to add the debt and the interest that will accrue upon it, to the sum of the premiums in order to equal or exceed the face of the policy. The sum of the premiums plus interest alone, will do that. So this rule, dignified by Cooley in his Brief on Insurance as the Pennsylvania rule, is simply an absurdity.

[87]Grant v. Kline, 115 Pa. 618. The objections to the rule in Ulrich v. Reinoehl, 143 Pa. 238 were pointed out in a forcible way, by Prof. A J. White Hutton in an article in the Forum of May, 1905. He has since restated them in a paper read before the Pennsylvania Bar Association at Bedford Springs, July 1909.

[88]The plan on which premiums are computed is stated with scientific precision in 13th Encyc. Brit. p. 171. See also 11 New Internat. Encyc. p. 261.

JUDGE MCPHERSON'S OBJECTION TO THE RULE.

In Ulrich v. Reinoehl[89] the evidence justified, and counsel for the creditor invited, the application of the rule previously propounded by Paxson, J. and approved by Sterrett, J. McPherson, J. somewhat hesitatingly, applied it. "With much respect" however, he ventured to suggest two matters as worthy of consideration before the rules as yet only adumbrated, should be "positively adopted." (1) The rule could not be well applied to insurances on which the insured was bound to pay, not premiums whose size was ascertained in advance, but variable assessments; (2)The rule does not provide for cases in which the insured outlived his expectancy. To the first objection; the answer of Paxson, C. J. is that while it is impossible to foresee the precise amounts of assessments that will become payable through the period of the expectancy, these assessments may be approximated by the aid of the experience of other similar companies. "A slight mistake, one way or the other, owing to the condition of the company's business, by which assessments are increased or diminished, would not necessarily (!)vitiate a policy." But would it ever? and if so, when? Where is the rule? Probably what is meant is that when the assessments that, when the policy is issued to a creditor, or assigned to him, will probably be made during the period of expectancy, plus the interest on them, will pobably amount with the debt and the interest thereon during the expectancy, to the amount of the policy, the whole of it will belong to the creditor unless the understanding between him and his debtor was that he should hold it merely as security. Whether the assessments will probably amount to so much, must be ascertained by the past experience of the company or of other companies.

To the second objection, Paxson, C. J. replies that it may be disposed of without difficulty. In no case should a policy be allowed, he says, because the sum of the premiums, or assessments during the *possible* life of the policy may with the debt and interest, equal the face of the policy. "If we go beyond the expectancy where are we to stop? A man may live to the age of a hundred and such length of days is of frequent occurrence. (?!) To

[89]143 Pa. 238. In Shaak v. Meily, 136 Pa. 161, it appeared that the debtor's expectancy was 20.20 years; that the assessments and dues during this period, would amount to $2206.80; that the interest being added, they would amount to $3530; i.e. would exceed the policy ($3000).

sanction a policy covering such a period, and yet allow the holder to recover the full amount in case of death within a year, would be a retrograde step in our decisions." The creditor then, is to be allowed to take a policy for an amount that will not exceed the sum of all the premiums plus interest, that will be paid if the debtor lives through the period of expectancy, whether he shall in fact live through that period, or die even earlier, within it; but he may not take a policy for an amount that would be equalled only by the premiums paid through a longer period than that of the expectancy.

A WORKABLE RULE.

The rule in Ulrich v. Reinoehl does not put a stop to wagers by creditor upon the life of the debtor. He may, for a debt of $100, take out a policy for $3000, and recover and retain the $3000 although the debtor should die before the second premium becomes payable. The only way to prevent speculation on the debtor's life, to a grave extent, is to regard all assignments of policies to creditors, or nomination of them as beneficiaries, as intended for collateral security, and to allow the creditor, in any case, to retain, of the money obtained on the policy, only so much as shall equal the debt and interest to the time of his obtaining it, together with the premiums that he shall have paid for it, with the interest thereon. Is it said that the possibility must not be ignored, that the debtor will live so long that the creditor, in sustaining the policy will pay premiums the sum of which, with interest, will exceed the money ultimately obtained on the policy? But it is not the same man that will thus lose, and that will, in the other case, make by the insurance. Because A will lose, why must B make? Nor is it necessary to encourage creditors to lend money by allowing them to take the chance of profit by an early death, and of loss by a late death, of the debtor.

CONTEST BETWEEN WHOM.

The insurance company may waive any question whether the policy was a wager or not. It may pay the money into court, under an agreement with the claimants, that an issue shall be

[90]Chidester v. Yard, 155 Pa. 483; Downey v. Hoffer, 110 Pa. 109; McHale v. McDonnell, 175 Pa. 632; Corson's Appeal, 113 Pa. 438.

framed between them.[90] The company may file a bill compelling the competitive claimants of the money to interplead.[91]

AGAINST COMPANY.

The company may have a right to pay the policy to A, and by so doing discharge itself, although A may be compelled to pay all or some of the money received to B. The assignment of the policy by the assured may justify payment by the company to the assignee, so that, should later a suit be brought by one who disputes the right of the assignee to the money, the prior payment will be for the company a good defense. Deciding that such payment will be a good defense, will not necessarily be a decision that another might not recover the money paid from the recipient of it.[92] A becomes a member of a beneficial society, and designates B as the beneficiary, although he has no insurable interest. If on A's death, the society pays the money to B, it cannot be compelled to pay it again to A's administrator. A notice from the widow of A not to pay to B, may be ignored by the company, although she is also the administrator.[93] The executor or administrator of the insured may recover from the company, notwithstanding a virtual assignment of the policy, such assignment being voidable by the plaintiff.[94] It is tacitly[95] or expressly, assumed that if the beneficiary is such in virtue of a wager transaction, or the assignee, under a wager assignment, an action by such beneficiary[96] or as-

[91]Masonic Aid Assn. v. Jones, 154 Pa. 99; Cf. McArthur v. Chase, 5 Sadler, 67. In Overbeck v. Overbeck, 155 Pa. 5, a feigned issue was framed between two wives of the insured.

[92]Hill v. Ins. Assn., 154 Pa. 29. A policy payable to the administrator of the insured is assigned by him. The company may safely pay the assignee, in the absence of notice of fraud in the procuring of the assignment. Mut. L. Ins. Co. v. Roth, 118 Pa. 329.

[93]Bomberger v. U. B. Mutal Aid Society, 18 W. N. C. 459. Cf. Hettinger v. Mut. Aid Society, 1 Del. 466; 4 York Leg. Rec. 39, where it is said that notice before payment not to pay the assignee need not be heeded by the company.

[94]Burke v. Ins. Co., 155 Pa. 295. A took out a policy on her own life, payable to her executor or administrator. She immediately gave it to her daughter-in-law B, who was to pay the premiums and from the proceeds of A's policy the funeral expenses of A, the balance to the daughter of B. B became administrator, and as such, sued the company and recovered.

