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DICKINSON LAW REVIEW

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EDITORS:
EMILIO MARIANELLI
ROBERT J. PUDERBAUGH
JOHN EYSTER MYERS

BUSINESS MANAGERS:
GEORGE B. STEVENSON
JOHN H. MCKINNEY
THOMAS B. MILLER

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PROVING PREVIOUS CONSISTENT STATEMENTS OF A WITNESS.

THAT a witness may be impeached, by showing that on some other occasion he has given a variant account of the matter, is a well known principle of the law of evidence. That the witness has given inconsistent versions of the same event reveals as Wigmore explains[1] "some undefined capacity to err; it may be a moral disposition to lie, it may be a partisan bias, it may be faulty observation, it may be defective recollection, or any other quality. No specific defect is indicated; but each and all are hinted at." The fact that the witness has given a contradictory account, makes his testimony less credible. The testimony is delivered under oath or affirmation and subject to cross-examination. The inconsistent statement may likewise have been so delivered; or in the form of an *ex parte* affidavit; or it may not have been sworn or affirmed; it may even not have been reduced to writing. However informally it may have been made, it is recognized as tending to diminish the reliability of the testimony delivered in the cause being tried. We are, in this article to consider what uses, if any, may be made by the party who has called the witness, of his declarations which are consonant with his just delivered testimony.

WHEN THERE IS NO IMPEACHING CIRCUMSTANCE.

"When the witness has merely testified on direct examination without any impeachment" says Wigmore, "proof of con-

[1] 2 Evidence, p. 1178.

sistent statements" made elsewhere and previously "is unnecessary and valueless. The witness is not helped by it, for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it. Such evidence would be both irrelevant and cumbersome to the trial"[2] "Statements by a witness at another time," remarks Gibson, C. J., "though admissible to contradict him, are not equally so to confirm him. They are certainly not receivable before his credibility has been assailed."[3]

WHEN INTEREST IN THE SUIT IMPEACHES.

Interest in the suit no longer disqualifies a party, plaintiff or defendant, to become a witness for himself. Interest however creates a bias, and the testimony of a party must very often lose in weight on account of the possible deflection of the witness from the truth, on account of it. May the testimony of a party, then be corroborated by proof that he has made similar statements on previous occasions before the rise of the controversy, and the production of the bias? This question was presented in Crooks v. Bunn.[4] Libels appeared in the Sunday Transcript, September 28th, 1885, and March 31st, 1886. Bunn was the proprietor of this paper, and an action was brought against him as its editor and publisher. The principal defense was that Bunn had in June, 1884, leased the paper for two years to Jackson, and had become governor of the territory of Idaho, and had not resumed his editorial connection with the journal, until June, 1886. In support of this defence. Bunn himself testified. A letter of his written Dec. 26, 1884, from Idaho to the city editor of the peccant paper, assumed the execution of the lease, expressed satisfaction that the lessee was doing well; stated that he ought to make $3,000 or $4,000 "during his two years' lease," and added "if he does I am in hopes he will feel like and be able to form a company that will buy the plant of me. I do not want to go back to Sunday journalism unless I am compelled to. I shall resign during the summer." This letter was written nine months before the first, and 15 months before the last of the libels, and therefore before any controversy had arisen between Bunn and Crooks. He had

[2] 2 Evidence; p. 1323.

[3] Craig v. Craig, 5 R. 91; Clever v. Hilberry, 116 Pa. 431.

[4] 136 Pa. 368.

a motive to testify falsely. He had no apparent motive to tell the city editor what the latter knew to be a falsehood, if falsehood it was. That the letter was sensibly corroborative of the testimony is perceptible to any one. Yet the supreme court reversed the judgment for the defendant in the court below, for the sole reason that the letter was admitted in evidence, thus conceding that it would naturally have weight with the jury as indeed it would with any reasonable men. Thus having weight, why was its admission erroneous? Green, J., denies that it was receivable to disprove an allegation of recent fabrication, because the record does not show that a charge of recent fabrication had been made. "What is there on the record" he triumphantly asks, "to show us that such a charge has been made against the defendant?" The answer is palpable. The record never shows the arguments of counsel. The suspicion that the defendant had invented the story of a lease, in order to avoid liability for the libels, would be present not simply in the mind of the plaintiff's counsel but in those of the jurors. The temptation to invent it was plainly present, and its operation was a legitimate subject of remark and argument. To allay this suspicion, to nullify this argument what more useful than the fact that long before the liability to suit had arisen, the defendant had asserted in a letter to a friend that he had ceased for two years to control the paper? When the character of the defence leads or may probably lead to the argument of counsel, and of the jurors in deliberating over the case, that it has been invented by the defendant, a witness, since the cause of action arose, this argument might well be answered by showing that before the cause of action had arisen, the defendant has stated the same fact. A similar result to that of Crooks v. Bunn, was reached without discussion, in Frazer v. Linton.[5] A bill in equity alleged a partnership between the plaintiff and the defendant; in the sale of certain land. The defendant offered to prove that within a day or two after the agreement upon which the plaintiffs claimed, the defendant had told the witness that he had an agreement with the plaintiff,

[5]183 Pa. 186. In Turnbull v. O'Hara, 4 Y. 446, Yerkes, J., remarks that after a witness has testified any declaration, oral or written, which he has made, may be given on one side to show his consistency, in support of his testimony, or on the other side to discredit it by showing that he had spoken differently of the same transaction.

what it was; that it had reference to a sale to a particular person, that this sale was never consummated, but that a sale was made to a different person. This evidence was excluded, although it would have corroborated the testimony of the defendant which, delivered in order to defeat a recovery against him, was liable to be suspected of being untrue on account of the bias of interest.

WHEN GENERAL CREDIBILITY IS ATTACKED.

Wigmore observes that "When a bad reputation for veracity has been introduced to impeach, proof of consistent statements [i. e. prior statements consistent with the witness' present testimony] is equally irrelevant and useless [i. e. as when there has been no impeachment whatever.] Even assuming the existence of the bad character alleged, a depraved witness may well have repeated a story consistently. The bad character indicates some probability of untrustworthiness; the evidence of repetition does not attempt to meet the charge of bad character, or diminish its effect, but evades it by retorting with the irrelevant fact that the witness has been consistent. A few courts only have seen fit to admit the evidence." Among these courts, he cites that of Pennsylvania, in Henderson v. Jones[6], an action of trespass. For the plaintiff, Rupert testified. The defendant called witnesses who assailed his character for veracity, and who also contradicted him in several particulars. The plaintiff then offered to prove by an arbitrator who had sat in the same cause, eight years before, that Rupert's testimony then coincided with his present testimony. For the court's refusal to admit the evidence, the judgment was reversed. "It consists with my own experience" says Duncan J., "that such evidence has been constantly received, and it appears from the cases cited by the counsel of plaintiffs in error, that wherever the matter has come before our courts, it has been conceded by counsel, and allowed by the court, that evidence may be given of declarations without oath of the witness, to corroborate his evidence, whenever its truth has been called in question." He declares that he has not felt the cogency of the argument against the rule, that "where the evidence is not offered in chief, but [as] confirmatory of what a witness has sworn, *either* where his credit is impeached by attacking his character, [or by] the inconsistencies of his declarations, or where his evidence is im-

[6]10 S. & R., 322.

pugned by contradictory proof, it is admissible." As late as Zell v. Commonwealth[7] it was held that an attack upon a witness' veracity, justifies proof of prior declarations consistent with his present testimony. On the other hand, the "better opinion" is said by Kennedy, J., in Good v. Good[8] to be that confirmatory evidence, i. e., previous statements of the witness agreeing with those just made by him, "is not admissible generally, merely because the credit of the witness is impeached by showing his general character for truth to be bad." He concedes however that "it seems to be admitted by all, that special circumstances may render it admissible; as for instance, to contradict evidence tending to show that the account of the witness was a fabrication of late date induced by some occurrence at the time, when consequently it becomes material to show that the same account had been given before its ultimate effect and operation, arising from the change of circumstances, could be foreseen." We are not prepared to say with Wigmore, that consistency of narratives of an event delivered at long intervals, and under different circumstances, would not tend to show the truth of the statement. The inducements to falsify are not constantly operating, and to speak according to the memory of an event is probably easier than to invent an event, despite the opposing memory, and to express the invented, rather than the remembered, event. It must be, that men who have bad reputations in respect to veracity, do nevertheless in a large percentage of cases, tell the truth.

