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MARTIN V. BERENS, 67 PA. 459

Berens leased from 1 Dec. 1866, for 7 years and 9 months to Martin and Monroe, a distillery. The rent was made payable quarterly. The lessees agreed to make all improvements and additions and all repairs or rebuilding, in case of any accident, which now may be made voluntarily or hereafter may be necessary to keep the premises in a proper state of repair at their own expense, without any claim for damages or restitution or as offset for rent.

An affidavit alleged that the premises had been totally destroyed by fire March 30th, 1870, and remained so destroyed and in ruins, and that before and at the making of the lease, the plaintiff agreed with the defendants, as part of the lease that the lessees were not to be liable for any rent while the premises, after destruction by fire, should remain so destroyed.

The trial court entered judgment for the rent claimed, which had accrued since the fire. The affidavit attempted no explanation of the omission of the alleged exemption from rent accruing between the destruction by fire, of the buildings, and their reconstruction. It did not allege (a) that the omission was the result of fraud or mistake; nor (b) that the lessees were induced to execute the lease by the alleged parol agreement ("on the faith of the alleged parol agreement," is the phrase) "Being incapable of proof, it (the parol agreement) is the same, says Williams, J. as if

it had never been made, and therefore it constitutes no defense to the action."

Williams, J., remarking that the principles which govern the admission of parol evidence affecting written instruments are well established, undertakes to give a summary of cases in which such admission is permitted.

1. The first is when the object of the evidence is "to explain and define the subject matter of a written agreement."

The first case cited, to sustain this use is Barnhart v. Riddle, 29 Pa. 92. A, partner with B, sells his interest in the firm to C for $800, C agreeing also to pay A's "share of the demands against him" as a partner. A statement of the debts of the firm was exhibited to C before he thus agreed. The debts thus named in this list were $1500 less than the actual debts. The suit was for this $1500, the scheduled debts having been paid by C. A's recovery was confined to the scheduled debts.

The second case cited is Aldridge v. Eshleman, 46 Pa. 420. Eshleman gave a guaranty of payment of goods sold to his brother by Aldridge. Whether this guaranty covered goods already sold, as well as goods thereafter to be sold, or only the latter, was a question. The words used were "I hereby agree to be responsible for merchandise bought by my brother x x x to the amount of $600," etc. It was proper to show the existence of debt for past sales and other facts from which it could be inferred that the guaranty was intended to cover past as well as future sales. But, is not the word "bought" ambiguous, and might the evidence be receivable to remove an ambiguity?

In the third case, Gould v. Lee, 55 Pa. 99, replevin for hides, the defendant put in evidence a certain release of all demands. Whether it embraced these hides was a question. Parol evidence of a person, present at the execution of the release, to show that it did not include the hides was received to explain and define the agreement.

2. Parol evidence is receivable to prove a considera-

tion not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it. Lewis v. Brewster, 57 Pa. 410 is cited as authority. A deed from A to C, named $300 as the consideration. C was A's daughter-in-law. Evidence was received that no consideration was paid, and that the conveyance was a gift, in ejectment by one who claimed as purchaser at sheriff's sale, of the interest of C's husband. Note that the proviso against inconsistency with the expressed consideration is inaccurate. The inconsistency is palpable.

3. Parol evidence is admissible "to establish a trust." Cozens v. Stevenson, 5 S. & R. 421 cited, is not authority for this principle. The case has naught to do with trusts. Tilghman, C. J., is, like Williams, J., attempting to mention cases in which parol evidence is admissible. He mentions "cases of trust," but does not say whether to "establish" or rebut trusts. The same Chief Justice in Iddings v. Iddings, 7 S. & R. 111, says that a resulting trust may be rebutted by parol, because no writing is then contradicted, the trust, if at all, arising from facts, and not writings.

4. The fourth function of parol evidence mentioned is "to rebut a presumption or equity."

In Bank v. Fordyce, 9 Pa. 275 a bank had judgments against the maker and two endorsers of a note. It assigned the judgment against the maker and that against the first endorser to Luce. This *prima facie entitled* Luce to the judgment against the last endorser. "The purchase of a debt entitles the purchaser to all the additional securities for it." Bank v. Fordyce, 1 Pa. 454, Fisher v. Fox, 4 W. & S. 92. On a *sci. fa.* on the judgment against the last endorser, at the suit of the bank to the use of Luce, the defendant could rebut the presumption that Luce had become the owner of the judgment, by proof that when the bank assigned the judgments against the maker and the first endorser, it was agreed that the judgment against the last endorser should not pass. Two

reasons are suggested (a) it would be a fraud to repudiate the agreement; (b) an equity can be rebutted by parol.

Musselman v. Stoner, 31 Pa. 265, contains the dictum that parol evidence is proper to rebut a presumption or an equity. So does Chalfant v. Williams, 35 Pa. 212. In Musselman v. Stoner there was a contract for the delivery of horses under certain circumstances. The agreement did not specify the place of delivery. It could be shown that the parties orally agreed where the delivery should take place.

5. The fifth function of parol evidence mentioned is "to alter the legal operation of an instrument where it contradicts nothing expressed in the writing. In Chalfant v. Williams, 35 Pa. 212, Odgers transferred a coal mining lease to Williams and others. A creditor of Odgers attached the money due on the transfer to Odgers. The purchasers were to pay $4000, in this manner: $600 down, $216.62 on a note at 30 days, fifty cents for every ton taken from the colliery until the sum of $815 was paid; and the remainder of the consideration was to be paid at the rate of 25 cents for each and every ton so taken from the colliery. Parol evidence was received that the transferees of the lease refused to sign the agreement, if they were bound to mine coal enough to pay the $4000. Says Woodward, J., the fair and reasonable construction of this writing, standing alone, would be perhaps, that the purchasers were to take out coal enough to pay, at these rates, the balance of the whole sum of $4000,—but there is no such covenant expressed; and the parol evidence of what occurred at the execution of the paper shows clearly that, if such a covenant had been expressed, the defendants would not have signed it; and that Odgers agreed to take the risk that they would mine that quantity of coal'. "The parol evidence contradicts nothing expressed in the writing, but only an implication from what is written."

6. "To explain a latent ambiguity" is a sixth purpose which permits the use of parol evidence.

