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ASSIGNMENT

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NOTICE AND GROUNDS OF APPEAL

New Jersey Supreme Court

ESSEX COUNTY

NELLE E. FINNIE, Administratrix of the Estate of DAVID T. FIN- NIE, Deceased,	} Plaintiff,	} <i>Action at Law.</i>	} 10
vs. SARAH H. KELSEY,			

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds: 20

1. Because the trial judge, upon the trial of said cause, directed a verdict in favor of the defendant and against the plaintiff, whereas said trial judge should have submitted the case to the jury for its verdict.

2. Because the trial judge denied the motion of the plaintiff that the complaint be amended by adding one Arthur S. Herenden as a party defendant.

3. Because the following papers were admitted in evidence: 30

a. An unsigned carbon copy dated January 18, 1915.

b. An unsigned carbon copy dated May 18, 1915.

4. Because the following questions were overruled:

a. At the time that this policy was issued

Grounds of Appeal

were other policies issued to Finnie by the Equitable Life Insurance Company?

b. If Finnie could not have borrowed on this policy he could not have borrowed on any similar policy, could he?

5. Because the following questions were admitted:

10 a. Do you know whether or not Mr. Finnie expressed any desire to sell this policy?

b. And when was it that he told you he wanted to sell it? (i. e., this policy).

c. At the time Miss Kelsey received the assignment which is in evidence and paid or caused to be paid the \$95 to Mr. Finnie, did she personally and physically have the money available or did she have to take some steps to raise it?

20

E. A. MERRILL,
Attorney of Appellant.

Dated April 9, 1920.

To

MCCARTER & ENGLISH,
Attorneys of Respondent.

30

40

Complaint

NEW JERSEY SUPREME COURT

ESSEX COUNTY

<p>NELLE E. FINNIE, Administratrix of the Estate of DAVID T. FIN- NIE, Deceased,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>SARAH H. KELSEY,</p> <p style="text-align: center;"><i>Defendant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>Complaint.</i></p>	10
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This plaintiff, the administratrix of the Estate of David T. Finnie, residing in the City of Plainfield, County of Union and State of New Jersey, says:

1. On August 20, 1912, the Equitable Life Assurance Society of the United States issued to one, David T. Finnie, its life insurance policy 1,778,975, insuring the life of the said David T. Finnie, in the principal sum of \$5,000. The said principal sum of \$5,000 was payable to Nelle E. Finnie, wife of said David T. Finnie, as beneficiary, but the right to revoke the designation of said beneficiary was reserved to said David T. Finnie. Thereafter, and on or about January 14, 1915, the said David T. Finnie, acting upon the right to revoke thus reserved, revoked the designation of said Nelle E. Finnie, as beneficiary, and the policy thereupon became payable, upon the death of the assured, to his Estate or assigns.

2. On January 18, 1915, the said David T. Finnie was indebted to the said Equitable Life Assurance Society in the sum of \$120, being the balance of the premium then due and unpaid on said policy 1,778,975, for the policy year from August 20th, 1914, to August 20th, 1915.

3. On the same date, January 18, 1915, one,

Complaint

A. S. Herenden received from the said David T. Finnie, his note dated January 18, 1915, made by said Finnie to the order of said Herenden, in the principal sum of \$215.

10 4. On the same date, January 18, 1915, and coincidentally with the execution and delivery of the note described in paragraph 3, the said David T. Finnie assigned said policy 1,778,975 to Sarah H. Kelsey, the defendant herein, by an assignment absolute in form, for the expressed consideration of \$1.00.

20 5. On the same date, January 18, 1915, the said A. S. Herenden, paid said Life Assurance Society the said balance of \$120 due and owing on account of the premium on said policy 1,778,975, and paid \$95 to the said David T. Finnie. No other or further payment was made to said David T. Finnie by said A. S. Herenden, or by said Sarah H. Kelsey.

