

signed by the defendant. It is incredible that the defendant would have thus habitually and constantly reported this money as surplus,—that is, an asset of the bank,—had he believed it to be a liability. Again, the facts that at the time defendant's advance was made the bank held his notes, one for \$3,000 and the other for \$5,000, being two of the three notes sued on, and that no account was taken of those notes; and that, a few days before the expiration of one year from the time of the advance, the defendant executed another note to the bank, for \$7,000, also one of the notes sued on,—are circumstances tending to discredit defendant's contention of a loan, and to strengthen the position of the plaintiff that the transaction was a voluntary assessment. Furthermore, all the entries upon the books of the bank, made by the examiner during the time he had charge, point in the same direction; and when it is remembered that the defendant was president of the bank, largely interested, and actively participating in the efforts then being made for its resumption of business, it is a fair inference that he had knowledge of and was familiar with these entries. The fact that after the whole arrangement had been consummated, and the money paid thereunder, the defendant objected to one of these entries at a meeting of the directors, cannot alter or affect the nature of the transaction, which had already been accomplished. Again, the receipts given by the examiner to two or three of the stockholders at the time their advances were made, as well as the entries above mentioned, show conclusively that he considered the arrangement a voluntary assessment. In view of the close relations which the defendant bore to the bank, and his efforts for reopening the same, can it be presumed for a moment that he was ignorant of or at war with the views of the examiner? I think not.

For the reasons above indicated, my finding is that the \$20,500 mentioned in defendant's answer was a voluntary contribution for the betterment of his stock, and therefore is not a debt against the bank. This view of the facts renders it unnecessary for me to decide the other question, made in argument, as to the right of set-off. Judgment will be entered for plaintiff in accordance with the demand of his complaint.

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BARBER et al. v. PITTSBURGH, FT. W. & C. RY. CO. et al.

(Circuit Court, W. D. Pennsylvania. August 2, 1895.)

No. 10.

1. FEDERAL COURTS—CONCLUSIVENESS OF STATE DECISIONS—EJECTMENT SUITS.  
A single verdict and judgment in ejectment in Pennsylvania not being conclusive in the state courts, a decision by the supreme court of the state upon the construction of a will, in a first ejectment suit, is not conclusive in a federal court, but is entitled to peculiar regard as a precedent.
2. EVIDENCE IN EJECTMENT SUITS—RECORD OF PROBATE—ADMISSIBILITY.  
It seems that, where both parties to an ejectment suit claim under the probate of a will, a statement in the record of such probate to the effect that the attesting witnesses deposed before the register that on a date named they subscribed their names to the will as witnesses, at the request

and in the presence of the testator, who then declared that it was his last will and testament, is competent evidence to show the date of the attestation and publication of the will.

**8. WILLS—CONSTRUCTION—ESTATES TAIL.**

Testator devised certain lots to Amanda Stephens, and subsequently declared that, "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided" among other persons designated. *Held* that, under the Pennsylvania decisions, this will did not create merely a defeasible fee, and, if it did not vest in the devisee a fee simple, it at least gave her an estate tail.

This was a suit in ejectment brought by Barber and others against the Pittsburgh, Ft. Wayne & Chicago Railway Company and others to recover possession of certain lots in the city of Pittsburgh, Pa.

S. Duffield Mitchell and J. S. Ferguson, for plaintiffs.  
Scott & Gordon, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. The parties to this suit respectively claim title to the land in controversy under the following provisions of the will of James S. Stevenson, deceased:

"I, James S. Stevenson, of the city of Pittsburgh, in the state of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March in the year of our Lord one thousand eight hundred and thirty-one.

"I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69, and 70 in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny river, and by lot 71. Said Amanda Stephens is now five years old (born April 7, 1826). — Stephens and — his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Penna.

"In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna."