The first case cited is McDermot v. United States Insurance Co., 3 S. & R. 604, an action on a policy of insurance of goods shipped in a schooner. The parties had referred all matters in dispute to three persons, who decided that proof "has not been produced sufficient to establish a claim against" the insurance company. In order to show that the report was not final, plaintiff offered to prove that the plaintiff before the referees desired a postponement but that the defendants urged a decision. The offer was rejected. The supreme court approved the rejection. Parol, says Tilghman, C. J., may be used to explain a writing, only when it refers to something dehors of so ambiguous a nature as to require explanation. "This is called a latent ambiguity, because it does not appear on the face of the writing, and is exemplified by the case of a man having two sons of the name of John and making a devise *to his son John.* But when the ambiguity is in the words themselves, the rule is that no parol evidence shall be received. If one has several children and should make a devise to *one of his children,* parol evidence would be rejected and the devise would be void for uncertainty." The court found that there was *no* ambiguity in the award, and hence no occasion for parol evidence to resolve it. What is said on the subject of ambiguity is therefore dictum merely.

The second case cited is Iddings v. Iddings, 7 S. & R. 111. A will contained unequal legacies to children, but advances had been made to them, which, added to the legacies, would have given them equal shares of the testator's estate. The scrivener inserted in the will a direction to the executors *not to cancel* any of the accounts between the testator and his children. Evidence of the scrivener was offered that he had improperly used the word cancel, to express the thought of the testator. Tilghman, C. J., approved of the rejection of this evidence. The general rule, he says, is that a writing is not to be altered or explained by evidence aliunde. There are exceptions. "A man has two sons of the name of John and devises land to his *son*

John. The uncertainty is made to appear by parol evidence, that there are two sons called John. It is permitted therefore to remove this uncertainty by other parol evidence, showing which son was intended." He adds that an "ambiguity patent", one arising "on the face of the will," may not be explained by parol. In the case before him, there was, he says, no latent ambiguity; hence no justification for the use of the scrivener's testimony. Here, again, the observations of the court are *dicta.*

7. To supply deficiencies in the written agreement, is another object of permissible oral evidence. Miller v. Fichthorn, 31 Pa. 252, is first cited. The action was on a bond for the purchase money of land. At the time of the conveyance, there was a lien on the land, upon which lien the land was subsequently sold, and the obligor alleged that he had thus lost the consideration for his bond. The answer to this was that he had agreed to pay the sum mentioned in the bond besides the judgment lien. Oral evidence of this agreement was permitted. The deed contained no reference to it, but the function of a deed is not to express the whole of a negotiation concerning a transfer of land, but only the act of conveyance. (But the deed often mentions a consideration. An additional consideration could be shown by parol). The bond made no reference to the assumption of the judgment, but it is the function of the bond to express the particular obligation defined in it. There are complex transactions, parts of which only, may be manifested by writing. The other parts must be, and therefore may be, established by parol.

The second case cited, that of Chalfant v. Williams, 35 Pa. 212, has been stated supra. It contains the dictum. "We permit a deed absolute on its face to be proved a mortgage; we receive parol evidence to rebut a presumption or an equity—to supply deficiencies in the written agreement—to explain ambiguities in the subject matter of writings—to prevent frauds and to correct mistakes."

8. With respect to contradicting or varying the terms of a written instrument, the opinion of Williams, J., states that "as a general rule, it is inadmissible to contradict or vary the terms of a written instrument." Several cases are cited, of which the first is Hain v. Kalbach, 14 S. & R. 159. In an action on a bond by the administrator of the obligee, the defendant offered to show that it was agreed by the obligee at the execution of the bond that nothing more than the interest was to be paid, during his lifetime, and after his death neither principal nor interest. Gibson, J., does not decide that the parol evidence was not admissible to contradict, etc. On the contrary, he says that if the defendants had offered to prove that they were *induced* to execute the bond in consequence of the obligee's statement, the case would have fallen within the principle of Miller v. Henderson, 10 S. & R. 290. In that case a bond for $1000, with two seals to it, was presented by Miller, to his debtor Patton for execution. Patton asked Henderson to sign it as surety saying the signing was a mere matter of form. To this Miller assented. Henderson then took the pen and said "it is understood that this is mere matter of form, and that I am not to be called on to pay." Miller replied "it is mere matter of form; it is not even supposed you will be called on." Henderson then signed. Although this evidence was "in total destruction of the defendant's obligation," Tilghman, C. J., held it admissible. Though the destruction of a written instrument by parol evidence may seem dangerous, and in fact it is so" remarks the chief justice, "the community would be in a still worse condition, if it were established as an inflexible rule, that when a man's hand was once got to an instrument, no matter by what means, the door should be shut against all inquiry." In this case, the evidence showed that Henderson was unwilling to sign until he had assurance that he would not be liable and that he manifested this unwillingness to the obligee, at the time. In Hain v. Kalbach, the offer is to show "that at the time of the

execution and delivery of the said bond, the said William Bell (the obligee) alleged that he would require nothing more to be paid on it" than the interest that should accrue during his lifetime.

The second case cited is Barnhart v. Riddle, 29 Pa. 92. B agreed with A to buy A's interest in a stock of goods for $800, and also to pay A's share of certain debts of a firm to which he belonged. Evidence was received that a list of debts was exhibited, purporting to be complete, and that the debts actually existing were greater by $1500 than the amount stated. The evidence was properly received. "B," says Woodward, J., "was either overreached, grossly defrauded by false representations, or else both parties were egregiously mistaken as to the amount of Barnhart's (A's) indebtedness. The latter is the more charitable supposition, and just as efficacious as a ground of defense."

Miller v. Fichthorn, 31 Pa. 252, is the next case cited, but if it contains the principle, it does so only as a *dictum*. The effort was not to contradict a writing, the deed of conveyance, or the bond and mortgage, but to add to the consideration mentioned in the deed the assumption of a lien on the land.

The next case is Harbold v. Kuster, 44 Pa. 392. An article of agreement to convey land, dated Dec. 15, 1855, reserved the grain then in the ground to the vendor. The deed was made and delivered April 7, 1856, but contained no reservation of the grain. When the grain was ripe, the vendee appropriated it. In trover by the vendor, the defendant offered to prove that at the making of the article, the actual agreement as to the grain was, not that it was reserved to the vendor, but that it should be the vendor's if found to be movable property, and the vendee's, if not so found to be. The trial court's rejection of this offer was approved by Thompson, J., who said that to have admitted it would have been to "disregard the established

rule that parol evidence cannot be received to contradict, vary, or alter an instrument of writing. It was not offered to reform the instrument on the ground of fraud, accident or mistake, where such evidence is necessarily receivable."