[95]Mutual Ins. Co. v. Kane, 81 Pa. 154; Mut. Assn. v. Beaverson, 16 W. N. 188; Mullen v. Ins. Co. 182 Pa. 150; Weber v. Ins. Co. 172 Pa. 111; Brady v. Ins.Co., 5 Kulp, 505; Ramsay v. Mut. Aid Society, 6 Dist. 468.

signee,[97] against the company may be defeated by it on that ground. The company may defend in an attachment execution, issued on a judgment against a beneficiary who has no insurable interest.[98] If the policy is payable to the executor or administrator, or the assignee of the person insured, or to such person as the company may deem equitably entitled, by reason of having incurred expenses in burying the insured, a niece cannot, by paying the premiums and burying the insured, entitle herself without the consent of the company.[99]

ACTION BY ONE CLAIMANT AGAINST ANOTHER.

If the Company pays the money due upon the policy to a party who, as respects another claimant, is not entitled to it, the other claimant may maintain an action against the recipient, for money had and received to his use. Frequently the administrator of the insured thus recovers the money from a person named as beneficiary, or from an assignee of the policy, the beneficiary or assignee having a wagering interest only in the policy.[1] The assignee of the beneficiary having obtained the money, the beneficiary may recover it from him, (or, he dying, his administrator) if the assignment was wagering.[2] Although the company might have avoided paying anything on the policy because it was void, as being a wager, nevertheless, if it pays to the assignee or beneficiary, the administrator of the insured can recover from him.[3]

WHAT MAY BE RECOVERED.

The policy may have been assigned as collateral security for a debt. If the money is paid to the assignee, the administrator of

[97]Carpenter v. Life Ins. Co., 161 Pa. 9; McGraw v. Ins .Co., 5 Super. 488. In Keystone M. B. Assn. v. Norris, 115 Pa. 446 the policy was taken out payable to a son-in-law, but with the intention that he should immediately assign it to X. Within 18 days, the assignment to X was made. An action by the son-in-law to the use of X was defeated.

[98]Ramsay v. Mut. Aid Society, 6 Dist. 468.

[99]Crone v. Prudential Ins. Co. 11 Dist. 433.

[1]Gilbert v. Moose, 104 Pa. 74; Vanormer v. Hornberger, 142 Pa. 575; Seigrist v. Schmoltz, 113 Pa. 326; Ruth v. Katterman, 112 Pa. 251; Battdorff v. Fehler, 6 Sadler, 559; Stambaugh v. Blake, 22 W. N. 407.

[2]Vanormer v. Hornberger, 142 Pa. 575; Speck v. Hettinger, 2 Sadler, 474; Wegman v. Smith, 16 W. N. 186. The burden is on the plaintiff to show that the policy or the assignment of it was wagering; Lenig v. Eisenhart, 127 Pa. 59. Slight evidence however, may shift the burden; Vanormer v. Hornberger, 142 Pa. 575.

[3]Ramsay v. Myers, 6 Dist. 468.

the assignor may recover all beyond the debt and interest, and premiums paid to support the insurance plus interest.[4] Generally the plaintiff grounds his right to recover upon the wagering nature of the interest of the defendant. If the defendant has paid premiums or assessments, in keeping alive the policy he is allowed to retain the amount thus paid[5] plus the interest thereon.[6] When no premiums have been paid by the assignee, because of the quick death of the insured, and no other allowable abatements exist, the whole amount received on the policy will be recoverable from the assignee.[7] If B procures a policy on A's life, to be issued, without A's knowledge, and without insurable interest, and after paying some premiums, assigns the policy to C who has an insurable interest, and C receives the money from the insurance company, on A's death, B cannot recover from C the amount of premiums paid by him. Had he acted with the knowledge and approbation of A, he would probably have a right to recover them.[8] The policy may have been assigned or otherwise given to X, as a creditor, the intention being that he should have all of the money which should be paid on the policy at death. If the transaction is a wager, the creditor while compelled to pay the rest, may retain, besides the assessments or premiums paid by him, with interest thereon, the debt, plus the interest on it.[9] But, he will not be entitled to a credit for assessments paid by the insured, prior to the assignment.[10] If a policy on the life of A's wife, is assigned to secure A's debt the assignee may retain the amount of the debt and interest upon it, as well as the premiums paid by him plus interest thereon.[11] If the assignee has paid the insured something for the assignment, when sued for the money

[4]Cunningham v. Smith, 70 Pa. 450.

[5]Stoner v. Line, 16 W. N. 187; Wegman v. Smith, 16 W. N. 186; Ruth v. Katterman, 112 Pa. 251; Gilbert v. Moose, 104 Pa. 74; Kerr v. Lauser, 174 Pa. 608; Cooper v. Shaeffer, 20 W. N. 123; Brennan v. Franey, 142 Pa. 301. Cf. Shaeffer v. Spangler, 144 Pa. 223, 227, for statement by Gibson, P. J. of allowances that may be made to the recipient of the money from the company.

[6]Grant v. Kline, 115 Pa. 618; Ulrich v Reinoehl, 143 Pa. 238.

[7]Vanormer v Hornberger, 142 Pa. 575.

[8]McDonald v. Gibbons, 14 Dist. 668.

[9]Ulrich v. Reinoehl, 143 Pa. 238; Cooper v. Shaeffer, 20 W. N. 123; Hendricks v. Reaves, 2 Super 545; Shaffer v. Spangler, 144 Pa. 223, Brennan v.Franey, 142 Pa. 301.

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

[11]Hendricks v. Reaves, 2 Super. 545.

obtained on the policy he will be entitled to retain the amount thus paid, and interest thereon, in addition to what he has paid of the assessments or premiums.[12] If the holder of the policy has been obliged to sue the company in order to get the money, he will be entitled to a credit for the necessary counsel fees paid by him, when he in turn is sued by the administrator of the insured;[13] and it matters not whether the fees were deducted from the fund before the defendant received it, or whether he paid them out of it after it came into his hands. If the beneficiary or assignee agrees to furnish a support to the insured, and has furnished it, the money value of that support plus interest thereon, may be retained by him from the money received from the insurance company.[14] If the assignor of a policy for $3000 retains the right to $1500 thereof, the assignee undertaking to pay all the premiums or assessments, the assignee on receiving the insurance money from the company, must pay the $1500 to the assignor, although the assessments paid are greater than the amount of money obtained upon the policy.[15] The beneficiary A, assigning 1-3 of the policy to X, who virtually reassigns it, if subsequently A assigns the whole to Y, who holds it without insurable interest and who receives the money from the company, he cannot defend as to 1-3, on the ground of the assignment to X, who disavows ownership.[16] In an action by the administrator of the member of a beneficial society who has named X, a person without insurable interest, as beneficiary, against X, it is not a defence that X has made a settlement with the widow and all the adult children who would share in the money, there being one child

[12]Downey v. Hoffer, 110 Pa. 109. In Wegman v. Smith, 16 W. N. 186 nothing was said about $5.00 paid for the assignment.