The testator died October 16, 1831. His will was probated on the 18th day of the same month and year. Amanda Stephens survived the testator, and in the year 1847 intermarried with Samuel Haight. On July 27, 1848, Amanda and her husband, by deed to Jacob Haight, executed, acknowledged, and recorded agreeably to the provisions of the statute for barring estates tail, barred any estate tail that Amanda had in the devised lots of ground. Afterwards the title of Amanda, freed from any entail, became vested in the defendants. Amanda had several children by her husband, Samuel Haight, but they all died in the lifetime of their mother, without having had issue. Amanda died September 28, 1891. Her husband died previously. The plaintiffs are children and grandchildren of John Barber, deceased. Their position is that Amanda Stephens took no greater estate in the devised lots of ground than a qualified fee, defeasible in the event of her dying without offspring by her husband surviving her, and, this event

having happened, that the devise over to the heirs of John Barber took effect. The defendants insist, primarily, that Amanda took an estate in fee simple; but, if not, then they contend that she took, at least, an estate in fee tail.

The will of James S. Stevenson was considered by the supreme court of Pennsylvania in the case of *Mitchell v. Railway Co.*, 165 Pa. St. 645, 31 Atl. 67. The court held that, although the testator died before the wills act of 1833, the words in the preamble of his will, "desirous of making a distribution of my property," showed an intent to dispose of his whole interest, and were to be carried down into the body of the will, and that those words imported an intent to give to Amanda an estate in fee simple in this particular property, notwithstanding the devise over to "the heirs of John Barber"; that the contingency upon which the estate was to go to them was the death of Amanda, "without offspring by her husband," in the lifetime of the testator; and that Amanda, having survived him, took a fee simple. The defendants maintain that this decision is conclusive here. But to that proposition we are not able to assent. A single verdict and judgment in ejectment in Pennsylvania, not being conclusive in the courts of the state, is not conclusive in the courts of the United States. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. 129. This decision of the supreme court of Pennsylvania, indeed, as a precedent is entitled to peculiar regard, and we would be disposed to follow it, even though we might doubt the correctness of the construction which that court gave to the devise to Amanda Stephens.

The plaintiffs, however, have introduced (under exceptions) some evidence that was not, it seems, before the courts in the former litigation, with reference to the state of facts under which, as they allege, the will of James S. Stevenson was made; facts which they contend are competent aids in construing the will, and call for a different conclusion from that reached by the supreme court of Pennsylvania. On the strength of this evidence it is asserted, in the first place, that Amanda Stephens was the natural child of James S. Stevenson. We are of opinion, however, that there is no competent evidence to establish the truth of this allegation, if it be material. The declarations here mainly relied on were made by a person who was not related either by blood or marriage to James S. Stevenson, and they were made many years after his death. Again, the plaintiffs claim to have shown that Stevenson was dangerously ill for two weeks preceding his death, and of this we think there is satisfactory evidence. Then they have offered the register's record of the probate of the will, which sets forth that the two attesting witnesses deposed before him that on the 16th day of October, 1831,—the date of Stevenson's death, as appears aliunde,—they subscribed their names to the will as witnesses at the request and in the presence of the testator, who then declared that it was his last will and testament. As this probate was the judicial act of the register, and both sides claim under it, we incline to think that the contemporaneous and customary record made by the register in the course of his official duty is com-

petent evidence to show the date on which the testator caused the will to be attested, and published it in the presence of the subscribing witnesses. But upon the question whether the evidence here relied on warrants a different construction of the will from that adopted in *Mitchell v. Railway Co.*, supra, we do not feel called upon to express an opinion. If we were to hold that the devise to Amanda Stephens did not pass to her an estate in fee simple, this conclusion would not help the plaintiffs, for we cannot agree with them in their contention that Amanda took only a defeasible fee. In our view of this will, if Amanda did not take a fee simple, she took, at least, an estate tail. "Offspring" is a word of limitation, not of purchase. *Allen v. Markle*, 36 Pa. St. 117. Speaking of the devise in question, the court in *Mitchell v. Railway Co.*, supra, said:

"The word 'offspring,' here used, is but a synonym for 'issue'; and 'issue' cannot be lawful without marriage. The devise, then, is in the first instance to Amanda, and, in the event of her dying without issue, over to alternative beneficiaries."