Lloyd v. Farrell, 48 Pa. 73, the next case cited, was an action for the purchase money of land. The vendor had the legal title to the land, but subject to an equity in two undivided thirds, in favor of his sisters. The article of agreement contained the vendor's covenant to convey to the vendee "in fee simple and clear of all incumbrances." The trial court admitted the testimony of a witness, who was present at the signing of the article, that it was the "understanding" of the parties that the vendee was to take whatever title the vendor had, at his own risk. The court refused to withdraw this evidence. This was, in the opinion of Strong, J., error, because it did not appear how the witness gathered it, whether from their negotiations or their written contract, and because "it was in direct contradiction of the written covenant given by Farrell (the vendor) and exacted by Lloyd (the vendee) with no evidence or even allegation of mistake or fraud."

The last case cited to sustain the principle that parol is not admitted to contradict or vary a writing, is Anspach v. Bast, 52 Pa. 356. In a suit by the payee of a promissory note against the maker, the affidavit of defense alleged that the note was given for the price of a lease of coal land; that the vendee (defendant) at first refused to give the note, fearing that he might not get enough coal out to meet the payment, but that he finally gave it with the express agreement that if he was unable to pay the note when it matured, it was to be renewed by a note maturing six months later; and that when the note matured, sufficient coal to pay it had not been taken out. The entry of a judgment for want of a sufficient affidavit, was sustained by Strong, J., for several reasons, one of which was that

the alleged agreement contradicted the writing. "No case goes to the length of ruling that such evidence is admissible to change the promise itself, without proof, or even allegation, of fraud or mistake. The contrary has been repeatedly decided."

The opinion of Williams, J., in Martin v. Berens, then alleges that there are cases in which equity would set aside or reform an instrument. They are cases of fraud, accident or mistake. Parol evidence is there admissible to contradict or vary the terms of the agreement as written. He cites several cases.

The first is Christ v. Diffenbach, 1 S. & R. 464. This was replevin by a lessee of a mill, for goods distrained for rent, by the lessor. Before the lease was written, evidence was offered to show that the lessor agreed to deepen and widen the tail race, and that a covenant of this purport should be inserted in it. When the writing of the lease was begun the lessee stated verbally that he would not accept the lease, unless the tail race was dug out. The lessor replied that if the lessee would accept the lease, he would engage to complete the race to his satisfaction. Later, before the acceptance of the written lease, the lessee, finding that it omitted the covenant, objected to it. The lessor then said he was a man of honor, and what he promised should be punctually performed. Whether inserted or not, the agreement should be performed. Trusting to the assurances thus given, the lease was executed. The trial court rejected the evidence. This, says Tilghman, C. J., was error. "Parol evidence is admissible in cases of fraud and of plain mistake in drawing a writing. The evidence offered in the present case went directly to establish a fraud." The lessee was "induced" to sign the lease, by the lessor's promise that he would do what had been agreed upon in the months of June, July or August next ensuing. Was the lessee "not tricked into the execution of the lease?" It is to be noted that the omission of the covenant was not alleged to have been by accident, or mis-

take. It is not clear that there was a fraudulent intent on the part of the lessor, not to do the deepening and widening. The case is simply the omission of reference to an influential act on the lessor's part, and the acceptance of the thus imperfect lease because of the oral promise to do the act, mention of which the lease should have contained, and the failure to keep this promise.

The second case, already described, is Iddings v. Iddings, 7 S. & R. 111. The mistake of the scrivener, in foisting on the testator the word "cancel," when something quite different was intended by the testator was not allowed to be corrected by the scrivener's testimony. Tilghman, C. J., saying "if these mistakes were to be corrected by the scrivener's recollection of his conversation with the testator, it would open such a door for perjury and confusion (collusion?) as would render wills of very little value. By way of dictum, the chief justice remarks, in the case of fraud, parol evidence is admitted, "not for the purpose of *explaining* or *altering* the writing, but of showing it to be void." He illustrates fraud by the case of a substitution by subreption of a paper, not intended by the testator to be executed, for the one which he did intend to execute. He supposes that the mistake of executing a paper as a will on the supposition that it was another, the mistake not being discovered in time to correct the error, might be shown.

The third case cited, Miller v. Henderson, 10 S. & R. 290, has been discussed *supra*. The opinion uses the words "fraud or artifice," to characterize the act of the obligee of the bond. But, it nowhere appears that he did not mean what he said, at the time of saying it. The court would possibly have said that the subsequent attempt to compel the defendant to pay was, itself, a fraud to defeat which evidence of the promise was receivable.

Parke v. Chadwick, 8 W. & S. 96, is the next case cited. Chadwick conveyed to Parke a tract of land. On mortgage given by one who had conveyed the land to

Chadwick, it was sold by the Sheriff. This is an action on the covenants of title contained in the conveyance to Parke. The defense was that this conveyance had been made to Parke at the instance of one Church, who was a creditor of Havens, to secure the payment of the Havens debt, with the understanding that when this debt was paid, the land should be reconveyed. This evidence was held admissible. Huston, J., holds that the attempt of Parke to assert ownership of the land, was a fraud, which justified the parol evidence of the facts. It is not necessary that there should have been a fraudulent intent, when the conveyance to Parke, by Chadwick, was procured by Church. "It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose, as to obtain it by fraudulent statements."

Clark v. Partridge, 1 Pa. 13, was an action of debt on an award. The defense was that the award was made by only two of the three referees. Plaintiff alleged that at the time of signing the agreement to refer, it was verbally agreed that the award of a majority should be final; that this was intended to be inserted but was omitted by the scrivener's mistake, and that the defendant suggested that the same was unnecessary, that he would not deny his agreement, and, if he did, the scrivener could prove it. Rogers, J., says that that is a case of fraud, not mistake. "If the case be as stated, it is a palpable fraud which consists in the defendant refusing to comply with his contract, and insisting, in violation of good faith, upon the legal construction of the agreement as written". He maintains, however, that the pleading should have alleged the fraud. It is not enough for the plaintiff to set out facts in his declaration from which the jury may infer fraud. It should aver fraud, or that the plaintiff was induced to sign the submission by the fraudulent representation of the defendant. It is to be noted that the subsequent denial of the agreement is conceived as fraud.