[13]Shaffer v. Spangler, 144 Pa. 223; But, in Vanormer v. Hornberger, 142 P. 575, the beneficiary recovered from his assignee apparently even the money paid by the society to the attorney of the assignee. In Cooper v. Shaeffer, 20 W. N. 123, a policy of $3000 was assigned to A for a debt of $100. A paid the premiums. He assigned to B one half of the policy. B recovered from the company $1800. The residue was paid to A. The administrator of the insured sued B. There was a recovery of $1100.04, but the instruction of the trial court is obscure. Judgement affirmed.—If the policy is assigned ½ to X and ½ to Y, and they jointly receive the money from the company, they are jointly suable by the beneficiary, if they had no insurable interest; Speak v. Hettinger, 2 Sadler 474.

[14]Batdorff v. Fehler, 6 Sadler, 559; Seigrist v. Schmoltz, 113 Pa. 326.

[15]Kerr v. Lauser, 174 Pa. 608.

[16]Brennan v. Franey, 142 Pa. 301.

a minor whose guardian is not a party to said settlement, although there are no debts.[17] A release by the only child and heir of the insured, to the assignee of the policy who has received the money, and to the administrator (who has not accounted for the money which he might have recovered from the assignee) is no defense to an action by the administrator *de bonis non.* When the money is collected and accounted for in the orphans' court, that court may consider the effect of the release upon the right of the assignee to take back the money in distribution proceedings.[18] If a policy has been assigned to X who has no insurablee interest, and who has since died, the administrator of the insured would have a right of action against X's administrator. But, if he, X's administrator has made a division of the money among the guardians of his minor children who have received it in good faith, they cannot be compelled to pay it to the administrator of the insured.[19] If B, without insurable interest, induces A to suffer the use of his name as the subject of insurance, pay him $25, and a policy is issued payable to B, who pays all the premiums or assessments, the administrator of A can probably recover from B the money he gets upon the policy, less the premiums or assessments, but not the $25.[20] If a policy on A is made payable to B, who has an insurable interest, and B assigns it to C who has no such interest, and C obtains the money on the policy, the administrator of A is not entitled to the money; but the beneficiary B, is entitled to recover it from C.[21]

MOTIVE OF THE ASSIGNEE.

It is sometimes said that if in fact there is no insurable interest, the beneficiary or assignee does not become entitled to the policy; does not acquire a right to receive and retain the money upon it, however blameless his motives. In Downey v. Hoffer[22] Boas obtained a certificate of membership in the U. B. Mutual Aid Society, entitling him to $2000 at his death and paid assessments

[17]Ruth v. Katterman, 112 Pa. 251.

[18]Shugar v. Garman, 2 Sadler, 490. In the Orphans' Court, the administrator may be surcharged with moneys which he should have collected, but has not, from the recipient of the insurance money. Ellott's Appeal, 50 Pa. 75.

[19]Blake v. Metzgar, 150 Pa. 291.

[20]Kohr v. Wolf, 16 W. N. 189.

[21]Hoffman v. Hoke, 122 Pa. 377.

[22]110 Pa. 109.

upon it for three years. Unable longer to pay them he sold the certificate for $65 to Downey, who continued to pay the assessments for six years, when Boas died. Denying to Downey the right to receive and keep more than his expenses in obtaining and maintaining the policy with interest, the court said, "It is not sufficient that the sale and purchase of this policy may have been in good faith and with correct motives. The mischief resulting from a sale of the policy for purposes of speculating on human life is so contrary to the policy of law,and so in conflict with the just principles of life insurance, that it is unsafe to release the rule that the holder of the policy must have some pecuniary interest in the life of the person insured." There can in such cases arise "no question of motive or good faith."[23] "The question is not one of good faith but of public policy.** The intention of John Schwartz in obtaining this policy may have been pure and innocent, but this cannot be regarded, for the fact remains that he was in no way interested to maintain the life of Jacob Seigrist, and it is certain, the sooner that life was extinguished the better it was, in a pecuniary point of view, for the beneficiary."[24] Yet at times reference is made to the good faith of the party in order to justify the sustaining of the transaction.[25] The fact that it was not the cupidity of the assignee that prompted the assignment, but the solicitation of the insured and his wife, is considered as negativing the speculative character of the act, in Ulrich v. Reinoehl[26] and in Corson's Appeal.[27] Clark, J. thought that the "essential thing" was "that the policy should be obtained in good faith and not for the purpose of speculation upon the hazard of a life in which the insured has no interest." As a sane man knows, when he has a policy on another man's life, the sooner that man dies, the sooner he will get the money and the fewer the assessments or premiums that he will have to pay, there is always room for the cupidity of the assignee to awaken, however dormant at the moment of his accepting the assignment.

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[23]Mut. Aid Society v. McDonald, 122 Pa. 324.

[24]Seigrist v. Schmoltz, 113 Pa. 326. Whether the intention was to speculate in life, was not a question to be submitted to the jury.

[25]Mut. Association v. Beaverson, 16 W. N. 188; Grant v. Kline, 115 Pa. 618.

[26]143 Pa. 238. Cf. Cunningham v. Smith,70 Pa. 450.

[27]113 Pa. 438.

RECOVERING BACK PREMIUMS.

If the policy is void because it is wagering, the beneficiary named therein cannot recover back the premiums or assessments paid, from the society or company "because" says McPherson, J. "these payments were not of benefit to the society."[28] A policy on the life of A, payable to his executor or administrator is taken out, by the agency of B, who pays all the premiums, and expects, probably to receive, the money upon it. Prior to the death of A, the insuring company cancels the policy and refuses to receive further premiums. B cannot recover back the premiums paid.[29]

POLICY VALID, THOUGH ANOTHER THAN THE INSURED PAYS THE PREMIUMS.

A policy on the life of A, payable to his executor or administrator, is valid as against the company, although it was procured by B who had no insurable interest in A's life, and although B paid all the premiums, and although B claims the benefit of the policy. The administrator of A may recover.[30] *A fortiori* the policy is valid, on which, payable to the executor or administrator that B pay the premiums, and from the proceeds of the policy, is given by the insured to her daughter-in-law, B, with direction that B pay the premiums, and, and from the proceeds of the policy, the expenses of the funeral of the insured, and the balance of such proceeds to B's daughter. B paid the premiums and after the death of the insured, obtained letters of administration upon her estate. As such she may recover from the company upon the policy.[31]

WHEN ADMINISTRATOR HAS NO CLAIM.

If the assured in a beneficial society has only a power of appointment, if, e.g., the certificate is payable to his devisees, or, if he makes no will, to his heirs, the administrator has no right to the money. It is not property, in which creditors have an interest.[32]

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[28]Ramsay v. Myers, 6 Dist. 468.

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

[30]Brennan v. Prudential Ins. Co., 148 Pa. 199. Cf. McDermott v. Prudential Ins. Co., 7 Kulp, 246.

[31]Burke v. Prudential Ins. Co., 155 Pa. 295.

[32]Masonic Aid Assn. v. Jones, 154 Pa. 99.