In *Vaughan v. Dickes*, 20 Pa. St. 509, the testator, after a devise to his wife for her life, directed as follows:

"And, after the decease of my said wife, I give, bequeath, and devise all the aforesaid real estate above described to my son, Peter Dickes, and daughter, Catharine Albertson, to them and their heirs forever, share and share alike, equally to be divided between them; \* \* \* and it is further my will that, should my son Peter Dickes not marry and have lawful issue, then the said real estate heretofore devised to him shall go to my said daughter, Catharine Dickes, and her heirs forever."

The court held that these words created an estate tail in Peter. In *Matlack v. Roberts*, 54 Pa. St. 148, the court decided that the words, "I give and devise to my sons all the residue of my estate, real and personal. \* \* \* And, in case of the death of either of my children unmarried or without issue, then I do order that the share of said child or children so dying may be divided equally among my surviving daughters or their heirs,"—created an estate tail in the sons. The authority of these decisions is unshaken. It will be perceived from the above quotation from the opinion in *Mitchell v. Railway Co.*, supra, that the court treated the word "unmarried" as unimportant, holding that the devise over was in the event of Amanda's dying without issue. Now, it is firmly established by an unbroken line of authorities, among which are *Vaughan v. Dickes*, supra, and *Matlack v. Roberts*, supra, that a devise over to named living persons upon the failure of the issue of the first taker does not import a definite failure of issue. In the leading case of *Eichelberger v. Barnitz*, 9 Watts, 447, 449, the devise which there was adjudged to create an estate tail contained these words:

"And, further, my will is, because my son Henry is not yet married, that, if he should die without leaving any lawful issue, that then his full share shall fall or go in equal share to my other three children, Adam and Anna Mary and Susannah, to one of them as much as to the other."

Here the devise over was not only to named living children of the testator, but it was to them distributively in equal shares. To

hold at this late day that such a devise over imports a definite failure of issue would shake a multitude of titles. The authority of *Eichelberger v. Barnitz*, supra, was fully recognized in the recent case of *Hackney v. Tracy*, 137 Pa. St. 53, 20 Atl. 560. The case of *Middleswarth v. Blackmore*, 74 Pa. St. 414, was decided upon the peculiar provisions of the will there involved. It does not furnish a rule for this case. Amanda Stephens was the preferred object of the testator's bounty, and the construction should incline towards making the gift as effectual to her as possible. We are satisfied that upon any admissible construction of the will of James S. Stevenson the title to the land in dispute is in the defendants.

BUFFINGTON, District Judge, concurs.

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RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, E. D. Pennsylvania. April 4, 1895.)

1. LIFE INSURANCE—SUICIDE—INSANITY.

If one whose life is insured kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequences, and effect, his self-destruction will not, of itself, prevent a recovery on the policy. But by capacity to understand the "moral character of his act" is to be understood a capacity to understand what he was doing, and the consequences thereof to himself, his character, his family, and others, and to comprehend the wrongfulness of the act, as a sane man would.

2. SAME.

The contract of life insurance contains an implied condition that the insured will not intentionally terminate his own life.

3. SAME—PRESUMPTION OF SANITY.

The presumption of sanity is not overthrown by the act of committing suicide. Suicide may be used as evidence of insanity, but, of itself, is insufficient to establish it, and the burden of proof is still on the party alleging it.

This was an action by A. Howard Ritter, executor of the estate of William M. Runk, deceased, to recover upon policies of life insurance. The deceased carried policies aggregating \$75,000, and the defense to the action was suicide.

Barnes, Wintersteen & Bispham, for plaintiff.

John G. Johnson and Chas. P. Sherman, for defendant.

BUTLER, District Judge (charging jury, orally). This case, as it has been said to you, is one of great importance; one which deserves your careful attention, which can only be decided justly by understanding the law that governs it and adhering strictly to the evidence.

As frequently occurs, a good deal of testimony has been heard and several questions raised that will be found in the view the court now takes of the case, to be entirely unimportant. I only regret that we could not know at the outset how the case would present

itself to our mind at the close that we might have avoided the unnecessary expenditure of time, and unnecessary taxing of your strength and patience, and devoted ourselves to what turns out to be the consideration upon which the case must be decided.