CONTRADICTION OF A WITNESS.

The credit of the particular testimony of a witness is weakened, when that testimony is inconsistent with that of other witnesses. Two contradictories cannot both be true. Witness B cannot be believed if witness A, who has contradicted him, is believed. When such contradiction in testimonies of different witnesses occurs, the question for the court and jury is which, if either, shall be believed. Is it allowable to corroborate one of the mutually contradicting witnesses, by evidence

[7]94 Pa. 258, 273. The witness in a poison case testified that she was made sick by some coffee. After her veracity was attacked it was allowed to show that she had previously told a person shortly after the drinking of the coffee, that she had been made sick by it.

[8]7 W. 195.

of his previous consonant statements? That a witness is contradicted, said Duncan, J,[9] "I consider as one of the strongest reasons for admitting proof of his earlier agreeing statements. For if a man takes upon him to remember things long since transacted, where the matter itself is frivolous, he might be supposed to swear rashly, and it would tend somewhat to confirm him where he is contradicted, to show that immediately after the transaction he related the fact as he did on the trial." Hence, X, as a witness being contradicted, it was proper to allow proof of his prior testimony eight years before, to show his consistency with himself. A witness having testified that she was made sick on a certain morning by drinking coffee, and evidence having been offered tending to show that she was not sick at that time, declarations of X at the time of the alleged sickness, that she was sick, were receivable.[10] At the trial of a murder case in 1877, Parr testified that in 1869, the accused had been in jail for another offence, and that he had in a conversation with another prisoner, admitted that he had committed the crime for which he was being tried. That Parr had heard this conversation was contradicted by proof that he *could* not have heard it under the circumstances. Ikeler was then allowed to testify that shortly after the alleged conversation in 1869, Parr had told him of it. The trial judge told the jury without error that they could consider this as evidence that Parr's statement was not a fabrication of recent date.[11]

Wigmore is of the opinion that "A former consistent statement helps in no respect to remove such discredit as arises from a contradiction by other witnesses. When B is produced to swear to the contrary of what A has asserted on the stand, it cannot help us in deciding between them, to know that A has asserted the same thing many times previously. If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible. Nevertheless a few courts see fit to receive the evidence, misled

[9]Henderson v. Jones, 10 S. & R. 322.

[10]Zell v. Commonwealth, 94 Pa. 258; 273. Poisoning case.

[11]Hester v. Commonwealth, 85 Pa. 139, 148, 158. In Packer v. Gunsaulus, 1 S. &. R. 526, declarations of a grantor, prior to the conveyance were received His declarations after the conveyance were not receivable either to corroborate his declarations before, or to corroborate the testimony of another witness.

by the traditional notion that it has some force.''[12] A contradiction by one witness of another, is an assertion that the testimony of the latter does not accord with the facts. That disaccordance may be due to original imperfect observation; to defective memory; to conscious falsification. If it appears that the witness, who testifies long after the event, has at moderate intervals, had the event in mind, and made statements concerning it; that is, has had his memory in consciousness from time to time, the probability that he has forgotten the event when he testifies will surely be lessened. If the period is long, and the witness' circumstances have undergone changes during its lapse, there is a lessened probability that the testimony delivered is the result of conscious fabrication. It is not wise, we think, on the one hand to say that repetition of a story is never a guaranty of the accuracy of the last of the series; or on the other to say that it always is such guaranty. Whether it is or not will depend on other circumstances.

PRIOR INCONSISTENT STATEMENTS. WAS THE STATEMENT MADE?

After a witness has testified, and evidence is given by the party against whom his testimony bears, that he has on other occasions given a different version of the events, one of the questions which the jury has to settle is, was the alleged inconsistent statement made. If the statement was written, if it was a deposition or an affidavit, the jury will generally easily satisfy itself that the statement was made. If it was oral, and its contents are provable only by the testimony of the assailing witness, the question whether it was in fact made becomes more difficult to answer. If the attacked witness can be shown to have made declarations on several occasions consonant with his testimony, this very repetition may make the alleged deviation improbable. Can the evidence of statements consonant with the present testimony be received, in order to convince the jury that the alleged inconsistent statement was not in fact made? This question does not seem to have been considered in Pennsylvania. It is considered in Stewart v. People, 23 Mich. 74; by Judge Cooley, whose conclusion is that in some cases, proof of prior consistent statements would satisfy the jury that the alleged inconsistent statement had not in fact been

[12]2 Evidence, p. 1328.

made. Cases he says may readily be supposed, in which, under the peculiar circumstances the fact that the witness "has always previously given a consistent account of the transaction in question, might well be accepted by the jury as almost conclusive that he had not varied from it in the single instance testified to for the purpose of impeachment * * * We think that there are some cases in which the peculiar circumstances would render this species of evidence important and forcible. The tender age of the principal witness might sometimes be an important consideration; and the fact that the previous [consonant] statement was put in writing—as it was in this instance—at a time when it would be reasonably free from suspicion, might very well be a controlling circumstance. We think the circuit [the trial] judge ought to be allowed a reasonable discretion in such cases, and that though such evidence should not generally be received, yet that his discretion in receiving it ought not to be set aside except in a clear case of abuse. "This argument," says Wigmore, "seems irrefragable. It does not deny the correctness of the preceding argument, which points out that a consistent statement does not explain away a self-contradiction but it shows that argument to rest upon the assumption that there has been a self-contradiction; and it reminds us that consistency of statement may serve to overthrow that assumption."[13]

THE MAKING OF INCONSISTENT STATEMENT ESTABLISHED.

When a statement inconsistent with the present testimony of a witness is proven to have been made, "since the self-contradiction is conceded" says Wigmore[14] "it remains as a damaging fact, and is in no sense explained away, by the [other and] consistent statement. It is just as discrediting, if it was once uttered, even though the other story has been consistently told a score of times." His conclusion is that proof of consistent statements is not justified by evidence of one or more inconsistent statements, unless the object is to convince the jury that

[13]2 Evidence p. 1326. In Craig v. Craig, 5 R. 97, Gibson, C. J., remarks that "it follows not because the witness had sometimes told the tale delivered by him at the bar, that he had never told a different one," but this is scarcely a clear negation of the proposition that proof of several consonant statements may convince that an alleged dissonant statement had not in fact been made.

[14]2 Evidence, p. 1324.

such inconsistent statements were not in fact made, or their making is doubtful. The decisions of Pennsylvania are not wholly clear and consistent. In 1815 Tilghman C. J.[15] apparparently saw no difference between allowing proof of inconsistent, and allowing proof of consistent, statements. "Both being without oath [but both might be sworn to, or one sworn to and the other not,] one is as good as the other, and the jury will judge of his credit on the whole." This is characterized by Wigmore as "a bit of loose logic which is natural and plausible." It is true that the credibleness of a story does not depend on the ratio of the number of its repetitions to the number of conflicting versions of the same occurrence. If a man has given one version five times, and a different version once, we are not to say that the former is, because so often repeated, more probably correct than the latter. To have deviated once shows a capacity to forget, or to falsify. The forgetting, the falsifying, *may* have occurred in the prior statement; they *may* have occurred in the sworn testimony; we cannot know. Hence the testimony is less convincing than it would otherwise be. We can hardly assume that the desire to lie is not so constant as the desire to tell the truth, and hence infer that the more numerously given version is the true version. Gibson, C. J., remarks:[16] "As rebutting it cannot be pretended that they [the consistent statements] disprove the fact of [self] contradiction, or that they remove the imputation of inconsistency; for it follows not, because the witness had sometimes told the tale delivered by him at the bar, that he had never told a different one. If it be supposed that they rebut the inference to be drawn from the fact of contradiction by decreasing its force, they still leave the witness more exposed than ever to the charge of vacillation[17] and how he is confirmed by being left in a predicament so unfavorable to his veracity is not easy to comprehend."

A glance at the decisions of this state will show that they are not harmonious. In Henderson v. Jones,[18] Duncan J., *says*

[15]Packer v. Gunsaulus, 1 S. &. R. 526.

[16]Craig v. Craig, 5 R. 97.