MOOT COURT.

COMMONWEALTH vs. TALBOT.

Evidence. Dying Declaration. Res Gestae.

STATEMENT OF FACTS.

William Atmore was killed by a pistol shot, and Talbot was on trial for the killing. The Commonwealth, inter alia, offered to prove that Atmore said, three minutes after falling from the shot, and before being removed, that Talbot shot him; also that Samuel Karper, (since dead) who was present at the occurrence, had cried out to Talbot, "what did you do that for," immediately after Atmore fell. The Court admitted the evidence over the objection that it was hearsay. The Court declined to let Talbot prove that his instant reply to Karper was "I did not do it." Conviction of murder in the first degree. Motion for a new trial.

BARNITZ for Commonwealth.

BRENNAN for Defendant.

OPINION OF THE COURT.

DIPPLE, J.—The ground on which the defendant seems to be making his plea for a new trial is the admissibility and inadmissibility respectively of certain points of evidence. First, claiming that the dying declaration of deceased is inadmissible, being hearsay evidence; second, that the declaration of Karper, (since dead) is hearsay; and, third, that the answering remarks of the prisoner to Karper, which were rejected by the Trial Court, should have been admitted.

The term "hearsay" is used with reference to that which is written, as well as to that which is spoken, and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given the witness himself, but rests, also, on the veracity and competency of some other person. Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge. That this species of testimony supposes something better, which might be adduced in a particular case, is not the sole ground of exclusion. Its intrinsic weakness, its incompetence to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, combine to support the rule that hearsay evidence is usually inadmissible.

But there are exceptions to this rule and one exception is in favor of "dying declarations" in homicide cases. The general principle on which this species of evidence is admitted was stated by Lord Chief Baron Eyre

to be this: That they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a Court of Justice.

The Court assumes that Atmore realized that he was mortally wounded and in danger of immediate death, in the absence of facts to the contrary. He was shot, and died a short time afterwards, and it is reasonable to presume that the deceased knew he was mortally wounded, and that he made his dying declaration in view of the fact that he did not have long to live. It was not error of the trial Court to admit this evidence. Similar evidence was admitted in Commonwealth vs. Van Horn, 188 Pa. 143; 161 Pa. 581; 91 Pa. 304; 85 Pa. 127.

As to the second point. Karper was an eye witness to the murder and his declaration was competent evidence. No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to the satisfaction of the presiding judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant. The Court is of the opinion that the declaration of Karper was made in good faith and there has been no evidence offered to show any adverse motive or reason why he should have made the declaration otherwise than in good faith.

As to the third point, the answer made by the prisoner that "he did not do it," this evidence should have been admitted, but this trivial error is not sufficient ground to grant a new trial, for a Supreme Court will not reverse a judgment on a verdict of guilty of murder in the first degree because of a trivial error which could have done the prisoner no harm. 56 Pa. 256; 161 Pa. 115; 31 Pa. 523; 106 Pa. 87.

Both the counsel for the plaintiff and for the defendant have cited the Act of 1887 in support of their argument but this act appears to have no bearing on the case whatever.

Although the trial Court made a trivial error in rejecting the answering remarks of the prisoner to Karper, this Court comes to the conclusion, that as the prisoner could not have been benefited by his declaration and as the other evidence objected to was properly admitted, there was not sufficient reason for granting a new trial.

OPINION OF THE SUPERIOR COURT.

A proper determination of this case requires a decision as to the admissibility of the declaration of (1) Atmore, the deceased; (2) Karper, the bystander; (3) Talbot the accused.

The learned judge of the court below, ignoring the brief of the counsel for the state, decided that the declaration of Atmore was admissible as a dying declaration. This was clearly erroneous. The conditions essential to the admissibility of this statement as a dying declaration did not exist at the time the declaration was made. They cannot be presumed to exist.

The declaration of Atmore was, however, admissible as a spontaneous exclamation. It is well settled that the declarations of the deceased as to the cause and circumstances of the homicide, if made after the lapse of so brief an interval and in such connection with the main transaction as to preclude the idea of premeditation and design are admissible. No fixed measure as to time and distance from the main occurrence can be established as a rule to determine what declarations of the deceased should be admitted as spontaneous exclamations. Each case must necessarily depend upon its own circumstances. The admission of Atmore's statement in this case is amply justified by the authority of Commonwealth vs. Werntz 161 Pa. 591.

The declaration of Karper the bystander was also properly admitted, not as an implied admission on the part of Talbot, but as a spontaneous exclamation.

Tho there is a considerable conflict, the weight of authority supports the view that the exclamations of bystanders made at the time of the occurrence of the main fact in issue or immediately thereafter, and immediately and naturally connected therewith, are admissible for the purpose of identifying the accused and showing the circumstances and manner of homicide. If declarations are to be admitted on the ground of spontaneity as the natural utterance of a person when greatly excited, the utterances of any person coming within the influence of the exciting circumstances should be admitted. In Coll vs. Easton Transit Co., 180 Pa. 619 the exclamations of a bystander were admitted and it was held that the "speeches of any one concerned whether participant or bystander" were properly admissible as part of the res gestae. It is true that this was a civil case but no reason is discovered why the rule is not equally applicable to criminal cases.

The declarations of Harper did not identify the accused in any way but the record states that the declaration was made *to Talbot.*

The statement of Talbot in answer to the question of Karper should have been admitted. Counsel for the Commonwealth contend that it was properly rejected as a self-serving declaration. It is not, however, a universal rule that self-serving declarations are to be rejected simply because they are self-serving. If declarations are part and parcel of the res gestae they are admissible whether against or in favor of the interests of the accused. State vs. Lockett 168 Mo. 480; S. & W. 563. Honeycutt vs. State 57 S. D. 896; 26 A. & E. Encyc. 877; 12 C. Y. C. 426. If the spontaneous exclamations of anyone within the influence of exciting circumstances are to be admitted, it would seem that the declarations of the accused, as well of the deceased and bystanders, should be admitted. In the present case, however, the declaration of Talbot was in answer to the question of Karper accusing him of the crime, and can, therefor, hardly be consldered as a spontaneous exclamation.

Another principle required the admission of the declaration of Talbot. The question of Karper accusing Talbot of the crime, if unanswered, would

under the law be an implied admission by Talbot of his guilt. The reason for the rule is that a person knowing the truth or falsity of a statement affecting his right made by another in his presence under circumstances calling for a reply will naturally deny it, if he does not intend to admit it. It is true that Karper's statement was admitted as a spontaneous exclamation and not as showing an implied admission, but *it was admitted*, and the jury may have considered it as warranting the inference of Talbot's acquiescence in the truth of Karper's charge. Talbot's declaration should have been admitted to show that he did not acquiesce in the truth of the charge.

The rejection of Talbot's statement was not a trivial error. The jury may have given great weight to Karper's apparently unanswered question as an implied admission of guilt on the part of Talbot. See 1 Greenleaf 198.

We agree with the learned Court below that the act of 1887 has absolutely nothing to do with the case.