The counsel for plaintiff have presented to the court several points on which we are asked to charge, for the purpose of getting their view of the law before you. The plaintiff's first, second and third points are disaffirmed. The fourth is also disaffirmed for the reasons given in answering the defendant's first point, of which I will speak directly.

The fifth point reads as follows:

"If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, such self-destruction will not of itself prevent recovery upon the policies."

This is affirmed.

I will say, however, that we must understand what is meant and intended by the term "moral character of his act." It is a term which has been used by courts, and it is correctly inserted in the point; but it is a term that might be misunderstood. We are not to enter the domain of metaphysics in determining what constitutes insanity, so far as the subject is involved in this case. If Mr. Runk understood what he was doing, and the consequences of his act or acts, to himself as well as to others; in other words if he understood as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do as a sane man would, then he is to be regarded by you as sane. Otherwise he is not.

The defendant's first point reads as follows:

"There can be no recovery by the estate of the dead man of the amount of policies of insurance upon his life, if he takes his own life designedly, whilst of sound mind."

This point is affirmed. The defendant's first point which I have just read to you and affirmed, and the plaintiff's fourth point which I have disaffirmed, raise the same question and it is one of very great difficulty. It is very remarkable that the question has never been directly passed upon by any court of last resort, nor so far as has been discovered, by any other, in this country or in England. When the points were presented I said in your presence that in the absence of authority, or of custom on the part of insurance companies, or the business of insuring, bearing on the subject, I would feel little hesitation in holding that suicide by the insured, while in a sane condition of mind, constitutes a defense to the payment of the policy, but that I was inclined to believe there is authority to the contrary.

It is conceded, however, that there is nothing to be found on the subject but dicta; and this is conflicting, and there is no evidence before the court of any custom in the business of insurance bearing on the subject.

I regret that I must pass on the question without opportunity for examination or reflection. It seems to me, however, that every contract of life insurance contains an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural, ordinary course of events. It is upon these chances that the premium is calculated and based, and the contract is founded. It cannot be doubted that if one having a policy on his buildings, insuring against fire, should intentionally burn them, his act would be a defense to the policy; nor that one taking a policy on the life of his debtor, whom he subsequently murders, cannot recover the insurance. In principle I am unable to distinguish these cases from that where the insured commits suicide.

The fraud upon the insurer seems to me to be as clear in the latter case as in either of the others.

A different construction of the policy would seem to make it a contract to pay the insurance immediately if the insured commits suicide; thus offering an inducement to commit this act. If the insured lives out the ordinary term of life, the time of payment may be very remote, and therefore the inducement to commit suicide is very great if payment follows this event. Of course no insurer would intentionally enter into such a contract; it would be destruction of his interest. His premiums are calculated, and his prospect of gain based, on the insured's chances of life under ordinary circumstances; and if the latter may render the insurance payable immediately by committing suicide, the former is completely at his mercy. If, however, an insurer should enter into such a contract, the law would declare it void, because of its violation of public policy. It would seem, in effect, to be a contract to pay money for the commission of suicide.

If suicide results from insanity, it is not, in legal contemplation, the intentional act of the insured.

What constitutes insanity, in the sense in which we are using the term, has been described to you, and need not be repeated. If this man understood the consequences and effect of what he was doing or contemplating, to himself and to others; if he understood the wrongfulness of it, as a sane man would, then he was sane, so far as we have occasion to consider the subject, otherwise he was not. Here the insured committed suicide, and, as the evidence shows, did it for the purpose as expressed in his communication to the executor of his will, as well as in letters written to his aunt and his partner, for the purpose of enabling the executor to recover on the policy, and use the money to pay his obligations.

I, therefore, charge you that, if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defense to this suit.

The only question, therefore, for consideration is this question of sanity. There is nothing else in the case. That he committed suicide, and committed it with a view to the collection of this money from the insurance companies and having it applied to the payment

of his own obligations, is not controverted and not controvertible. It is shown by his declarations, possibly not verbal, but written.

The only question, therefore, is whether or not he was in a sane condition of mind, or whether his mind was so impaired that he would not, as I have described, properly comprehend and understand the character of the act he was about to commit.