6. In making the payments of \$120 to said Life Assurance Society, and of \$95 to said David T. Finnie, the said A. S. Herenden was the agent of the said Sarah H. Kelsey, the defendant herein, and the said Kelsey thereafter repaid these sums to said Herenden.

7. The said assignment of said policy 1,778,975, was a collateral security for the said note for \$215.

30 8. The said note for \$215 was not paid by the said David T. Finnie during his lifetime.

9. On or about August 20, 1916, the said Sarah H. Kelsey applied a dividend then declared on said policy 1,778,975 to an addition to the said policy amounting to \$59.00.

10. On or about August 20, 1917, the said Sarah H. Kelsey applied a dividend then declared on said policy 1,778,975 to an addition to the said policy amounting to \$62.00.

40 11. On September 18, 1917, the said David T. Finnie died.

Complaint

12. On September 20, 1917, the said Sarah H. Kelsey collected from said Life Assurance Society the whole amount due on said policy 1,778,975, being the sum of \$5,123.54.

13. On October 10, 1917, Nelle E. Finnie, the plaintiff herein, was appointed administratrix of the Estate of said David T. Finnie, by the Surrogate of Union County.

10

14. On October 2nd, 1919, the said Nelle E. Finnie, administratrix, the plaintiff herein, tendered to said Sarah H. Kelsey, the defendant herein, the principal of said note made by said David T. Finnie to said A. S. Herenden, with interest to October 2, 1919, being the sum of \$275.77, by directing that she, the said Sarah H. Kelsey, deduct said \$275.77 from the \$5,123.54 received by said Sarah H. Kelsey from said Life Assurance Society in payment of said policy 1,778,975.

20

15. On October 2, 1919, the said Nelle E. Finnie, administratrix, demanded of said Sarah H. Kelsey, that she, the said Sarah H. Kelsey, pay to her, the said Nelle E. Finnie, administratrix, the balance of \$4,847.77 remaining after deducting from the \$5,123.54 received from the said Life Assurance Society, the sum of \$275.77, being the amount due and owing on the note referred to in paragraph 3 herein; but with an authorization to further deduct from said balance of \$4,847.77 the expenses, if any, with interest thereon, properly incurred in keeping the said policy alive but the said Sarah H. Kelsey refused, and still refuses to pay to said Nelle E. Finnie, administratrix, the said balance of \$4,847.77 or any part thereof, but has converted same to her own use.

30

16. The plaintiff demands of the defendant as damages the sum of \$4,847.77, and interest from October 2, 1919.

E. A. MERRILL,
Attorney for Plaintiff.

40

Answer

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10	NELLE E. FINNIE, Administratrix of the Estate of DAVID T. FIN- NIE, Deceased, <i>Plaintiff.</i>	}	<i>Action at Law.</i>
20	<i>vs.</i> SARAH H. KELSEY, <i>Defendant.</i>		<i>Answer.</i>

The answer of the defendant, residing in the City of East Orange, Essex County, says, that:

FIRST DEFENSE

1. She admits the 1st, 2nd, 5th, 6th, 8th, 9th, 10th, 11th, and 12th paragraphs of the complaint.
- 20 2. Answering the 3rd paragraph of the complaint, she admits that on January 18, 1915, David T. Finnie gave to A. S. Herenden his note of that date to the order of the said Herenden in the sum of \$215, as a convenient means of financing the sale of his policy of insurance No. 1,778,975 to the defendant. Upon giving said note, said Herenden gave to said David T. Finnie his agreement to pay said note of maturity, reading as follows:

"January 18, 1915.

30 "Received from David T. Finnie his note for two hundred and fifteen and 00/100 (\$215.00) dated January 18, 1915, drawn to my order at four months, payable at the Coal & Iron National Bank, New York. This is my agreement to protect the said note at maturity, the maker being duly released from all liability thereunder."

Said Herenden paid said note when due.