Renshaw v. Gans, 7 Pa. 117, was an action by the vendor of land, for the price. The article stipulated for payment of $1000 "so soon as Renshaw makes a warranty deed for the lots." The deed tendered contained a general warranty "excepting quit-rents," and the vendee declined to accept such a limited warranty. The plaintiff was allowed to prove by the scrivener that Gans agreed to take the land subject to the quit-rents; that both parties, and himself concluded that it was unnecessary that the articles should so state, since they considered the quit-rents to be of the same nature as annual taxes. That evidence is admissible, in cases of fraud, mistake or trust, was affirmed by Bell, J. Here, he observed, there was no mistake as to the contents of the articles, though there was as to their legal effect. (Must the mistake be as to the contents of the writing?) There was no trust contemplated. "The evidence was admissible upon the foot of fraud." "It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose, as to obtain it by a fraudulent statement. All the cases show (not all by any means) that to pave the way for the reception of oral declarations it is not necessary to prove a party was actuated by a fraudulent intention at the time of the execution of the writing." But, the supreme court reversed the judgment for the plaintiff because the facts had not been set out in the declaration and fraud had not been specially averred in it.

The last case cited to sustain the principle that parol evidence is admitted to contradict or vary a writing, in cases of fraud, accident or mistake, is Rearich v. Swinehart, 11 Pa. 233, an action of covenant by the executor of Henry Rearich, against Henry's son, Christian Rearich, on an article of agreement for the sale by the father to the son of a tract of land, at a price named. The defendant offered to prove that, at the making of the article, it was agreed that Christian should have this land as his portion of the father's estate, and that he was not to pay for it un-

less the father should need the money during his lifetime. The father had died not needing the money. The trial court rejected the evidence. This, holds Bell, J., was error. Parol evidence is admissible in cases of fraud, mistake or trust. "Nor is it essential to the admission of parol evidence that a fraud was originally intended. It is enough that though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a purpose not contemplated, or use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose and use it for a different and unfair purpose, as to practice falsehood or deceit in its procurement. The primary honesty of purpose but adds to the moral turpitude of the subsequent effort to escape from it." (This last is a surprising ethical discovery). The plea was "covenants performed". Under rule of court, notice of the special matter relied one should have been given, but this objection was not made at the trial.

Even when parol evidence contradicting or modifying a writing, by showing fraud or mistake, is permitted, this must be, says Williams, J., "of what occurred at the execution of the instrument." What occurred after, even a minute after, the execution and delivery of the instrument would be inadmissible. But "at" must not be interpreted too strictly. Exact simultaneousness of representation and execution is hardly possible, and representations preceding by some short time, the execution, may continue to influence the mind of the person to whom they were made, and induce the execution. When the fraud consists in the subsequent use of an instrument in a manner violative of the agreement, only the agreement needs to occur "at" the execution; the fraud consisting in the misuse in court of the written instrument, is of course, posterier to the execution of the writing.

The parol evidence of the facts which are to lead to the partial or total nullification of the writing, must have a

certain degree of persuasiveness. It "should be clear, precise and indubitable."

As supporting this principle, is cited Stine v. Sherk, 1 W. & S. 195. Samuel Sherk had inherited land from his father, his mother having dower therein. He sold this land, she releasing her dower. He then executed to her a bond for $1828.33, whose condition was that it should be void if Samuel Sherk should survive his mother, or dying before her, should leave lawful issue. He died before her, leaving issue. A feigned issue was made, 14 years after the transaction, in which the mother claimed the interest on the $1828.33 for the 14 years. Says Sergeant, J., "To set aside a solemn instrument between the parties under such circumstances and to convert it into an obligation of so different a purport, the evidence of fraud or mistake ought to be of what occurred at the execution of the bond, and should be clear, precise and indubitable." No explanation appears in the case of the phraseology of the bond, if the parties intended that the son should simply bind himself annually to pay the interest on the sum named.

If the evidence offered and received to modify a writing, on the ground of fraud or mistake, is not clear, precise and indubitable, it should, says Wliliams, J., "be withdrawn from the jury." The case cited in support of this position, Miller v. Smith, 33 Pa. 386, is not a very distinct authority. A sues B in ejectment. A claimed a tract of land under a certain deed. B claimed all or some of the land, under a conveyance from A, but this conveyance, clearly showing that it was not intended to convey the whole tract, left the part intended to pass undefined. The plaintiff agreed that the defendant was entitled to a specified part, and limited his claim to the residue. "If he had gone for the whole lot, it is not easy to see," says Thompson, J., "how the defendant could have maintained himself at all." The plaintiff offered parol evidence to explain his deed to the defendant and show what the parties thereto intended to be conveyed. Thompson, J., says the evidence was admissible

because it was intended to show and correct a mistake and mistake is "a ground of reform." But, the evidence being received, did not come up to the offer. The court nevertheless allowed the jury to consider it, although it was asked "to charge that as no mistake was shown, the evidence could not have the effect claimed." In refusing so to charge, error was committed. Neither the expression "clear, precise and indubitable," nor any equivalent, appears in the opinion. We encounter in it simply the implicit doctrine that when evidence to establish a fact (here mistake) is offered, but, when received, is manifestly insufficient, the court must in substance let the jury know that the fact has not been proved.

The pertinency of the proposition that the evidence must have a certain persuasiveness, is not apparent. The case was determined on the sufficiency of the affidavit of defense, and it is not the function of the affidavit to furnish the evidence, nor to state the number and quality of the witnesses who will be called, nor must it aver that evidence will be produced, which will be clear, precise and indubitable. Gandy v. Weekerly, 220 Pa. 285.

Since Martin v. Berens, the principle that a writing will not be reformed on the testimony of one witness, uncorroborated, has been applied. Fuller v. Lane, 207 Pa. 101; Phillips v. Meily, 106 Pa. 536.

Why was the affidavit of defense not sufficient? The written lease makes the lessee undertake "to do the rebuilding in case of any accident whatsoever" without any claim "as offset for rent". The agreement orally proved is that no rent accruing after the destruction of the building by fire and before reconstruction, was to be paid. It partially contradicts the writing. But that is no sufficient reason for its exclusion. The first reason for not deeming it a defense is that it is not alleged that it was omitted from the lease by fraud or mistake. Several of the cases already noticed show that that was unnecessary. The fraud needed to justify a reformation of an instrument, is not fraud

in the omission of the alleged *actual* understanding, from the writing, or the insertion in it of what was *not* the actual understanding, but is fraud in the subsequent denial of the actual understanding, and the setting up of the writing as accurate. Cf. Potter v. Grim, 248 Pa. 440.