A new trial should have been granted.

Judgment reversed.

HARPER vs. HENDRICKS.

"Evidence." Rule in "The Queen's Case."

STATEMENT OF FACTS.

At the trial of assumpsit, on a rule, the defense was that the work in the building of an engine was too long delayed, and that loss ensued therefrom. The defendant, producing a letter, written by Harper, in cross examination, said "I see that you say in this letter that you were delayed by a strike of your men; is that true?" Plaintiff objected to the citation of a statement from the letter, without first proving its execution, and without putting the letter in evidence. The evidence was nevertheless admitted. Motion for a new trial.

EASTER for Plaintiff.

JENKINS for Defendant.

OPINION OF THE COURT.

FETTERHOOF, J.—We think plaintiff's objection to the admission of the citation of a statement, without first proving the execution of the letter and without putting the letter in evidence was well taken, and, when overruled, was ground for an exception, upon which to base a motion for a new trial.

The Queen's case, decided in England, in 1820, 2 B. & B. 286, decides that counsel cannot, by question addressed to the witness, enquire whether or not, certain statements are, or are not, contained in a letter, but that the letter itself must be read, to manifest whether such statements are or are not contained therein. However, by an English statute passed in 1854, it

was provided that a witness may be cross-examined as to whether or not he made certain statements which have been reduced to writing. But, if it is proposed to contradict the witness by such writing, the document must first be shown to the witness.

It is not allowed on cross-examination, in the statement of a question to a witness, to represent the contents of a letter and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the letter to the witness and having asked him whether he wrote *that* letter, because if it were otherwise, the cross-examining counsel might put the Court in possession of only a part of the contents of a paper, when a knowledge of the whole was essential to a right judgment in the cause. Though the witness acknowledge the writing of the letter, yet he cannot be questioned as to its contents, but the letter itself must be read. Greenleaf on evidence, page 175.

Those who disaffirm the doctrine of the Queen's Case contend that counsel should be permitted to question a witness as to the contents of a letter written by him, for the purpose of testing his credibility and veracity, without being obliged to put such writing in his possession first, which they claim, sacrifices the great principle of cross examination. For, if the witness has taken the precaution to reduce his previous statements to writing, the presenting of the letter gives him full warning of the danger he has to avoid and full opportunity of shaping his answers to meet it.

Suppose the correspondence between Hendricks and Harper had extended over several months, or possibly a year, and in the meantime a number of letters had been written. Could Harper, when asked upon cross examination, "I see that you say in this letter that you were delayed by a strike of your men. Is that true?" the letter not having been shown him, know whether *that* particular letter in the hand of defendant's counsel, referred to the contract of building an engine, or not? Then again, the other parts of the letter might so explain and alter the statement to which counsel refers, that it would leave no doubt whatever in the minds of the jury as to defendant's liability.

By this method unscrupulous attorneys would be afforded the opportunity to ask questions concerning certain statements contained in a letter that might have no connection whatever with the case, and thus put a construction upon it, that would prejudice the opposite party in the minds of the jury. This would certanly be a dangerous principle, to allow a witness to be asked questions concerning those statements only in a letter, which were favorabe to the one side or other, without putting the letter in evidence.

'Tis a well established rule that if one would prove the contents of a writing he must produce the writing itself or show a sufficient legal reason for not doing so.

The letter might also have reference to another letter. When one writing refers directly or indirectly to another for a fuller description, the admissibility of the first writing involves the admissibility of the second. 2 Rawle 104, 36 Cal. 489.

One part of a correspondence being in evidence, the other part should have been admitted, the correspondence being of such a connected character that the whole was necessary to properly enlighten the jury.—85 Ky. 259.

Despite the fact that the Queen's Case has been overruled by the English statute, nevertheless the law of Pennsylvania has adhered to the doctrine as therein laid down so late as 223 Pa. 36, viz: that if counsel desires to show the contents of a letter and to cross examine upon it, he should first have it identified, offer it in evidence and, if admitted, introduce it as part of his cross examination.

In view of the authorities cited a new trial is granted.

OPINION OF SUPERIOR COURT.

Harper sues for compensation for loss occasioned by Hendricks' slowness in making an engine which Harper expected to use in his works. Hendricks defends, in part, by alleging that even had there been, on his part no delay, Harper would not have been able to operate his works, because of a strike. It was competent for Hendricks to prove that this strike occurred, and that it of itself prevented the prosecution of work. He could prove this by cross-examining Harper. Instead of asking Harper directly, whether there had been a strike of his men, he, by his question, assumes that a certain letter, in his hand, had been written by Harper, and that this letter contained the assertion that there had been a strike and that it had caused delay in the operation of the mill. The question being allowed, despite objection to its propriety, Harper answered that there had been a strike. He seemed, in so doing, to admit that the letter had been written by him, and that it contained the assertion postulated by the question. But, what harm was done him? The letter was not used for any purpose. No other of its contents was in any way disclosed. If the whole letter ought to have been put in evidence by Hendricks, and if put, it would have shown facts useful to Harper, he has reason to complain of the Court's not compelling the proof of the execution of the letter, and the putting of it in evidence: otherwise, not.

Can it be said that the whole letter ought to be put in evidence, as well that bearing on the strike as other portions, in order that Hendricks might be benefitted by it, simply because Harper was questioned concerning the truth of one of its statements? We cannot concede this. If the statement in the letter is used as evidence of its truth or of the assertion by the writer of its truth, all the letter qualifying it ought to be received. But the letter was not used in this way. Hendricks, as witness, made the same assertion that he had made in the letter. If the letter contained qualifications, so far as appears Hendricks could have repeated them as witness.

The learned Court below relies on Kann v. Bennett, 223 Pa. 36, as authority for the application of the principle announced in the Queen's Case. But, that case is applicable when the purpose is to lessen the credit of a witness by showing a bias; or improper motive to falsify, or by showing that

he has made in writing a statement contradictory of his present testimony. If in a letter, he has said that he is going to testify against the plaintiff, or he has made an averment with which his present testimony is inconsistent, and it is desired to show these facts, that rule requires that the letter be proved to have been written by the witness, and then that it be put in evidence. Here so far as appears, the purpose was not to discredit the witness, either by showing bias, or inconsistency. Apparently it was to show by the witness, the truth of his earlier assertion in the letter. The reference to the letter is a mere superfluous inducement. Instead of prefixing to the question, is it true that a strike delayed your men, the remark "I see that you say in this letter that,", etc. the remark might just as well have been omitted. The fault with the question was, that it assumed a fact which was not admitted and not proved, viz: that Hendricks had made a statement in a letter, the making of which was entirely unimportant.