[17]The force of this observation is not apparent. If A has spoken twice about a thing and in contrary senses, he has shown vacillation. If he has spoken four times about it. the first, second, and fourth times in one way and the third in a contrary way, how is he more exposed "to the charge of vacillation."

[18]10 S. & R. 322.

that where a witness' credit is impeached by evidence of his inconsistent declarations, evidence of his declaracions, consistent with his present testimony is admissible. The same is assumed in Foster v. Shaw.[19] On the other hand, it is said by Gibson, C. J., that previous consonant statements are not admissible, simply because inconsistent statements have been proved.[20]

WHEN THE EVIDENCE SHOWS THE TESTIMONY TO BE A RECENT FABRICATION.

There may be evidence that the story sworn to, has been invented recently. The witness may have formed a friendship or an enmity for one of the parties; or some other event may have occurred which has created a bias under whose influence the testimony may be supposed to have been delivered. That it was produced by this influence, would be rebutted, if it appeared that the witness had made similar declarations before the biasing fact had begun to operate. It is said, then, that evidence of previous consonant declarations is receivable in contradiction of evidence tending to show that the testimony at the bar is a fabrication of recent date for the purpose of showing that these declarations were made before the effect on the question trying could have been foreseen.[21]

WHEN DOES EVIDENCE SHOW A RECENT FABRICATION?

Sometimes, apparently, the only evidence that the story embodied in the testimony has been recently fabricated, is the fact that the witness on some previous occasion has acted or spoken inconsistently with its truth. Thus, in a trial for murder by poisoning by means of coffee into which arsenic had been put, R testified that she had taken some of the coffee, at the home of the deceased Mrs. K, and had been made sick by it. She was contradicted by evidence that, on her way from that house, after she had taken the coffee, she had conversed with X, about being at Mrs. K's house and had said nothing about being sick. It was held proper to rebut this by evidence of Y, who had met R on the same trip, that she, R, had asked for a drink of water,

[19]7 S. & R. 156. The prior sworn testimony consistent with the present testimony could be shown, but the notes of the trial judge now dead, who heard the testimony, could not be used as proof of what the testimony was.

[20]Craig v. Craig, 5 R. 92.

[21]McKee v. Jones, 6 Pa. 425.

and stated that she had breakfasted at Mrs. K's and been made sick by the coffee. Says Trunkey, J., this evidence "was admissible for the sole purpose of showing that the statement of Mrs. Read [the witness R] was not a fabrication of recent date. It is true that the defence did not in very words, charge that it was fabricated, but the story of her own sickness at the house of the deceased was attacked [only by her saying nothing of it to X] and also her character for truth, which made it competent to prove that she made the same statement at the time merely as bearing on her credibility."[22] In McKee v. Jones,[23] the principle of recent fabrication is invoked, but the appropriateness of it is scarcely discernible. A had, by devise, the legal title to the land, but it was alleged that he held an undivided half of it in trust for R. Ackleson who had been a tenant under A, as a witness for B said in a deposition that A had often declared that one half of the land belonged to B, and that A had given him a receipt for rent signed "by himself and as agent for" B. This receipt had been lost. A then offered a deposition taken later than the former, in which he contradicted the former. B then called a witness to prove that Ackleson while tenant had told him to divide the grain for the shares of A and B; for the purpose of corroborating Ackleson's testimony in the earlier depositions, that in favor of B. The receipt of this testimoey was justified by the principle that consonant declarations may be given in contradiction of evidence, tending to show that the testimony is a recent fabrication. But the only evidence of recent fabrication was the later of the two inconsistent depositions by the same person, It seems then that a later declaration may impugn an earlier, and an earlier a later declaration as a recent fabrication, so as to admit evidence of a still earlier declaration.

In Craig v. Craig[24] is a peculiar application of the principle, A sued B, his co-obligor on a bond payable to C, for one half of the amount of the bond, alleging that he had paid it to C. They agreed to leave the fact of payment to C's decision, and at the effort to reach a settlement in 1828, before two arbitrators chosen by the parties, C made a statement that he had received full payment from A in 1824. The effort at settlement failing

[22]Zell v. Commonwealth, 94 Pa. 258.

[23]6 Pa. 425.

[24]3 R. 472; 5 R. 91. The second trial was in 1833.

a suit followed. After evidence of C's statement was given, B offered in evidence C's deposition, taken in 1827; another taken in 1829, another in 1830 to rebut his declaration made in 1828, which was treated as his testimony for A. A then offered a declaration made in the Common Pleas of Lehigh County by C, May 12th, 1823 for the purpose of obtaining a pension, and another declaration in 1822, in the Common Pleas of Northampton County, which declarations were consistent with C's statement made in 1828. Gibson, C. J., thought the declarations of 1822, and 1823, receivable in evidence, because consonant declaratlons may be employed in contradiction of evidence tending to show that the testimony at the bar is a fabrication of a recent date; and to show that the same statement was made before its ultimate effect on the questions trying could have been foreseen. He found that the earliest contest between the parties was in October 1823, while the last of the two consonant declarations was made May 12th, 1823, five months previously. C's statement before October, 1823, "while his passions and prejudices were in a state of repose, and especially when he could not have foreseen the existence of the present controversy, or the bearing which his declarations might have on it, are indisputably within the exception to the general rule." The only evidence that his statement in 1828 was a recent fabrication was an inconsistent deposition of 1827, and inconsistent depositions of 1829, and 1830, and some evidence of bias towards A.

In respect to recent fabrication or contrivance, Wigmore aptly remarks, "The charge of recent contrivance is usually made not so much by affirmative evidence, as by negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now; i. e. as a self-contradiction. The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story. The use of former similar statements is universally conceded to be proper; though occasionally it is difficult to apply the principle to the facts."[25]

[25]2 Evidence, 1329.

CLEVER V. HILBERRY.

It is now proper to consider Clever v. Hilberry.[26] Hilberry's suit was upon a bond, given to secure the furnishing of proper support to her. She testified that this support had not been furnished to her, and that she had been badly treated by the family of Clever, and compelled to leave his house. The defendant's evidence in part, was that she had expressed herself well satisfied with her treatment. Her declarations soon after she left Clever,s house, consonant with her assertions on the witness stand were offered, in order to show that these assertions were not a recent fabrication, and were received. There was the same form of evidence on the defendant's side, that her testimony was a recent fabrication, as in the cases just considered, viz, her declarations. Green J. however reverses the judgment for Hilberry, on account of the admission of these consonant declarations. They were made just before the bringing of the suit, and hence did not rebut the suspicion that the testimony was a recent fabrication. They were not made before their effect on the question trying could have been foreseen. "It would be a very dangerous practice" says the justice, "in our opinion, to permit a party who is about to commence an action against another, to go about making declarations to third persons as to the substance of his cause of action, and then in the trial of that same action, to give these declarations in evidence for any purpose. It looks too much like an attempt to manufacture improper testimony for the very purpose of using it on the trial."

IMPEACHMENT BY BIAS, INTEREST, CORRUPTION.

A witness may be discredited by showing his bias against the truth, e. g., that he has a species of interest, which would possibly induce false testimony. It may be shown, when this bias is proved, that before it began to exist, before, e. g., the

[26]116 Pa. 431. In Thomas v. Miller, 165 Pa. 216, Clever v. Hilberry is cited with approval. In an issue to determine whether a note, on which judgment had been entered, was a forgery probably after evidence had been given that it was a forgery, it was proposed to ask X whether the plaintiff had ever told her of the existence of a contract out of which the debt represented by the note was alleged to have grown. The object of the evidence was to rebut the defendant's evidence that the note was a "forgery or a matter of recent date." The offer was properly rejected.

acquiring of any interest, the witness had made consonant statements, at a former trial of the same cause, or otherwise. In order to discredit witness A, it was shown that the plaintiff, for whom he had testified, had stated that if he recovered, he would give a portion of what he recovered to A. It was therefore proper to allow proof of the testimony of A in a former trial delivered before the plaintiff had declared his intention to give.[27] Says Wigmore[28] "A consistent statement at a *time prior* to the existence of a fact said to indicate Bias, Interest or Corruption, will effectually explain away the force of the impeaching evidence, because it is thus made to appear that the statement in the form now uttered, was independent of the discrediting influence. The former statements are therefore admissible."

WHAT FORMER STATEMENT.