The second reason for not deeming the actual agreement a defense, is that the affidavit does not allege that the lessee was induced to execute the lease on the faith of it. Hain v. Kalbach, 14 S. & R. 159, *supra* is authority for the principle. Cf. Phillips v. Meily, 106 Pa. 537; Appleby v. Barrett, 28 Super. 349; Gandy v. Weakerly, 220 Pa. 285.

The facts stated in the affidavit of defense not being sufficient to constitute the parol agreement a defense, the proof of it would not be permitted. Hill v. Gaw, 4 Pa. 493 is cited as authority. Suit was brought on a check executed January 5th, but dated January 10th, 1845, payable on that day, against its drawer. The defendant offered proof that it was agreed at the delivery of the check, that if the defendant so desired, the check should be given up and his note at 4 months in favor of the plaintiff would be taken instead. This was virtually an agreement to extend the time of payment from 5 to 150 days. The court held that oral evidence is not admissible to contradict, vary or materially affect by way of explanation, any written contract. Exceptions on account of mistake or fraud, says Rogers, J., have never been extended to a "written contract, whether by bond, promissory note, bill of exchange, or by a check, which is in the nature of a bill of exchange." So far as bonds are concerned, this dictum is hardly consistent with Hain v. Kalbach, 14 S. & R. 159, and Miller v. Henderson, 10 S. & R. 290. Anspach v. Bast, 52 Pa. 356 seems to concede that such agreements could be shown in case of fraud or mistake. Indeed in Hill v. Gaw, Rogers, J., observes that the affidavit of defense contained no allegation of mistake or fraud. A judgment for want of a sufficient affidavit of defense was affirmed.

MOOT COURT

LEOPARD v. INS. CO.

Insurance—Ratification of Unauthorized Contract After Loss

A contract of insurance was made by Stone acting in Leopard's name and on his behalf, but without authorization from Leopard. After loss, Leopard ratified the contract.

Umsted for the plaintiff.

Taylor for the defendant.

OPINION OF THE COURT

YORK, J. This case, as admitted by both attorneys, hinges on the doctrine of ratification. Can a person, in whose name and for whose benefit insurance has been taken out by an unauthorized third party, ratify the act of that third party after a loss has occurred, and make the insurance company liable? That is the question at bar.

The leading case on this point is the English Case of Ohrerson v. Hegerdorn, 2 Maul. and Selw. 485, Wambaugh, Cases on Insurance, p. 38. It was held there that if the policy is procured for the benefit of the person interested, an adoption of the policy by that person after loss is sufficient.

Hughes in his "Treatise on Insurance", p. 41, speaking of this decision said, "The insurance being for the benefit of the owner, the reasonable presumption was that he would adopt the act, and altho he was under no legal obligations to repay the premium to the party negotiating the policy, there was such a moral obligation as furnished a sufficient consideration to support his adoption of it after the happening of the loss."

Later the English Courts carried this doctrine to an extreme, ruling that one might ratify even after the other party has withdrawn from the contract. Bolton Partners v. Lambert, 41 L. R. Ch. Div. 295.

From this extreme view, there has been a reaction, and the latest case holds that a contract of fire insurance which was taken out by an unauthorized agent could not be ratified by the property owner after the loss had occurred. In reversing the old line of decisions, Hamelton, J., gave as his reasons, that, "A rule which would permit a principal to ratify an insurance even after loss was known to him is an anomalous rule, which it is not for business

purposes desirable to extend." Grover v. Mathews, 2 K. B. 401, (1910).

In this country the cases are not uniform, but they have generally followed the old line of English decisions. The leading case, and perhaps the one which carries the doctrine farther than any other is that of Marqusee v. Hartford Fire Ins. Co., 198 Fed. 475. It holds that a property owner may, after loss and before the insurer has withdrawn from the contract, ratify the unauthorized act of the agent and make the company liable even tho no premium had been paid. Mitchell v. Minn. Fire Ass'n., 48 Minn. 228.

In Pennsylvania the doctrine of Hegerdorn v. Oliverson, has been followed in the case of Miltenberger v. Beacom, 9 Pa. 198. The court said "It is clear that one may insure, in his own name, the property of another for the benefit of the owner without his previous sanction, and it will enure to the benefit of the party intended to be benefited upon his subsequent adoption of it, even after a loss has occurred."

All the cases are, however, unanimous in holding that the insurance must be taken out for the benefit of the party ratifying. "The contract of insurance like other contracts may be effected thru the agency of a third person without the authority of the person to be benefited, if he subsequently ratify. But to enable the beneficiary to sue directly upon it he must be expressly named or must be so pointed out that it covers generally or specifically the interest of all concerned."

Applying the principles found in these cases to the one at bar, we find that the insurance was issued to Stone, who was unauthorized, but he took it out for the benefit of Leopard, naming him as beneficiary in the contract. Thus a valid contract was formed, lacking only ratification on the part of Leopard either before or after loss, and before the insurance company withdrew from the contract.

The facts show no withdrawal on the part of the company, and do show a ratification on the part of Leopard, therefore the company must be liable.

Ward, J., in deciding Marqusee v. Ins. Co., said, "The other party having agreed to be bound by this contract and not having withdrawn from it, has no ground to complain if compelled to perform, the original lack of authority having been cured."

It seems neither right nor just that the insurance company seeking a bargain for the sake of the money consideration, after they have gotten what they seek and the premium has been paid, should be permitted to rescind the contract and pay nothing in

case of loss, merely because the person purchasing the insurance is not technically an agent of the owner, at the time of insuring.

In view of these considerations we render a judgment for the plaintiff.

OPINION OF THE SUPERIOR COURT

It is stated as the present law of England that "the doctrine in marine insurance that the contract of insurance may be ratified after knowledge of the loss does not apply to life insurance, nor, indeed to any other contract of insurance." 17 Laws of England 551.

In this country the cases "are not in entire harmony." "A number of cases have held that an agent's unauthorized act in obtaining a policy of insurance may be ratified after a loss has occurred." 42 L. R. A. (N. S.) 1026. It has been stated, however, that in nearly all the cases so holding the premium on the policy had been paid or that the agent had bound himself for the amount of the premium, neither of which conditions exist in the present case. 42 L. R. A. (N. S.) 1025.