It would be deeply regrettable, were the rule in the Queen's Case now fastened upon the law of evidence of Pennsylvania. Announced in 1820, it astonished the profession in England. So great was the dissatisfaction with it that it was abrogated by act of Parliament in 1854. "In England" says Wigmore, 2 Evidence, 1527, "the rule laid down in the Queen's Case, so far as it applied to attempts to discredit a witness by cross-examining him to prior inconsistent or biassed or corrupt utterances, was unanimously condemned by the Bar." The adoption of the rule in the American States, he attributes to ignorance of the statutory abolition of the rule in England, an ignorance which he thinks arose "probably because the learned author of Greenleaf on Evidence died in 1853, the year before the statute, and the Queen's Case remained elaborately treated as law in his text, while the statute was only noticed in an obscure corner of the editorial notes." This ignorance still lingers after fifty years, and as a result of it, we are now threatened with the incorporation into the law, hitherto exempt from it, of Pennsylvania of an objectionable rule. There were other reversible errors in Kann vs. Bennett, and we are not too lightly to assume that, without them, the Court would have found justification for reversing the case, in the allowance of the question objected to. Had the learned Court used Wigmore's edition of Greenleaf, instead of the Philadelphia edition, or, better still had it consulted Wigmore's great work on evidence, it would have been prevented, doubtless, from snatching up without reflection, a long discarded error of the House of Lords; "a rule" says Wigmore, "which, for unsoundness of principle, impropriety of policy, and practical inconvenience in trials, committed the most notable mistake that can be found among the rulings upon the present subject," [the use of documentary originals].

What we have said, indicates dissatisfaction with the allowance of a new trial for the cause assigned. Such allowance is however so wholly in the discretion of the Court below, that we do not reverse for what we may deem error in it.

Judgment affirmed.

JOHN HARKER vs. TIMOTHY SLOPE.

Sale. Breach of Warranty. Measure of Damages.

STATEMENT OF FACTS.

Slope sold harness to Harker for $500, July 7th, 1900, warranting it to be sound and to continue sound for six months. Harker sold it to Freeman on July 19, giving Freeman a warranty that it was then sound. Freeman paid Harker $250 for it. In an action on the warranty he re covered the full price, $250 dollars from Harker. Harker on Sept. 19, 1906. brought this suit for breach of Slope's warranty. He was allowed to recover $250, plus interest from the time of the sale to Freeman. Motion for a new trial.

BUTLER for Plaintiff.

BRANCH for Defendant,

OPINION OF THE COURT.

DAY. J.—What were the grounds alleged for a new trial does not appear, but we assume the objection was to the amount of the damage recovered.

There is a line of cases in Pennsylvania holding that, when the *vendee* is sued by the vendor for the price of goods sold and delivered, and the vendee shows that the goods are not as warranted, and as a result third persons to whom he has contracted to sell the same refuse to take the goods, such loss of profits can not be allowed as a set off.—Low vs. Craig 8 Superior 622.

There are other cases which seem to recognize profits in determining the damages. In Pennypacker v. Jones, 106 Pa. 327 in an express warranty of certain machines to make a certain amount of flour daily, it was held that the loss of possible profits which might have been made if the machines had worked properly, was not a proper subject of damage, the plaintiff being measurably in fault, and further, because such damage was too remote and speculative. In Lentz v. Choteau 42 Pa. 435, where plaintiff agreed to make certain grading for a R. R. Co. in an action for breach of contract in not allowing plaintiff to complete the work, it was held the plaintiff could have recovered for loss of profits that would have been made on the work, if he had proved such profits. In Culin v. The Glass Co. 108 Pa. 220, the plaintiff was allowed to recover the loss upon contracts he had made with third persons in reliance upon the fulfilment of the contract by the defendant Glass Co. But we must admit that the Court, in this case, was influenced by the fact that plaintiff could not procure the special size of bottles contracted for in the general market. In the Coal Co. v. The Coal Co. 138 Pa. 45, the defendant Co. agreed to furnish sufficient coal to run plaintiff's coke plant for a certain time, but failed to do so. The plaintiff Co., in a suit claiming damages, was allewed to recover the net profits it would have made, had the contract been performed. The Court held,

as a reason for so doing, that the profits in this case were not speculative: they did not depend on the fluctuation of the market, nor on the demand for coal, and they could be ascertained with mathematical accuracy. In The Taylor M'f'g. Co. v. Hatcher & Co., Fed. Rep. 3 L. R. A. 587, the plaintiffs were allowed to recover profits they would have made on sales, if the M'f'g. Co. had furnished the engines according to contract. The Court held that profits which are remote, speculative, and incapable of clear and direct proof cannot be recovered, but when they are direct and immediate fruits of the contract they may be.

The action before us is an action on a breach of an expressed warranty. The damage is not uncertain, a matter of speculation: it is an amount certain, established by a judgment recovered against the plaintiff by his vendee. Harker, the plaintiff, had a right to rely on the expressed warranty, and is not affected by his failure to test the truth of Slope's warranty before selling the same goods to Freeman.—Thompson v. Bertrand 23 Ark. 730; Hale v. Philbrick 42 Iowa 8.

The measure of damages for a breach of warranty as to the quality of goods sold, as stated in The McCormick Harvesting Machine Co. v. Nichalson, 17 Superior 188, is: the vendor is liable to the vendee for any loss sustained by the latter as the natural and probable result of the furnishing of inferior goods, unless the vendee contributes to the loss by using the goods after discovering their imperfections and inferior qualities. The rule as stated in 4 Pa. 168, is: the difference of value between the article in a sound, or unsound state, is the measure of damage for a breach of warranty without regard to the price paid,

In a Mass. case, Reggio v. Braggiotte 61 Cush. 166, where almost the same state of facts was before the Court as in this case, it was held that the measure of damages in an action for breach of a warranty, for an arricle sold as opium, is the value of an article corresponding to the warranty, deducting the value, if anything, of the article sold, and, if the vendor has in the meantime sold the article with a like warranty, the sum paid on a judgment obtained against him in an action brought by his vendee for a breach of that warranty, is prima facie evidence of the amount which he can recover of his vendor; and if he gave notice of that action to his vendor at the time it was commenced he may also recover his taxable costs. The same is held in Armstrong v. Percy, 5 Wendell (N. Y.) 535, Blasdale v. Babcock, 1 Johnson, (N. Y.) 518. In the Woodland Oil Co. v. Byers & Co. 223 Pa. 241, the plaintiff, in an action for breach of warranty, sought to be allowed as damages, a judgment obtained against him because of defects in the goods warranted to him by the Byers Co. The Court did not hold that this could not be considered in assigning the damages, as it was not necessary to pass upon this point, because the action was barred by the statute of limitations.

From the cases in Pennsylvania recognizing profits, when definite and ascertained, as an element in assessing damages for breach of warranty in a contract to sell goods, and from the rule as stated by the Mass. and N. Y.

Courts on the question; we hold, assuming the harness to be worthless from the defects discovered, the damage as recovered was correctly assessed. and we overrule the motion for a new trial.