The former statements which are used to show the inconsistency of the witness or to show his consistency may have been oral or written. They may have been in the form of an affidavit or deposition. They may have been delivered orally, under oath, in a judicial investigation,[29] or they may not have been sworn or affirmed. In Craig v. Craig,[30] three depositions and oral statements contradictory of the declaration which was accepted as equivalent to testimony, were received to impair the force of the testimonial declaration, and two sworn *ex parte* declarations consonant with the testimonial declaration, were admitted. In McKee v. Jones[31] the plaintiff used a deposition of a witness, and the defendant a later one, inconsistent with the former.

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[27]Good v. Good, 7 W. 107, 202.

[28]2 Evidence, p. 1328.

[29]Henderson v. Jones, 10 S. & R 322; Good v. Good, 7 W. 197, 202.

[30]5 R. 91.

[31]6 Pa. 425.

MOOT COURT

FRANCIS SCHOFIELD v. TIMES PUBLISHING CO.

Libel—Truth as Defense—Practicing Medicine Without a License.

STATEMENT OF FACTS.

Schofield who had been practising medicine for four years, without a license from the State was attacked in the articles of the Times, not on that ground, but on the ground that he was incompetent and unfit to be employed, and in certain specified cases he had failed to effect cures, when physicians of ordinary intelligence would have been successful. He proves that he has suffered the loss of practice and that his loss equals $5,000.

This is an action of trespass for libel of the plaintiff by the Times Publishing Company.

Dzwonczyk for Plaintiff.

McMurray for Defendant.

OPINION OF THE COURT.

W. D. WATKINS, J.—The facts are familiar. This is an action of trespass for libel, in which the plaintiff, an unlicensed physician brings action against the defendant (Publishing Company) for certain libelous statements, as regards his capacity and ability as a physician, from which, he alleges a loss of practice to the extent of $5,000.

The article published by the defendant accuses the plaintiff of general incompetency, and as a practicing physician he has lost cases where the man of ordinary intelligence would have succeeded.

Attorney for plaintiff bases claim upon grounds of malicious publication resulting in loss of practice.

True a charge of such gross professional incapacity as amounts to an imputation of *general* unfitness is actionable.

The act of March 24, 1877, sec. 42, provides: "Any person who shall practice medicine or surgery without a license conforming to the requirements of this act or shall otherwise violate or neglect to comply with any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished for each and every offence by a fine of $100 to be paid to the prosecutor and the other half to the county or be imprisoned for 60 days or both at the discretion of the court."

The question is first, whether the plaintiff is in the eyes of the law a physician, and second, has he suffered loss of practice.

There can be no hesitancy in stating that without a license he was not a legal physician and, being no physician, had no practice to lose.

Furthermore to impute to a man lack of professional capacity in specifie cases is not actionable. It must be general in its application.

Plaintiff lays his claim upon "Malicious Publication." There can not be any maliciousness in that which is true. He cites 177 Pa. 620, 152 Pa. 187; 162 N. Y. 154. We fail to adjust these cases to case in hand. Price v. Conway, 134 Pa. 340, is seemingly relied upon. This again is not analogous. P. & L. Dig. of Dec., Vol. II, Col. 18,494, specifically states, that any malicious publication written, printed, painted, which by words or signs, tends to expose a person to ridicule, contempt, hatred or degradation of character is not libel, nor can person libelled recover damages *unless* he can prove that the charges made against him were false. No charges were proved false here. Hence, assuming Schofield had license, could he collect? No, for that is not libel, which is true. Defendants prove his incompetency by citing specific cases of failure, where ordinary men succeed.

However, the law is made to regard the person and not made to operate upon the business itself. If he has no licence he has no legal right or title to practice and subject himself to the penalty. 81 Cal. 370; Aitken v. Blaisdell, 41 Vt. 666.

The case of Marsh v. Davidson, 9 Page (N. Y.) 579 is *directly* in line with our discussion. It was held not actionable to charge a person who is not legally authorized to practice physic or surgery. Held further where such person is not licensed according to statute and kills a patient he will be guilty of manslaughter.

The law can never become too strict in its guardianship of human life and the press generally is to be commended in exposing men, who unqualified, and unlicensed, prey upon the lives of their fellowmen.

Verdict for Defendant.

OPINION OF SUPREME COURT.

The plaintiff, if injured at all, has been injured in the reputation which, as of a physician, would have brought him patronage. He proves that he has suffered the loss of practice, and that he will probably suffer loss in the future. He had no right to practice medicine, and if his patronage has been reduced, he has simply been preserved from as frequent violations of the law as he would otherwise have been guilty of. The act of assembly of March 24, 1877; 3 Stewart's Purdon, 3511, declares that any person violating its provisions shall be guilty of a misdemeanor, the punishment of which shall be a fine of $200 to $400. Every act of prescribing as a physician would be a punishable offence. No legal right to compensation for it, would exist. Cf. Johnson v. Hulings 103 Pa. 498. Holt v. Green, 73 Pa. 198. We think no legal right exists to compensation for the loss of the employment which would have been unlawful, and for which the law would have given him no compensation.

The defendant has charged the plaintiff with incompetency and unfitness to be employed as a physician. We think the only evidence admissible, that the plaintiff is competent and fit to be employed, is his having the qualifications prescribed by law. No evidence in support of the charge, other than the absence of these qualifications, is necessary to sustain the truth of the charge.

For a discussion of the question, see Lathrop v. Scindberg, 33 L. R. A. N. S. 90, and the valuable note thereto.

Affirmed.

GEORGE SOLIDAY v. JAMES TRIPP.

Attorney and Client—Contingent Fees.

STATEMENT OF FACTS.

It appears that Tripp was seriously injured at a railroad crossing and employed Soliday to effect a satisfactory settlement with the Railroad Company, or to bring suit. He agreed to pay Soliday one-third of what he should obtain by negotiation and one-half of what should be obtained by suit. Soliday rejected the offer of $1200 from the company and sued it recovering a judgment of $2,500. Tripp, having received payment from the company of $2,500, refused to pay the solicitor more than $500. The latter sues for $1,250.

Rowley for Plaintiff.

Sharp for Defendant.

OPINION OF THE COURT.

SASSCER, J.—This suit was brought to enforce payment of $1,250 alleged to be due the defendant for professional services.

The counsel for the defendant cited many authorities to prove that this is a champertous contract and subsequently claims that under the common law it cannot be enforced. We do not deem it necessary to examine the authorities as it is well established in Pennsylvania that champerty does not invalidate a contract. The question now is, is this a valid simple contract? It has all of the essential elements of a simple contract. The only two concerning which there is any doubt are the competency of the parties and the mutuality. As an attorney has a great advantage over his client because of his superior knowledge of the law, a contract is strictly construed in favor of the client; 97 Pa. 455, but in this case we think both were competent, as the client extended the offer and there is nothing to show that he did not fully realize what his obligations in the matter would be. It was held in 161 Pa. 115, that where a client received a sum of money which included his fee, the attorney may maintain an action of assumpsit to recover the same. According to the American Encyclopedia of Law, the law will scrutinize such transactions as contracts for contingent fees closely, but an agreement is not necessarily invalid because the fee is made contingent upon the success of the suit, and such an agreement is not objectionable for want of mutality, 4 Cyc. 989. Such being the case we think that this was undoubtedly a valid simple contract.

The question now arises as to whether fifty per cent is such an unreasonable fee as to annul the contract. It is clear that if the fee is reasonable the attorney may recover. 2 P. & W. 75. It has been repeatedly held in Pennsylvania that fifty per cent ls reasonable, 19 Pa. 223. In 5 Pa. C. C. 516 it was held that the attorney was even entitled to be paid sixty per cent of the fund notwithstanding the attachment.

The defendant broke a valid contract, consequently plaintiff is entitled to recover the amount of money that he was entitled to under the contract i. e. $1,250.

Judgment for Plaintiff.

OPINION OF SUPERIOR COURT.

The learned court below has properly concluded that the contract for a fee contingent on the recovery, is not for that reason invalid. Such contracts are often made in this and other states, and althongh they may be perverted to improper uses, their validity is in many jurisdictions not denied. The Code of Professional Ethics adopted in 1909 by the American Bar Association provides: "Contingent fees where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges," but no special policy on this subject has been promulgated in this state. Williams v. Philadelphia, 208 Pa. 282.