In a recent case, however, in which the facts were similar to those of the present case it is held that a property owner may, after loss and before the insurer has withdrawn from the contract, ratify the unauthorized act of his agent in securing insurance upon his property. Marqusee v. Insurance Co., 198 Fed. 475, 1023.

The doctrine of this case has been approved by some writers and adversely criticized by others. The arguments in support of, and adverse to, the doctrine announced may be found in 25 Harvard Law Review 729, 42 L. R. A. (N. S.) 1025, Kline v. Ins. Co., 192 Fed. 378, and the opinion of the court in Marqusee v. Ins. Co. In Kline v. Ins. Co., 192 Fed. 378, it was held that the act of the agent could not be ratified after loss.

In view of this conflict of opinion, we are not constrained to declare that the decision of the learned court below is erroneous. And our intention to affirm his decision is confirmed by the fact that his decision seems to find support in the Pennsylvania cases. In Miltenberger v. Beacom, 9 Pa. 198, it is stated without qualification, that "these authorities abundantly prove that the contract of assurance, like other contracts, may be affected by the agency of a third person, without the authority of the party to be benefited, if he subsequently ratify it." And in McKelvey v. Ins. Co., 161 Pa. 279, the right of ratification was apparently assumed. The doctrine of ratification is always anomalous.

Judgment affirmed.

HOLMES v. INSURANCE CO.

Insurance —Lapse of Policy by Sale of Goods Insured

STATEMENT OF FACTS

Holmes, conducting a furniture store, took from the defendant a policy of insurance on his goods for one year to the extent of $1500. Three months afterwards he sold all these goods to X, intending to relinquish the business, and X removed the goods within a week thereafter. A few weeks after the removal, proposing to continue the business, he purchased another stock of furniture. Some of this he sold from day to day, replacing it with newly bought furniture. Four months after this resumption of business, his whole stock was totally destroyed by fire. Defendant contended that the policy lapsed with the sale of the furniture.

Maxey for plaintiff.

Savige for defendant.

OPINION OF THE COURT

BURKE, J. The question presented in the case at bar is whether an insurance company is relieved of the liability to pay the amount of the policy, when the goods, which were owned by the insured when the policy was issued, have been sold by the owners intending to relinquish business, who later buys new goods which are destroyed by fire.

It is a well recognized rule, in dealings between merchants and insurance companies, that although certain goods are sold which were originally insured, and new goods have been purchased, the policy of insurance covers the goods subsequently acquired to replete the stock. West Branch Insurance Co. v. Hefenstein, 40 Pa. St. 289; Lane v. Maine Ins. Co., 12 Maine 44.

Justice Potter, in a very recent decision, decides the question here presented, when he says: "The validity of the insurance is not affected by the fact that the stock may be largely reduced or wholly sold out one day and replaced the next. The policy is intended to cover merchandise used for traffic, and it applies to such goods as are in the store, and owned by the insured at the time when the loss occurs." Weisberger v. Western R. Ins. Co., 250 Pa. 155.

The learned counsel for the defendant argues that inasmuch as all of the stock was sold, the plaintiff cannot recover. He concedes that had there been a sale of a portion of the stock, and the

stock was refurnished, the insurance company would be compelled to remunerate the insured for loss of the newly acquired goods. If a merchant can sell ninety-nine one hundredths of his stock and then replace it with other stock and recover for its loss, why can he not sell one hundred one hundredths, replace it all and recover? To hold that he could not so recover, would be to illuminate technicalities and darken the ideals of justice.

The industrious counsel for the defendant also argues that the fact that the plaintiff intended to relinquish business, when he sold the furniture, prevents his recovery. This court deems the bare intention of the plaintiff, uncommunicated to the defendant, no possible obstacle in the way of the plaintiff's recovery.

Judgment for the plaintiff.

OPINION OF THE SUPERIOR COURT

This case differs from Weisberger v. Ins. Co. in two respects: (1) in Weisberger v. Ins. Co. the plaintiff repurchased the same goods; (2) in Weisberger v. Ins. Co. there was no evidence that the plaintiff intended "to relinquish their business."

Do either of these facts require us to disregard the decision in that case and to render judgment for the defendant?

The fact that the plaintiff purchased "another" and not the "same" stock of goods, is immaterial. The authorities seem to be unanimous on this point. 2 Cooley Briefs on Insurance 1741; 3 Joyce on insurance 2287; Hooper v. Hudson Ins. Co., 15 Barb. 413; 19 Cyc. 755; and the fact that the goods were sold in a mass does not render the foregoing rule inapplicable. Weisberger v. Ins. Co., supra; 2 Cooley 1746; Wolf v. Ins. Co., 39 N. Y. 49. See Briggs v. Ins. Co., 88 N. C. 141, contra.

We have been unable to discover any case in which it is held that the fact that the insured intended "to relinquish the business" requires a departure from the general rule. Nor do we percive any good reason why it should. One who sells his entire stock of goods and later buys another, necessarily intends, at the time of the sale, to relinquish the business at least temporarily.

The fact that the plaintiff intended to relinquish the business did not increase the hazard. The insurance company has insured the goods for "one year." The rule which allows the plaintiff to recover gives no opportunity for fraud. The insurance is not upon the business but upon the goods and if an intention to relinquish and an actual relinquishment of the goods does not prevent a recovery a mere intention to relinquish the business should not.

Judgment affirmed.

COMMONWEALTH v. HENDERSON

Homicide — Evidence — Uncontradicted Testimony — Statement of Opinion by the Court

STATEMENT OF FACTS

Henderson is tried for murder. Four witnesses testify harmoniously to the fact of his killing Orbison, and to the circumstances. If these facts occurred, Henderson was guilty of murder in the first degree.

The court told the jury that, since there was no contradiction of the four witnesses, the truth of their statement should be assumed by them. They returned a verdict of guilty of murder in the first degree.

Alexaitis for plaintiff.

Clark for defendant.

OPINION OF THE COURT

FARRELL, J. In a majority of the states, usually because of constitutional or statutory provision, trial courts are not permitted, in charging juries, to comment on the facts, or express an opinion on the weight of the evidence, and if an instruction asked by counsel is defective, in this respect it is of course proper to refuse it. A charge to a jury is perfectly unexceptional when the judge confines himself to the duty of setting forth the law applicable to the case, without either expressing or intimating any opinion as to the weight of the evidence, or the credibility of the witnesses. Even if the knowledge of the judge trying the case may be superior to that of the witnesses in respect to facts in issue, yet the law does not permit him to bias the jury by his own opinion, as to any disputed fact which is required to be proved.