The question as to whether the statute of limitations was a bar to plaintiff's claim does not seem to have been raised by the defendant. If it had been pleaded we think it would have been good. For Slope made the sale with the warranty July 7, 1900, and this action was not brought until September 17, 1906. In Woodland v. The Oil Co., it is held, a cause for action for breach of warranty in a sale of personality accrues at the time warranty is broken, and the statute of limitations then begins to run. When unsound personality is sold with a warranty of soundness, the warranty is broken as soon as made, and the statute begins to run from the date of sale not the time when the buyer sustains consequential damages. If one delivers goods which are not what he undertakes to sell, and the purchaser resells under his mistake, and is obliged to pay damages, he has a claim against the first seller, but he must bring his action to enforce it within six years from the first sale.

As the defendant in this case did not avail himself of this defense but chose to waive it, we cannot now sustain his motion.

OPINION OF SUPERIOR COURT.

The measure of damages for a breach of warranty is the difference between the value of the article actually furnished the buyer and the value the article would have had, had it been what it was warranted to be. Williston Sales, 1018; Seigworth v. Leffel, 76 Pa. 476; Himes v. Kiehl, 154 Pa. 180. Had Harker retained the harness, the price paid by him for it to Slope, might possibly be taken as the evidence of what would have been its value had it corresponded with the warranty. It was thought "strong evidence" in Clare v. Manyard 7 C, & P. 740 But there would be no evidence of the actual value of the harness. So far as the evidence would indicate, it might be equal to the value of the harness as represented, i. e., the harness might have been what it was warranted to be.

But Harker has sold the harness under warranty to Freeman, and for $250. Was this price to be taken as evidence of its value? The larger price obtained on a resale was thought, in 7 C. & B. 740, *supra*, not to be evidence of its value. A different view is taken by Shaw, C. J., in Reggio v. Braggiotte 7 Cush. 166, who thinks the larger price obtained by the vendee when he sells on a warranty, acceptable evidence of the value. We may adopt the latter view. Have we any available evidence of the actual value of the harness at the time of the resale to Freeman?

Freeman has sued Harker on his warranty, and has recovered $250, a sum equal to the price which he paid. If the price which he paid may be accepted as what would have been the value of the harness had it corresponded with the warranty, and the difference between that amount and the actual value of the harness was $250, it would follow that the harness in its actual state was worth nothing.

Twelve days elapsed between the sale to Harker, and the sale to Freeman. Shall we assume a change of values within this time? There is no evidence that the harness underwent any intrinsic deterioration; nor that there was a change in the market value of harness, within that short time. We think it may be assumed by the jury that the harness when sold to Freeman was as good as when it was sold to Harker. and that the market values of harness were the same.

But, may we take the judgment recovered by Freeman as evidence in this suit between Harker and Slope? Slope was not a party. He had not been invited by Harker to take part in the defence of it. The decisions are on this point, inconsistent with each other. Some authorities hold that the judgment is *prima facie* evidence, in the absence of bad faith or negligence on the part of the defendant in the suit. Smith v. Compton, 3 Barn. & Ad. 407; Nashua Iron Co. v. Brush 91 Fed. 213 (C. C. A. 1898), Reese v. Miles, (Tenn.) 41 S. N. 1065. The judgment then, is evidence that the difference in value between the actual harness, and harness as warranted, was $250.

"Another kind of case" says Williston, "which has given rise to the question of consequential damages, is where the buyer who purchases goods with a warranty, resells them with a similar warranty, and, the goods proving defective, is held liable in damages. He is allowed to recover these damages over against the person from whom he originally bought them." Sales, 1024. It is certainly sensible that the damages which a vendee has to pay to a sub-vendee, on account of a warranty given by him which is identical with that given to him by the primary seller, should be recoverable from the primary seller.

Judgment affirmed.

STEEL vs. SLEEPER.

Ejectment. Lien of Judgment. Equitable Conversion.

STATEMENT OF FACTS.

Thomas Temple devised his farm to his widow for life. At her death he directed the executors to sell the farm, if his only son Jacob should then be under twenty-four years of age. A judgment for $375 was obtained by John Steel against the son, then twenty-three years old on May 11, 1907. The widow died in March, 1908, when the son lacked 7 weeks of being 24 years old. Steel issued execution and and sold the interest of the son in the land. The son, a month before the levy, had sold the land to Wm. Sleeper, who took immediate possession. Ejectment.

WOODWARD for Plaintiff.

JONES for Defendant.

HOWER, J.—Jacob Temple under his father's will took a vested re

mainder in his father's farm, liable to be divested upon the happening of a contingency; viz: the death of his mother before he should become 24 years of age. The legal title to the fee rested in Jacob as remainder man.- We think there was no equitable conversion of the farm worked at the de cease of his father, by the directions in the will, because "to establish a conversion, a will must direct a sale absolutely, or out and out for all purposes, irrespective of contingencies and independent of all discretion."—Blucht v. Manufacturers and Mechanics Bank, 10 Pa. 131.

Again in Scott's Est. 37 Sup. Ct, 188, we read: "The presumption is against conversion, which is a fiction introduced on equitable principles to effectuate the intention of the testator. It is only to be resorted to when actually necessary to carry out the testamentary purpose. A direction to convey must be positive, and the instrument resorted to must decisively fix on the land, the quality of money. The direction to sell must be imperaative and explicit."

The will does not contain a positive and absolute direction to sell after the termination of the life estate, but only, provided, "Jacob should then be under 24 years of age." "Then," means at the death of the widow. If the mother lives until the son becomes 24 years of age, the executor has no power to sell the estate, but it passes as land to the son. But if the contin gency happens, i. e.: the death of the mother before the son is 24 years of age,—then and only then shall the executor sell the land.

Now, while the legal title was vested in Jacob and before the contin gency happened, John Steel got a judgment for $375 against Jacob, and it became a lien on the remainder vested in Jacob.

A remainder, when vested, may be subject to the lien of a judgment and may be levied upon and sold for the payment of the judgment.—Humphreys vs. Humphreys, 1 Yeates 427; Am. & Eng. Encyc. Vol. 17, p. 783.

The mother died before Jacob reached the age of 24. According to the directions given in the will, the farm is to be sold by the executor. The contingency has happened. The intention of the testator shall always govern, hence the executor must sell the land; his duty is imperative unless Jacob, being the sole legatee; elects to take the farm, which he has a right to do.—Willing v. Peters 7 Pa. 287.

Under the will and the facts the farm became personalty and the conversion takes place the moment of the death of the widow.—Laird's Appeal 85 Pa. 339; Longwell v. Bently 23 Pa. 99; Savidge v. Burnham 17 N. Y. 561.

And the lien of the judgment is lost by the conversion. "A judgment against a person entitled to the proceeds of land ordered to be sold will not bind his interest".—Evans' Appeal 63 Pa. 183.

Jacob sold his interest before Steel issued his execution. But when did he sell his interest? We may have two hypotheses: 1st, That he sold it before the widow's death. Now, if he sold his interest while the widow lived, he, being the sole heir, exercised his right of election and sold it sub-

ject to the lien of Steel's judgment, and Steel could sell the land on the judgment execution, and the purchaser could bring ejectment. If these are the facts we find for the plaintiff.