Nothing shows that any improper measures were employed to induce the defendant to enter into the contract. It does not appear that the relation of attornev and client had existed previously between the parties. It was the contract that produced the relation. Cf. Filon's Estate, 7 D. R. 316.

The ratio of the fee to the size of the verdict is, as the learned court has said no objection to it. Nothing indicates that it was excessive Shœnberger's Estate, 211 Pa. 99. The defendant was *sui juris* and evidently supposed that the services, if successful, would be worth the compensation which he agreed to give.

That an attorney can, if it becomes necessary, maintain a suit for his fee is not disputable, Perry v. Dicken, 105 Pa. 83; Williams v. Philadelphia, 208 Pa. 282; as if he obtains the money, he may retain from it his fee, and, if sued, defend by means of the contract. Strohecker v. Hoffman, 19 Pa. 223.

Judgment affirmed.

HARRISON, ET AL., v. MARTIN.

Wills—Testator's Intention—Sale of Remainder Subject to Life Estate.

STATEMENT OF FACTS.

John Harrison devised his farm to his widow for her life and at her death to such persons as shall *then* be my heirs. He left surviving him his father and mother, but no brother and sister. Subsequently to his death two sons were born to his parents who are alive at the death of the widow. The father is also still alive. The sons claiming a fee subject to the father's life estate, contract to sell it to John Martin. He refuses to accept the deed because the vendors had no estate to convey. The vendors sue in assumpsit for the purchase money after tendering a deed.

Evans for Plaintiff.

Hollister for Defendant.

OPINION OF THE COURT.

WESTOVER, J.—To decide, wehther or not, the brothers have an estate at their disposal we must first ascertain whether or not the testa-

tor intended to include them as his heirs. What was the intention of the testator? Did he intend such heirs as were living at his death and alive at the death of his wife, or such heirs living at his death, alive at the death of the wife and any others that may come into being?

As a general rule of construction, it is well settled that a devise to heirs will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plain; 61 Pa. 111, 5 Vesey 399, 3 Allen 589

But we believe that the use of the word "then" in testator's will changes the general rule of construction. "Then", in the testator's will, is used as an adverb and when so used, is the same as saying: "at that time," (referring to a time specified). "Then" as used in the will, must refer to the death of the wife and the heirs of the testator are to be determined as of that date.

When it clearly appears that the testator intended his heirs at the death of the tenant for life, such intent will prevail. 8 Gray 86, 8 Ves 38, 5 Hall 580.

In 21 Pick (Mass.) 314, part of the will was as follows: "should my wife marry or die, the land shall *then* be equally divided among my surviving sons." The court said: "that the time when the estate was to be divided among the sons is certain and definite. It was the time when the intermediate estate terminated by the death or marriage of the tenant. Among whom was it to be divided? Not those who survived the father; but those who survived that particular event, the death or marriage of the widow."

We conclude that it was the intention of the testator in this case that the sons, as it were, should be his heirs. We, however, come to this conclusion with some hesitancy. The law favors the vesting of remainders but not in disregard of the testator's intention. The law also favors the computing of the heirs as of the death of the testator. We must confess that the will, standing alone, is to a certain extent susceptible of the construction which the law favors.

But when we consider that, after the life estate was given to the wife, only a father and mother remained, how easy it would have been, if he desired the survivor to take a fee, to have expressly stated so in his will. We must presume that he desired the estate to remain in his immediate family. Could he have devised a better plan to keep the estate in the immediate famliy than he has done by his will? We think not. Testator desired to faithfully provide for his wife, and for his father and mother if they or either of them survived the wife and make allowance for his brothers or sisters if any should he born.

The estate will go to the father and sons according to the intestate laws. Therefore the father takes a life estate, Sec. 336 P. & L. 2712, vol. 2. The sons will have a vested remainder in fee after the life estate of the father, Sect. 237, vol. 2, P. & L. 2713. The brothers contracted to sell their interest subject to the father's life estate which was perfectly legitimate and the vendee, Martin, refuses to accept the deed and pay the purchase price.

Judgment for plaintiff.

OPINION OF SUPREME COURT.

When a particular estate is given hy will, to X, and then the land is given to the heirs of the testator, it is understood that the persons who are the heirs at the death of the testator, are intended to receive the remainder. Buzby's Appeal, 61 Pa. 111; Stewart's Estate, 147 Pa. 383. Cf. note in 33 L. R. A. (N. S.) 1.

The object of interpretation is to ascertain the intention of the testator. It is not proper, usually, to pervert this sense by the application to his words of hermeneutic principles which do not ascertain it. What did the testator, in the case before us mean? He gives the farm to his widow for her life. At her death he gives it "to such persons as shall then be my heirs." This *might* mean, to such persons then living, as were, at my death my heirs. It may mean, to such persons then living as would have been my heirs, had I lived until the death of my widow and then died. The learned court below has put the latter sense on the testator's words. We think this interpretation sound.

Had such persons as were the heirs at the testator's death been intended, the remainder would have gone to the father and mother, in fee, by entireties. Gillan's Exec. v. Dixon, 65 Pa. 395, and, on the subsequent death of the mother, the fee in the whole would have vested in the father, by survivorship. The sons would therefore have no estate.

On the other hand, if by heirs the testator means, such persons as would have been his heirs, had he survived until the death of his widow, the subsequently born sons of his parents (his brothers) would have taken the fee, subject to the father's life estate.

Appeal dismissed.

HEPBURN v. CURTS.

Action for Damages.

STATEMENT OF FACTS.

The plaintiff brings this action to recover damages for past and present medical expenses, prospective loss of service and for the blasting of his hopes for the future of a child crippled by the negligence of the defendant.

The plaintiff's son was the father of the child who it was alleged was the illegitimate offspring of the son and was three years old when injured. It had been abandoned by its parents. The plaintiff had taken it into his home and was providing for its needs when the injury occurred.

OPINION OF THE COURT.

SCHAEFFER, J.—In the case before the court the plaintiff seeks to recover damages for past and present medical expenses, prospective loss of service and for the blasting of his hopes for the future of a child crippled by the negligence of the defendant.

Letting alone plaintiff's right of action for medical expenses until further on the question for consideration is, has the paternal grandfather of an illegitimate child the same rights and duties and responsibilities as the grandfather of a legitimate child? The laws of intestacy, Act of July 10, 1901, Sec. 1, P. L. 639, provide that an illegitimate shall be known by the name of the mother and that the common law doctrine of *nullius filius* shall not apply (222 Pa. 613) as between mother and child. But mother and child can take as heir of each other, which is also extended to maternal grandparents, but the common law doctrine of *nullius filius* has not been abolished either by statutes or custom in regard to the father of such child. Now if father has no right to the child it is self-evident that the paternal grandfather has none. Thus by reason we come to the conclusion that the grandparent had no more right to take the child than any other person; and further he is under no legal or moral obligation to do so.

We are now confronted with the vital part of the case which is, "have the grandparents a right of action as people standing as *loco parentis* for the injury to the child?" When a person stands in *loco paretnis* the child can be taken away by its parent or parents unless the foster parents have a legal right to the child as provided by Act of May 19, 1887, Sec. 1, P. L, 1, which holds "that a child may be adopted by another person with the consent of the parents or parent, guardian, overseer of the poor or charitable institution where each child may have been for one year preceding, by a decree of the Court of Common Pleas." As a result of such decree the child assumes the name of the adopting parent and has all the rights of a child and heir of such parent. The parent of an illegitimate child is within the bounds of the act and consent of the mother is required, which doctrine is upheld by 7 Phila. 401. In Gillingham v. Ford, 128 C. C. R. 479 we find that a child was raised from infancy, married with consent of foster parents, was known by foster parent's name, but admitted that she had never been legally adopted. In suit wherein she claimed as a beneficiary death benefits coming to heirs it was held that a child can only be adopted by decree of the Court and in absence of such decree such child had no right.