Here the judge told the jury that since there was no contradiction of the four witnesses, the truth of their statements should be assumed by them. This was virtually the same as if the judge had told the jury to convict the prisoner of murder in the first degree, for if these facts occurred Henderson would have been guilty of murder in the first degree. Any remark made by the judge, whether direct or indirect, from which the jury may infer what his opinion is, as to the sufficiency of the evidence, or any part of it pertinent to the issue, is error. It is the duty of the court to state the law and of the jury to find the facts. The judge may state his opinion of the evidence but he may not withdraw it from the jury.

However clear and uncontradicted the evidence may be against the prisoner, his case is still entitled to a fair and just consideration by an impartial jury. They are not allowed to be influenced in any way so as to prejudice them against the prisoner. A jury may be greatly influenced by the opinion of the court on the subject when they are in any way undecided as to the decision of the case. The accused may be deprived of a fair and impartial consideration of the evidence against him.

In the case at bar, the judge clearly overstepped his authority in instructing the jury as he did. Even though the prisoner, Henderson, did not offer any evidence in his own behalf, he was still entitled to have the jury consider his case and decide whether or not he was guilty, without having them influenced in any way. The learned counsel for the defendant contends that the provisions of the Federal constitution were violated because the accused was deprived of the "right to a speedy and public trial by an impartial jury" and we do not think this contention is wholly without foundation. The jury was undoubtedly influenced by the instructions of the judge and could not render an impartial verdict. It is true that there was a preponderance of evidence against Henderson but this will not justify the instructions of the court below.

Had the court come out openly and directed the jury to return a verdict of guilty there would have been no question as to the error of the trial court. But it did not do this. By a skillful use of words it indirectly told the jury that from all the evidence in the case it was their duty to convict the prisoner of murder in the first degree. This was wholly unwarranted and without authority and precedent and cannot be justified in any manner whatsoever.

This court is clearly of the opinion that the lower court erred in its instructions to the jury and that the case should go back for a new trial.

Judgment reversed n. o. v.

OPINION OF THE SUPREME COURT

The provision of the Federal Constitution concerning a speedy and public trial by an impartial jury, is hardly relevant to the question presented by this case. The 6th amendment which contains this provision is applicable only to proceedings in the courts of United States.

The point of dispute is whether the court was in error in saying to the jury that "since there was no contradiction of the four witnesses (for the Commonwealth) the truth of their statement should

be assumed by them." Four witnesses, like one, may be mistaken, or may lie. The credibility of witnesses is for the jury. The jury might have doubted the testimony of these four witnesses sufficiently to be constrained to return a verdict of not guilty, had they not been told that they "should" assume its truth.

The judgment of the lower court is therefore affirmed.

COMMONEALTH v. ROWLEY

Homicide — Admissibility of Testimony by Defendant's Wife—Act of April 11, 1899

STATEMENT OF FACTS

Rowley is on trial for the murder of Atkinson. Testifying for himself, he says that he was attacked by his wife and Atkinson with a knife, and that in self-defense he fired the shot which killed atkinson. The court allowed Rowley's wife to testify that she did not make the attack with Atkinson; that Atkinson did not attack, and that Rowley's shooting was without any immediately preceding or accompanying provocation. A verdict of guilty of murder of the first degree being given, a motion for a new trial is made.

Bonin for Commonwealth.

O'Hare for appellant.

OPINION OF THE COURT

RORER, J. The only assignment of error presented is to the admission of the testimony relative to the conduct of the respective parties immediately prior to and at the time of the shooting.

The objection to the testimony was that its admission was equivalent to permitting a wife to testify against her husband, not merely for the purpose of rebutting an attack on her character but on the very gist of the defense set up by him, which in this case was self-defense.

And furthermore, counsel for the defendant contends that the Act of April 11, 1899 P. L. 41, applies only to trials of misdemeanors; that it was never intended to open the door so as to permit the wife to contradict her husband when on trial for his life.

The Act of April 11, 1899 reads: "Whereas it sometimes happens that in suits in which the husband is a party he testifies against the character or conduct of his wife, while in the existing state of the

law, the wife is not permitted to reply to such charges, because she would thus be testifying against her husband, if he makes defense at the trial upon any ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the Commonwealth."

The above Act has been judicially determined in the recent case of the Commonwealth v. Garanchoskie, 251 Pa. 247, 1916. Justice Frazer, in commenting on section 2, states as follows: "The language of this Act is clear and unmistakable. It applies to any criminal proceeding, and not merely to minor misdemeanors where the husband or wife had instituted the proceeding and one stands in opposition to the other, as is argued by counsel for the appellant. Neither does the Act apply merely to cases where the actual defense offered is such as in itself attacks her character and conduct. It is not necessary that her character or conduct should be directly in issue. If, during the course of the trial, the defendant in making defense offers evidence which attacks her character and conduct, even though the evidence bears directly on the actual defense on the case, which in itself makes no reference to her conduct, she becomes a competent witness in rebuttal for the Commonwealth."

The queston that now arises is whether or not the Supreme Court was correct in its ruling.

It is undoubted that the law prior to April 11, 1899, was to debar the husband or wife from testifying against one another with certain exceptions.

To what extent does the Act of April 11, 1899 change the prior law?

Endlich on Interpretation of Statutes page 174 states "All statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed." Esterley's Appeal, 54 Pa. 192; Mullin v. McCreary, 54 Pa. 230; Brown v. Barry, 3 Dallas 365.

But we feel that the construction adopted by the Supreme Court of Pennsylvania in Commonwealth v. Garanchoskie was entirely correct and therefore the motion for a new trial is denied.

OPINION OF THE SUPREME COURT

We cannot come to the conclusion reached by the learned court below. The Act of April 11, 1899 provides that if the husband in any criminal proceeding depends "on any ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the Commonwealth." In rebuttal of what? Of so much

of the defendant's evidence as imputes bad character or conduct to the wife. But the evidence admitted here, transcends this limit. The wife was allowed to testify not simply that she did not attack her husband with Atkinson; but that Atkinson did not attack him, and that he shot Atkinson without any provocation. We think this a serious violation of the spirit of the statute. It was not necessary for the wife to assert that Rowley had no provocation for the shooting, in order to refute the imputation against her conduct or character, made by his testimony.