But, by the second hypothesis, which seems to me to be the true one, Jacob sold his interest after the death of the widow, because, we are told, Sleeper "took immediate possession" and by that I understand possession as terre tenant and that, on the facts given, could only happen on the death of the widow.

If Jacob did not sell the land until after the death of the widow, we have seen above that the death, while Jacob was under 24 years of age, changed the property into personality, since he has not expressed an intention by word or act to take the farm as real property. Hence the lien is lost.

"Prior to the act of election he has no estate or title which can be the subject of a judgment lien."—Henderson vs. Henderson, 133 Pa. 399.

Between the time of the death of the widow, when the conversion took place whereby the lien was lost, since no election was made before that time and the issuing of execution by Steele, Jacob elected to take the estate as land. This election was made by the unequivocal act of selling the land to Sleeper. The lien had been lost and Sleeper took the farm free of any lien of the Steel judgment. Hence when Steel issued execution and sold a month later, he did so against a property that was free of a lien. He had no right to sell the land and therefore cannot maintain ejectment.

But it is contended such a holding "would be inequitable for it would enable Temple, by the fiction of law that the death of the widow worked a conversion, to defeat the bona fide judgment of Steele, which was at that time a valid lien on the land", and that, "the Pennsylvania Courts will apply equitable principles in order to accord justice to the parties."

"Conversion is altogether a doctrine of equity. In law it has no being It is admitted only for the accomplishment of equitable results, and when the purpose of conversion is attained, conversion ends".—Foster's Appeal 74 Pa. 391.

It was necessary to apply the doctrine of conversion to carry out the intention of the testator, but it goes no farther to protect creditors of devisees; they have their remedy at law. No doubt equity would assist them if there were no adequate remedy.

Steel has suffered no hardship. When he took his lien against the remainder with the contingency clause in it, the will was on record; he could read it; he is presumed to know the law and the nature of the lien he had on Jacob's interest. He knew that on the happening of the contingency he would lose his lien, and that the estate would be converted into personalty; but if he were alert he could recover on his judgment. His remedy was to issue a writ of execution immediately upon the death of the widow, if Jacob had not elected before that time to take the farm, and place it in the hands of the Sheriff, with a levy following in due course.

This would have created a lien on the personal property and secured for him the debt due him. Act of May 19, 1887, P. L. 132.

Equity will not restore the lien upon the reconversion because there is a complete and adequate remedy at law that would have given Steel his money. Steel has in a sense slept upon his rights and for such a one equity gives no relief.

Therefore, since the plaintiff in every ejectment suit must succeed by the strength of his own title, and since Steel does not show such a title, judgment must be for the defendant.

OPINION OF SUPREME COURT.

It is well settled that where a testator directs his executor to sell his land and divide the proceeds among designated legatees, such legatees "have no interest or estate in the land which is the subject of lien or execution". This is the law, whether the parties to whom the proceeds are to be paid are strangers, or are the heirs at law of the testator, to whom the land would descend as land in absence of the direction to convert.—Shick v. Mackey 4 W. & S. 196; Morrow v. Brenizer 2 Rawle 184; Allison v. Wilson 13 S. & R. 330; Roland v. Miller, 100 Pa. 47; Evans Ap. 63 Pa. 183; Willing v. Peters 7 Pa. 283; Stallman's Est., 2 Dist. Rep. 265.

As a consequence of this principle it is held that a judgment recovered against one of these legatees, among whom the fund when made was to be distributed, will not bind his interest therein, for he is seized of no estate in the land which can be made the subject of the lien, and consequently, that a sheriff's sale upon the judgment of the legatee's supposed interest in the land passes nothing to the purchaser.—Allison v. Wilson, 13 S. & R. 833; Morrow v. Brenizer, 2 Rawle 185; Evans Ap. 63 Pa. 186, Willing v. Peters 7 Pa. 287; Brolasky v. Gally 51 Pa. 509.

It is contended, however, that these principles are not determinative of the present case because (1) in the present case the proceeds resulting from the sale of the realty belong to a single person; (2) the title to the real estate as real estate had rested in Jacob Temple and the lien of the judgment had attached before the equitable conversion occurred.

It is true that in the cases previously cited the proceeds of the realty were bequeathed to several legatees. This fact was not, however, regarded as a determining element. In Morrow v. Brenizer, 2 Rawle 188, Gibson. C. J., delivering the opinion of the Court said, "It will not be disputed that a father may, if he thinks proper, bequeath to his children the value of his land in money, without giving them an estate in the land itself. Now he does bequeath it thus when he devises the land to his executors with directions to sell it and distribute the price among his children. Who can say that he resorted to this for the sake of convenience as regards partition and not for the very purpose of providing for his children, without exposing his bounty to interception by creditors".

An answer to the second contention is found in Allison v. Wilson 13

S. & R. 332. In this case a testator directed his executors to sell his land after the death of his widow and divide the money among his children, and it was contended, as in this case, that a judgment obtained by a creditor before the death of the widow bound the land because the fee descended to the heirs of the testator until the conversion occurred. The Court, deciding against the creditor, per Gibson, C. J., said "suppose the legal title to descend and remain subject, as it undoubtedly would, to the power to sell; it would doubtless be bound in the hands of the heir by a judgment against him; but for how much? Surely for just as much as descended to him; which would be all that was not disposed of by will. The judgment creditor could sell and the purchaser could obtain no more than what vested in the debtor as heir. Then, when the estate of the purchaser comes to be divested by a sale in the execution of the power, what right has he, in virtue of having owned the descended part of the estate, to the money from that part of it which never descended, but passed under the will as a personal bequest?"

No express disposition of the proceeds was made by the testator in this case, but it is never presumed that a testator intended to die intestate as to any part of his estate, if a contrary intent can be fairly deduced from the language of his will. We think that the natural and reasonable intendment of this will is that the realty shall be sold and the proceeds given to the son.—Roland v. Miller 100 Pa 50; Gardner on Wills 369.

The argument that since Jacob Temple is the only person interested it would be inequitable to consider the land free from the lien of a judgment so that Temple may recover the entire proceeds and thus defeat the claim of the lien creditor, has no weight. The doctrine of conversion was not designed for the protection of creditors. "It acts solely in the interest of the testator, to carry out his intention, and can never be worked for the purpose of placing title to property in any one, in order that his creditors may be benefited".—Painter v. Painter 220 Pa. 83. The very object of the testator may have been to provide for his son without exposing his bounty to interception by creditors, and, as said by Gibson, C. J., "Where such is the object I know no rule or policy of law to forbid it".—Morrow v. Brenizer, 2 Rawle 190. Moreover, equity favors an equality of distribution among creditors.—Morrow v. Brenizer.

We agree with the learned Court below that the record indicates that the election of Temple to take the land as land did not occur until after the widow's death and consequently after the judgment was obtained. In any event, the burden of showing an election is on the party alleging it.—7 A. & E., 483; 9 Cyc. 857.