In the absence of evidence on the subject, he must be presumed to have been sane. The presumption of sanity is not overthrown by the act of committing suicide. Suicide may be used as evidence of insanity, but, standing alone it is insufficient to establish it. It is sometimes thoughtlessly said—if a man commits a high crime or takes his life, he was insane, was crazy. The fact that the man commits a high crime is not evidence of insanity, and the fact that he takes his life does not of itself overthrow the presumption of sanity.

There must be something more than this. Therefore, we start with the presumption of sanity in the defendant's favor, and the burden of showing insanity on the plaintiff.

You have heard the evidence on the subject and the comments of counsel respecting it, and from this you must determine how the question should be decided.

I believe the wife and sister alone expressed an opinion that his mind was "unbalanced;" whether either of them formed this opinion before his death I am uncertain. The wife said she did not. If the opinion is based on the fact alone that he committed suicide it is of no value. If it is based on this fact, and his previous conduct, condition or conversation, it may and should be considered; its value still is for you. These witnesses, together with two or three others, and probably more, you will remember, testified to his conversation, his conduct, his nervousness, the change in his appearance, etc., shortly before his death.

You must judge in how far this testimony tends to show an insane condition of mind such as I have described. Might or might not the natural worry and distress occasioned by his unfortunate circumstances and the contemplation of self-destruction as a means of relief, account for his conduct and appearance, without the existence of such insanity?

On the other hand, the defendant has called your attention, on this subject, to the fact that he conducted the business of his firm during his partner's absence and up to within a very short time of his death. You have seen how methodically he prepared for his end,—the letters he wrote, the instructions prepared for his executor, etc. Now, from all the evidence on the subject, and your attention has been very fully called to this by counsel, and there need be no repetition of it, you must determine the question of sanity.

While I thus submit the question, and remind you that the responsibility of deciding it rests upon you alone, I consider it a duty to say that I do not regard the evidence on which the plaintiff relies as strong. It may be sufficient; that is a question entirely for you.

If you find him to have been insane, as I have described, your



verdict will be for the plaintiff. Otherwise, it will be for the defendant. There is nothing more I need say. I can render you no further assistance.

I will repeat, however, that you must be very careful to guard your mind against the influence of sympathy or prejudice.

Each of the parties is entitled to equal consideration at your hands. If you are not guided and controlled by the law as stated by the court, and the evidence as heard here, you will do great wrong to the parties and wrong to yourselves.

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McMULLAN v. HOFFMAN.

(Circuit Court, D. Oregon. August 26, 1895.)

No. 2,204.

CONTRACTS—ILLEGALITY—COLLUSIVE BIDDING.

A secret contract, between persons proposing to bid upon the construction of a public work, by which their bids are to be put in, apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, is illegal, and contrary to public policy, and will not be enforced, though one of the parties to it has secured the contract for the public work, and has executed the same, and received the profits.

L. B. Cox, for plaintiff.  
Rufus Mallory, for defendant.

BELLINGER, District Judge. The questions in this case for decision arise upon exceptions to the answer of Hoffman. The suit is upon a written contract between the parties, by which they agreed to share equally in a certain contract, for the construction of the Bull Run pipe line, entered into between the city of Portland and the defendant.

The complaint alleges that prior to March 6, 1892, the city of Portland, through its water committee, invited bids for the construction of a system of waterworks; that, before the time within which bids were to be received for such work, it was agreed between complainant and defendant that they would jointly endeavor to obtain the contract therefor, and that in their joint interest a bid should be put in for the construction of said waterworks, and that, in case they were successful, they should share equally in such contract as resulted from such joint bid; that, in pursuance of this agreement, a bid was put in, in the firm name of Hoffman & Bates, under which name the defendant was doing business, for the manufacture and laying of steel pipe from the head works of the water system to Mt. Tabor, which bid was found to be the lowest bid made for such work; that the contract for which such bid was made was thereupon awarded to the defendant, Hoffman; that thereupon, in evidence of their agreement, complainant and the defendant entered into a written agreement that they would share equally in the expenses, profits, and losses of such contract as should be en-