It is not the policy of the law to allow a wife to testify against the husband, except when and to the extent to which, it becomes necessary, in order to repel an insinuation against her.

An error having been committed, as we conceive, a new trial is necessary.

Judgment reversed with v. f. d. .n

CONNOR v. LIFE INSURANCE CO

Insurance—Presumption of Death—Habits and Manner of Living as Strengthening the Presumption

STATEMENT OF FACTS

John Connor obtained a life insurance policy from the defendant for $5,000. About two years after, he disappeared in the night from his home. The clothing he wore was found on the bank of a river. The marks of the bare feet of a man were seen in the mud leading to the water. No other footsteps were discovered. He was a man of good character, prosperous, respected, and of happy domestic circumstances. He was never heard of afterwards. At the end of a year, a demand was made on the Insurance Company for the $5,000. The court allowed the jury to find that he was dead, and to render a verdict for his administrator.

Wallace, for plaintiff.

Smith, for defendant.

OPINION OF THE COURT

MALCOLM, J. When a person is shown to be alive, the law presumes that the person continues to live, until the contrary is shown, or in the absence of such proof, until a different presumption arises. 8 R. C. L. 707; Greenleaf on Evid. §41. But after the

lapse of seven years, without intelligence concerning the person, the presumption of life ceases. Francis, applt. v. Francis, et al., 180 Pa. 644, and the burden of proof is devolved on the party asserting the fact that the absentee is living. Aside from this general presumption of death, certain facts afford grounds on which to base inferences of death, as presence aboard a ship which has been lost, exposure to peril, proximity to dangerous instrumentalities, etc. But such facts do not raise a presumption of death, without reference to the accompanying circumstances. The continued absence of the person in its relation to that person's disappearance, is considered in the light of the conduct and actions of the absentee. "Any facts or circumstances relating to the character, habits, conditions, affections, attachments, prosperity, and objects in life which usually control the conduct of men and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence." Tisdale v. Conn. Mutual Life Insurance Co., 26 Iowa 170. It was shown at the trial that John Connor was a man of good character, that he was respected in the community, that he was prosperous, and a man devoted to his family. It would be an unusual thing for such a man to desert his family, or to seek to defraud an insurance company. With a hypothesis similar to the facts here, the court stated in 26 Iowa 170, supra, (which is quoted with approbation in Butler v. I. O. F., 53 Wash. 118). "No greater wrong could be done to the character of this man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of his family and friends." It is not probable that Connor in the midst of his prosperity and domestic happiness left his home and friends with the intention of seeking new surroundings, which would be uncertain, indefinite and void of all his accustomed enjoyments. Men do not usually act in such a peculiar way. His absence for a year, combined with the fact that there is an indication of the way in which he lost his life, warrants the presumption of death by the jury. "Death may be inferred by the jury from the mere fact that a party who is domestic, attentive to his duties, and with a home to which he is attached, suddenly, and without explanation disappears." 2 Wharton on Evidence, §1277. A consideration of the habits of men, and the motives which lead men to do certain acts fortifies the presumption of death in this instance. Connor's absence from any other cause is improbable for it would be without motive, when considered in the light of the evidence presented, and inconsistent with the very nature of the man.

Some jurisdictions hold that absence alone cannot raise a presumption of death within the seven years. In the case of Davie v. Briggs, 97 U. S. 628, Mr. Justice Harlan said: "If it appears from the evidence that the absent person within the seven years encountered some specific peril or within that period came within the range of some impending or immediate danger which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years." This is the uniform doctrine in this country and in England. An English case, 1 Curt 595, held that those on board a missing ship were presumed to be dead after an absence of two years. The inference of death therefore arises from a disappearance under circumstances inconsistent with the continuation of life. The evidence in this case indicated that Connor came within the range of immediate danger. The marks of his bare feet led into a river which is certainly a dangerous agency, and which must have raised a question in the minds of the jury as to whether Connor was drowned there.

The learned counsel for the Life Insurance Company asserts that there is a presumption of suicide and on that ground that there should be no recovery. In a case of this character, where the defense is suicide, the burden is on the defendant to establish such facts by a preponderance of the evidence, XI Dec. Dig., § 817 (3). But it is usually stated that where death may have been the result of accident or suicide, the presumption is against suicide. Whether Connor committed suicide was a question of fact and the jury is the proper trier of such questions. It was apparently clear to them that Connor did not die by his own act, and there are many assumptions which would justify their conclusion. While some theories might be advanced to explain the clothes on the bank and the foot-prints in the mud, perhaps seemingly improbable, they could be nevertheless possible. A victim of aphasia might place his clothes as Connor's were found and walk into a river never to be heard of afterwards. Sudden illness often seizes a person while in the water, and life is extinguished in a moment. To say that Connor committed suicide would be to contravene his reputation and character, while it would be based on circumstantial evidence which is only sufficient to prove suicide when the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another. 25 Cyc. 946. As the presumption is against suicide the verdict cannot be set aside on that contention.

It might be vigorously maintained that there is danger in a rule which allows a recovery in a case of this type, as it is conceivable that there is a possibility of defrauding the insurance

company. When a person's unaccounted absence is relied upon to raise a presumption of death, the jury must consider all the concomitant circumstances, and determine the quantity of evidence that will outweigh that presumption. But there would be a greater danger arising from the establishment of a principle, that the life of a man ought to be presumed, under circumstances which usually attend death, merely because positive proof of death could not be obtained.

Letters of administration are prima facie evidence of the death of the party upon whose estate they are issued. 1 Greenleaf on Evidence, §b1, 550, for only upon evidence of death ought they to have been granted. This presumption is weak and inconclusive, and may be rebutted by slight evidence.

Moreover, in a case of this type, death need not be proved beyond a reasonable doubt. Fidelity Mutual Association v. Mettler, 185 U. S. 308. The case cited resembles the one before the bar and the court there said, "The party on whose side the weight of the evidence preponderated was entitled to the verdict. Proof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.'" Commonwealth v. Cosley, 118 Mass. 1. In civil cases, it is sufficient if the evidence on the whole agrees with and supports the hypothesis that it is adduced to prove.

We therefore, hold that the lower court correctly allowed the jury to find that Connor was dead, and think that the evidence is sufficient to warant their conclusion. Judgment affirmed.

OPINION OF SUPREME COURT

It is unnecessary for us to add anything to the discussion of the questions involved in this case of the learned court below.

Affirmed.