There are no Pennsylvania cases to be found which are exactly in point, but from the cases cited it can be seen that the child has no right to claim as heir to foster parents unless it has been legally adopted according to the Act cited above. If the child can not here be regarded as adopted and thus does not stand as a lawful heir why should the person in *loco parentis* have a right of action for an injury to the child which justly belongs to the lawful parent or guardian? Upon due consideration the Court cannot clearly see that the grandparent here has a right of action and in this we are upheld by an article in 29 Cyclopedia of Law and Procedure, page 1672 as follows: "where one stands temporarily in *loco parentis* and who may abandon the relation at any time and upon whom there is no legal or moral obligation to maintain and support, he cannot recover the value of the infant's service during minority, and thereby defeat the infant's recovery for his diminished capacity to earn money during these years." 74 Texas 202, 11 S. & W. 1091.

In lieu of the argument and cases cited above we hold that the plaintiff cannot recover for prospective loss of services and for the blast. ing of his hopes for the child's future.

As to his right of recovery for past and present medical expenses we have a different phase of the question. The injury to the child necessitated medical attendance and it would be immaterial under whose care the child would be; it should nevertheless be cared for. The defendant would be respoesible for the medical expenses and the plaintiff can recover the amount of the same. 60 N. H., 20, 49, Am. Rep. 392, and judgment is rendered to that effect.

OPINION OF SUPREME COURT.

Had the plaintiff been the lawful father of the injured boy, what damage could he have recovered? He had hopes that the boy would achieve great things in the future, perhaps twenty or thirty, or forty years thereafter. These hopes had been "blasted." He would not, we think, have been entitled to compensation for the demolition of these hopes. Says Woodward, J., "the father is entitled to compensation merely for the pecuniary loss he has sustained. Not compensation for his lacerated feelings or his disappointed hopes, for the law cannot [that is the judge will not] compensate these in money," etc. Penna. R. R. Co. v. Kelly, 31 Pa. 427. The jury, thought Kennedy, J., in Wilt v. Vickers, 8 W. 227, in a similar case, "could not give damages on account of any injury that might be done to the parental feelings as in cases of seduction."

The father is entitled to the services of the child only during its minority. Oakland R. R. v. Fielding, 48 Pa. 320; Caldwell v. Brown, 530 Pa. 453; Panama R. R. Co. v. Zebe, 330 Pa. 318; Wolckner v. Motor Co., 182 Pa., 82. If its disablement deprives him of its services, he should be compensated by the person who has thus deprived him. Unfortunately, no means has been furnished the jury, of measuring this loss. The child was only three years old when the injury was inflicted. We may judicially know that such a child could render no service. The sex of the child is not disclosed. What its physical and mental characteristics were, we do not know. To what kinds of renumerative work it would, if uninjured, have become adaptable, we are equally ignorant. Its legitimate father, on the evidence could have recovered nothing for the loss of its services. But see 48 Pa. 320.

The injury to the child imposes a duty on the father, to procure for it at his expense medical attendance. For this expense the father would be entitled to indemnification. Pennsylvania R. R. Co. v. Kelly, 31 Pa. 372.

The putative father, if the dictum of Gibson, C. J., is to be accepted, Moritz v. Garnhart, 7 W. 302, would be entitled to compensation for loss of the service of the child, but he affirms of a grandfather, "as the illegitimate offspring of his daughter, however, he is not legally related to it." He denies the right of the grandfather to compensation for the abduction of the grandchild on the mere ground of relationship. The father of a son who begets an illegitimate child, is no more related to it, than the father of a daughter who unfortunately gives birth to such a child.

Such a grandfather however, the Chief Justice thinks can put himself *in loco parentis*, with respect to the illegitimate grandchild. He is hence, entitled, if he assumes this relation, to the custody of the child as against others who, having no right, entice the child from him. We are unable to infer from this, that he entitles himself to the labor of the child until it reaches the age of twenty-one years, or that he puts himself under a duty towards the child to support it, to furnish it necessary medical attendance, until it reaches majority.

In Passenger Railway Co. v. Stutler, 54 Pa. 375, the mother of a legitimate son hurt by the negligence of the Railroad Company, and who furnished him necessaries, and medical attendance, was not allowed to recover from the railroad company. The relation of master and servant was not implied, thought Woodward, C. J. in that of mother and son. A mother not being bound to the duty of maintenance, is not entitled to the correlative right of service. The relation of mistress and servant can be established only as it could be between strangers in blood. That the son, 18 years old, lives with his widowed mother, and is at least in part supported by her, does not entitle her to compensation from the Railroad Company, for loss of his service, or for the expense of medical attendance secured by her for him. We can perceive no justification for giving to a grandfather of an illegitimate child, what is refused to the mother of a legitimate.

The judgment must therefore be modified.

Judgment for defendant.

JOHN BRIDE v. S. TROLOPE.

Rule in Shelley's Case Construed.

STATEMENT OF FACTS.

Wm. Bride, father of John devised a house and lot to "my son John for life. If issue shall survive him at his death, then I give to him and his heirs and assigns. If no issue survive him I give them to Robert, my brother."

John now has a son, six years of age. He has contracted to convey the house in fee to Trolope. Trolope denying the power to convey a fee, declines to accept the deed. Bride now seeks to recover the consideration money, viz. $4,090.

OPINION OF THE COURT.

ROUTH, J.—The point of contention in this case is: Did John take a fee tail made a fee simple in Pennsylvania by the act of Apr. 27, 1855, or did he acquire a mere life estate to be made a fee only by the survival of issue? Is the rule in Shelley's Case applicable?

This is mainly dependent upon the word "issue." It is necessary that in order for a man to take a fee under the auspices of the rule that the remainderman take by limitation. Therefore, is the word "issue" to be construed as a word of limitation or a word of purchase?

In regard to this, there is much adverse opinion, but it is generally conceded that the word "issue" may be construed as a word of limitation or purchase and its construction is regulated by the intent of the testator. We respectfully cite to the attorneys 126 Pa. 518; 142 Pa. 432; 160 Pa. 253. The presumption against construing the word "issue" as a word of purchase isn't as great as construing the words "heirs of the body" to be a word of purchase, 3 Am. Rep. 565. Ordinarily "issue" means the heirs of the body, which are words of limitation.

In every case where the rule is involved the intent of the testator is taken into consideration as to whether he intended a limitation to the remainder in fee or that there should be a root of a new succession taking directly from the grantor as purchasers. When the latter intention is visible the rule in Shelley's Case has no application. But if the intention is that the remaindermen are to take as heirs of the grantee of the particular estate instead of becoming themselves the root of the new succession, the rule is applied although it may defeat the most conspicuous intention of the testator that the first taker should have but an estate for life.

The question is not who should take but the question is how and what they took.

In this case the testator intended a life estate to John.

This he created by the words "for life." He clearly shows that his intention was not that the estate should pass by devolution from John to his heirs but directly from the testator to a designated individual. This intention is most manifest and conspicuous. The very phraseology of his will proves to the greatest degree of certainty that he had two separate and distinct thoughts in his mind. First, that the estate should go to John for life, and life only, and second, that the remainder should go to the last named devisee, Robert upon failure of issue to John. The will was worded simply and clearly so that the intention could not be misconstrued. A case directly in point with the case before the bar is Kemp v. Reinhard, 228 Pa. 144. It is one of the most recent cases on the rule in Shelley's Case and the essence of Justice Brown's opinion is, that a devise to one for and during his life and after his death to his issue in fee and should he die without issue, to another person designated does not create a fee since the intention of the testator to pass the remainder from himself to the issue is manifest. A definite or indefinite failure of issue was contemplated and words which may be dually construed will not be construed in a manner repugnant to such contemplation. The remainderman has a contingent estate which he may sell at his option. The failure of issue at the death of the life tenant will yield the estate to the remainderman as the contemplated contingency has occurred either negatively or affirmatively. 3 Yeates 221; 70 Pa. 70; 217 Pa. 419. To further substantiate this opinion we offer for the examination of counsel, 142 Pa. 349; 163 Pa. 509; 152 Pa. 18; 212 Pa. 91.

By clear implication the testator in this case meant by the word issue, "children," therefore it must be construed as a word of purchase and a fee tail will not be implied. If we look over this class of cases in the records of this state we will find that the courts of Pennsylvania are

gradually giving the rule in Shelley's Case a more liberal construction or rather more liberal interpretation. Mere technicalities no longer take precedence over the positive meaning and intention of a maker of a will. Common law rules often work hardships and are often impracticable at the present day. They are often unreasonable and a well known maxim in law is that where the reason ceases the law ceases.

But in this case we are not even deviating from the general rule in Shelley's Case but we are just interpreting the word "issue" in a more liberal and what is in this case a more equitable sense as is done in the case above cited (228 Pa. 143). This is the most recent case on the subject in Pennsylvania.

Therefore, as John did not take a fee he has no right to convey any more than he is owner of, namely a life estate, and Trolope cannot be compelled to perform the agreement entered upon or to pay the purchase money.

Let judgment be entered for the defendant.

OPINION OF SUPERIOR COURT.

The plaintiff contends that he takes a fee simple according to the rules of the common law or a fee tail which is changed into a fee simple by the act of 1855. In support of both contentions he relies upon the rule in Shelley's case.

Whenever a case involves an application of this rule it will be found that the cases militate against each other and that an appeal to the authorities only thickens the confusion. High and reverend authorities will be found on both sides of the question involved and there is no safe middle ground.

In such circumstances the course of prudence and justice is to avoid the "Serbonian bog" of authorities, and to endeavor to discover and effectuate the intention of the testator, invoking the aid of those authorities which justify a construction in accord with this intention and rejecting those authorities which require a constitution which would frustrate such intention.

In the present case there can be no doubt that the testator intended to give his son John a life estate. The devise was to John "for life" and the subsequent devise was "at his death."

In order to effectuate the intention of the testator and give John a life estate it may plausibly be argued that the devise of the remainder was to the issue of John, and his (the issue) heirs and asssigns. The word issue under this construction would be singular, and as there are superadded words of limitation, to wit, "his heirs and assigns," it would be a word of purchase and not of limitation. 29 L. R. A. V. S. 1021. Wells v. Ritter, 3 Whar. 217. The rule in Shelley's Case would therefore be inapplicable, the plaintiff would take a life estate merely, and his title would be unmarketable.

On the other hand if the word issue is not singular but plural, the same conclusion would follow.

The testator must be held to have contemplated a definite failure of issue because (1) he used the word "survive", Nes v. Ramsay, 155 Pa. 632; 18 A. & E. Encyc. 561; (2) he used the words "at his death", Parkhurst

v. Harrower, 142 Pa. 432; 18 A. & E. Ency. 564; (3) he used the word "then", Snyder's Ap. 95 Pa. 374; 18 A. & E. Encyc. 565 Miller's Estate, 145 Pa. 565: (4) the act of 1897 provides that words which impute a failure of issue must be construed as referring to a definite failure, etc., and not an indefinite failure, unless a contrary intention shall appear.

Under this construction John would take a fee only in case he left issue living at his death. Stoner v. Wunderlich, 198 Pa. 158; Marshall v. Clause, 230 Pa. 344; 29 L. R. A. V. S. 1110; Tiffany on Real Property, 64; Lewis v. Co., 222 Pa., 139; Kemp v. Renard, 228 Pa. 143. His title was therefore unmarketable.

Judgment affirmed.

COMMONWEALTH v. BROWNBECK.

Sale of Liquor with License—Location of Sale.

STATEMENT OF FACTS.

Brownbeck is a licensed dealer in liquor in Franklin County. When in Carlisle he met some friends who asked him to bring them each a quart of liquor. He agreed to do so but stipulated that terms should be cash on delivery. A few days later he came to Carlisle with three bottles of whiskey in his grip for his friends. The bottles were uniform in size and contents. He delivered a bottle to each of his friends and received the cash on delivery. He had no other liquor with him but he did not mark the bottles with the names of the purchasers before leaving home. He is indicted for selling without a license.

Rogers for Plantiff.

Routh for Defendant.

OPINION OF THE COURT.

KOUNTZ, J.—This brings before us the interesting question of how to locate a sale, and on this point the decisions of the different courts of the country seem to be in some conflict.

The rule laid down in 4 Col. L. Rev., in regard to cases of C. O. D. sales of liquor, is that "when a common carrier does not intervene between the vendor and the vendee, but the delivery is made by the vendor in unlicensed territory, without the intervention of any other person whatsoever, the sale is consumated and the defendant is guilty beyond dispute." In Black on Intoxicating Liquors, the writer goes even further, saying, "Irrespective of the place where the bargain was made or the order received, if the seller, by his own hands, or the hands of his servant or agent, carries the liquor to the purchaser without any intermediate delivery to or through a common carrier, and delivers the liquor at the latter's place and there receives pay for it, the sale is made at the place of delivery, and if the vendor is not licensed to sell there, he is indictable." This is declared to be the established rule. Under these rules, it is plain to see that the defendant would be guilty. But are these rules the law of Pennsylvania on this subject?

It is hard to say. Some of the cases seem to be in open conflict with each other; or to be reconciled only by such fine distinctions as amount almost to absurdities.

In Vol. XVI of the Dickinson Law Review, the writer of an article on "How to Locate a Sale" suggests by way of summary, that "if the same man accepts the order at the buyer's home and makes delivery in unlicensed territory, whether common carrier intervened and the goods were labelled or not, this is peddling and unlawful, whether he is really an agent or is in fact a middleman."

In Commonwealth v. Gebract, 96 Pa. 449, the court said: "The place of sale is the place where the goods ordered or purchased are set apart and delivered to the purchasers, or to a common carrier, who for the purposes of delivery represents him." This seems to be the law in Pennsylvania, as this case has been followed by the appellate courts in several recent cases.

In the case at bar, the defendant had set aside three bottles of liquor uniform in size and contents, and unmarked. So far as it appears he did not intend any specific bottle for any one of his buyers and so might just as well have brought the liquor to Carlisle in one large vessel and then measured out one-third of it to each man. While it may not be absolutely necessary for each bottle to be marked, yet we think that the bottles should have in some way been distinguished from one another in Franklin county, so that at least the vendor knew to whom each bottle was to be delivered.

We think this decision covers the case at bar, and so the defendant is guilty as indicted.

OPINION OF SUPERIOR COURT.

If the site of the sale is the place where the ownership passes from the vendor to the vendee, as we think it is, nothing indicates that Brownbeck's sale occurred elsewhere than in Cumberland County. The liquor had been his. He brought it to Carlisle. He then delivered it, one bottle to X, another to Y, a third to Z, and he received the price from each. What justification is there for asserting that he had ceased to own it at any time before these deliveries? We see nothing. He possibly had other liquor at his place in Franklin, although this does not appear. If he had, he separated the portion which he put into the three bottles, from the rest, but such separation did not terminate his ownership. That he separated the liquor with a view to the passing of the ownership of it to his three friends, may not be doubted; but the passing intended need not have been simultaneous with the separation. He expected to find the friends, and, finding them, and receiving the price, to make one of the bottles the several property of each, but he might not find them. They might alter their purpose. They might be unready to pay the price. We are unable to see any evidence that he had done anything prior to his delivery of each bottle, which terminated his ownership and originated an ownership in the friends.

Could he have sued for the price, had they declined to accept the bottles? Could they have maintained replevin or trespass for the bottles

had they been sold by Brownbeck to another before or after his arrival in Carlisle? If one of the bottles had been taken by a fourth person between the separation in Chambersburg and the delivery in Carlisle, whose property would he have taken; X's, or Y's, or Z's?

The friends were not intended to become tenants in common of the three bottles. Each was to receive one, a different one from that received by each of the other two.

Brownbeck's act of selection was necessary to make bottle No. 1, X's; and bottle No. 2, Y's, and this selection he intended to make when he met any one of them. If X appeared first, he would take at haphazard one of the bottles, and by that act, plus his accompanying intention, he would make the bottle so taken, X's.

The possession was changed in Carlisle; the price was paid there. Carlisle must be regarded the locality of the sale in the absence of convincing evidence of an earlier transmutation of ownership.

Affirmed.

LEONARD v. BLACKLEY.

Illegal Contracts—Gambling—Purchase and Sale of Stock on Margin.

STATEMENT OF FACTS.

Blackley is a broker, with whom Leonard dealt in stocks on margin. Leonard had all the money he had in the world up as margin and dealt in stocks purely as a matter of speculation. After Blackley had executed a number of buying and selling orders, there was a profit in his hands of $2,000 besides the $500 margin originally deposited. Leonard admits he could not have received the stock bought and paid for it and that he often ordered Blackley to sell stocks he (Leonard) did not own at the time he gave the order. Blackley admits he always executed these orders, he lending Leonard the stock to sell in case of short sales and lending him money when he bought. Leonard sues for profits less interest and commission, to wit, $1500.

Puderbaugh for Plaintiff.

Miss Long for Defendant.

OPINION OF THE COURT.

MENDELSOHN, J.—To the Court the facts here presented set forth a clear case of a wagering agreement between the plaintiff and defendant. Plaintiff deposited with defendant the sum of five hundred dollars ($500) to hold same indefinitely for the purpose of speculation in stocks on margins. Defendant had executed a number of buying and selling orders at different times for the plaintiff. The profits on said stock amounting to two thousand dollars ($2,000), plaintiff now seeks to recover fifteen hundred dollars ($1,500), out of said profits as his commission.

In Fareira v. Gabell, 89 Pa. 89, it was held a wagering contract is

one in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest, except that arising from the possibility of such gain or loss.

Wagering Agreements under the act of April 22, 1794, 3 Sm. L. 177, are illegal. No one is compelled to pay money lost on a horse race, or upon any game of hazard or other game. Same in 13 Pa. 601. 1 Rw. 27. Any wagering agreement whether prohibited by Statute or not is void.

In Maxton v. Gheen, 75 Pa. 160; North v. Phillips, 89 Pa., 255; Gheen v. Morgan, 90 Pa. 44; Dickson v. Thomas, 97 Pa. 278; it was held, transactions in stocks by way of margins, settlement of difference and payment of gain or loss, without any intention to deliver the stocks are mere wagers.

The law relating to stock gambling transactions has been considered in a line of cases extending from Brua's Appeal, 55 Pa. 294, to Anthony v. Unangst, 174 Pa, 10, and it has been firmly settled, that a purchase of stock on margin, for speculation is not necessarily a gambling transaction, if it is the intention of the parties that a real purchase shall be made by the taker. Although the delivery may be postponed or made to depend upon future conditions the transaction is legal.

But if it is the intention that there is not to be a delivery to complete the purchase, but that the account is to be settled on the basis of a rise or fall in prices, it is a mere wager and the contract cannot be enforced by either party. Peters v. Grims, 149 Pa. 163.

In Louchkeim & Co. v. Hildebrand, 187 Pa. 136, it was held, if the intention is that there is not to be a delivery to complete the purchase, but that the amount is to be settled on the basis of a rise or fall in the prices it is a mere wager and the contract cannot be enforced by either party.

The test is whether he bought and sold and not merely settled on differences with no intention at any time of taking his purchase or delivering his sales. That and that only is gambling. The extent of the transaction and the conduct of the parties in relation to them tend to sustain the averment that no real purchase or sale was ever contemplated, but merely a wager on the fluctuation of the market, and that his liability was limited by agreement to the amount he deposited as margin.

Judgment for Defendant.

OPINION OF SUPERIOR COURT.

The learned court below has decided that the contract between Leonard and Blackley was a wager, and for that reason unenforceable.

What evidence is there, that it was a wager? Leonard dealt in stocks. But to buy and sell stocks, is no more a wager than to buy and sell grain, pork, cotton, land, anything.

Leonard had "all the money he had in the world up as margin." To say nothing about the money he had out of the world, the fact that he invested all his money in purchase and sale of stocks, no more condemns the business than would his investing one-half or one-third, or one-tenth of his money.

Leonard dealt in stocks "purely as a matter of speculation." In ad-

dition to commendable senses of the word speculation, it means, if we trust the Century Dictionary, "The investing of money at a risk of loss on the chance of unusual gain; specifically, buying and selling, not in the ordinary course of commerce, for the continuous marketing of commodities, but to hold in the expectation of selling at a profit upon a change in values or market rates." To buy, not for the purpose of using, but to sell again, whether the buying be an ordinary act of the business of the buyer, or an "unusual" one, is not reprehensible, although the purchase is made in hope of a rise in the price of the article, and of the profit which by a sale at this price, will be realized. "A purchase of stock on margin for speculation," says Fell J., "is not necessarily a gambling transaction". Wagner v. Hildebrand, 187 Pa. 136; Peters v. Grim; 149 Pa. 163.

If the contract between Leonard and Blackley imposed on the latter the duty of buying stocks, at the direction of the former, and of paying for them, and imposed on Leonard the duty of accepting these stocks from Blackley, and of paying him for them, the fact that Blackley made himself liable for the price at which he bought them, and as security against loss, had the right to appropriate the so-called "margin" to any such loss, or to sell the stock unless Leonard paid him for them did not make the contract a gamble. Peters v. Grim, 149 Pa. 163.

If however, the intention of the parties was, that Blackley should buy and should also sell, on the monition of Leonard who was not to take the stock and pay the price, but, to pay Blackley any loss, if any, arising from his selling at a lower price than that which he paid, Blackley also paying Leonard any gain should the selling price be higher than the buying price, the transaction would be of a gambling nature.

What evidence is there that this was the nature of the transaction? The fact that there was a number of buyings and sellings, does not, nor the fact that there was a "margin," for Leonard may have intended to take the stocks which Blackley bought at his instance, and have intended the margin as a security to the latter, in addition to the possession of the stock, until he should be able or disposed to pay in full for it.

Leonard was not able, at any time, to pay for the stock. He *might* nevertheless have intended to purchase, for he might have expected to become able; e. g., to borrow the money from another, or from the broker himself, obligating himself to the lender to repay the entire amount lent.

Leonard often ordered Blackley to sell stocks when he, the former, did not own any. Blackley honored these orders lending the stock to Leonard. We see no gambling element here. A is not gambling when he sells stock which he borrows for that purpose from B, and which he replaces by other stock or the price of which he unconditionally binds himself to repay to B.

Blackley lent, the evidence indicates, money to Leonard when he bought. Then clearly, Leonard was buying the shares, and paying for them, borrowing the money. Buying things when one has to borrow the money with which to pay for them, in not gambling.

The evidence is in such a condition that the learned court below was not warranted in assuming that the transactions were wagering in char-

acter. The utmost that would have been properly done was to submit it to the jury in order that they might determine whether Leonard was gambling or not.

If he was not gambling, then he is clearly entitled to recover the profits made on his reselling the shares through the broker.

If the transfer should be determined by the jury to have been a gamble, the profits made from it, in the hands of the broker, could not be recovered. Bauer v. Fabel, 221 Pa. 156: Peters v. Grim, 149 Pa. 163. The broker cannot recover the losses on the resale by him of the stocks, notwithstanding the customer's having induced him to incur the risk of losses by a contract to indemnify him. Fareira v. Gabell, 89 Pa. 89; Wagner v. Hildebrand, 187 Pa. 136; (Implied in Fearon v. Little, 227 Pa. 348; Freedly v. Jacoby, 220 Pa. 602; MacDonald v. Gessler, 208 Pa. 147). This principle was applied by Mitchell, J. in Snider v. Harvey, 215 Pa. 538, although he strongly objected to it. He remarked that he did not "believe in the justice, morality or wisdom of extending the principle of public policy to the protection of transactions in fact dishonest." He added "But the law is too firmly settled for the courts to disregard it." It hardly needs remark that if the broker cannot recover for losses incurred at the instance of his customer in gambling transactions, the customer could not recover for gains made in such transactions.

For some reason not entirely clear, the courts allow a recovery of the deposit on "margin," provided that there are no losses by the broker which justify the retention of it. Peters v. Grim, 149 Pa. 163; Bauer v. Fabel, 221 Pa. 156; Danler v. Hartley, 178 Pa. 23; McNaughton v. Haldeman, 160 Pa. 144. Nor is it necessary that precisely the money that was given to the broker should still be retained by him, in order to its recovery; Repplier v. Jacobs, 149 Pa. 167. A contrary decision in Hirst v. Maag, 13 Super. 4 is hard to reconcile with the other cases. If there have been losses, so much of the deposit as is necessary to recoup them, may be retained by the broker; Stewart v. Parnell, 147 Pa. 523; Smith v. Kemmerer, 152 Pa. 98.

In the present case, there is no controversy over the deposit. Leonard sues for profits, less interest and commissions. He is entitled to them, if the transactions were not gambling, otherwise not.

Judgment reversed with v. f. d. n.