- 40 3. Answering the 4th paragraph of the com-

Answer

plaint, she admits that on January 18, 1915, David T. Finnie assigned to her policy No. 1,778,975 absolutely and says it was upon a sale by said Finnie to defendant of the policy, in consideration of the payment to him of \$95 in cash and the payment by the defendant of the premium of \$120 then due on said policy.

4. Answering the 7th paragraph of the complaint she denies said paragraph and each and every allegation therein, and says that said assignment of said policy was not a collateral security, but that said policy was sold by said David T. Finnie to her and that said assignment was given to transfer the title to said policy from said David T. Finnie and his estate to defendant. 10

5. Answering the 13th paragraph of the complaint, defendant has no knowledge, sufficient to form a belief, as to the allegations therein contained. 20

6. Answering the 14th, 15th and 16th paragraphs of the complaint, defendant denies said paragraphs and each of them.

SECOND DEFENSE

7. On January 18, 1915, David T. Finnie sold to the defendant his said policy No. 1,778,975 for the sum of \$95 in cash and the agreement of the defendant to pay the premium of \$120 then due thereon and executed and delivered an assignment reading as follows: 30

"Form of assignment otherwise than as collateral security.

"To be attached to and retained with the policy for use as evidence when required.

"For one dollar, to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer and set over all my right, title 40

Answer

10 and interest in Policy No. 1,778,975 on the life of David T. Finnie, issued by the Equitable Life Assurance Society of the United States and all money which may be payable under the same, to Sarah H. Kelsey, whose P. O. Address is No. 360 North Grove Street, East Orange, New Jersey, and for the consideration above expressed, I do also for my executors, and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators and assigns; and her title to the said policy will forever warrant and defend.

“In witness whereof, I have hereunto set my hand and seal, this eighteenth day of January, 1915.

“DAVID T. FINNIE. (SEAL)”

20 Said assignment was accepted by the Equitable Life Assurance Society and, upon the death of the said David T. Finnie, the money due under said policy was paid by said Equitable Life Assurance Society to this defendant, and is lawfully retained by her.

THIRD DEFENSE

8. The matters and things alleged in the complaint are *res adjudicata* against the plaintiff as between the plaintiff and this defendant.

30

FOURTH DEFENSE

9. The matters and things alleged in the complaint are *res adjudicata* against plaintiff as between the plaintiff and this defendant by virtue of a final decree of the United States District Court for the District of New Jersey made in a cause therein depending upon a bill filed by William Ryan, as a creditor of and on behalf of the Estate of David T. Finnie, against defendant.

40

McCARTER & ENGLISH,
Attorneys of Defendant.

Amendment to Answer

NEW JERSEY SUPREME COURT

ESSEX COUNTY

NELLE E. FINNIE, Administratrix of the Estate of DAVID T. FIN- NIE, Deceased, vs. SARAH H. KELSEY, <div style="text-align: right; margin-right: 20px;"> <i>Plaintiff,</i> <i>Defendant.</i> </div>	}	Action at Law. Order Amending Answer.	10
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The defendant desiring to amend her answer, and application being made, and counsel for the plaintiff consenting,

It is ordered, on this 15th day of March, 1920, that the first paragraph of the first defense to said answer be amended by striking out the No. 6th in said first paragraph. 20

It is further ordered, that said answer be further amended by inserting in the first defense between the first and second paragraphs thereof a paragraph as follows:

“1. a. She denies the 6th paragraph of the Complaint, except that she admits that she repaid to the said A. S. Herenden said sums of \$120 and \$95.”

WORRALL F. MOUNTAIN, 30
Circuit Court Judge.

I consent to the entry of the foregoing order.

E. A. MERRILL,
Attorney of Plaintiff.

Rule actually entered this 23rd day
of March, 1920, on motion of

MCCARTER & ENGLISH,
Attorneys of Defendant. 40

Reply

NEW JERSEY SUPREME COURT

ESSEX COUNTY

10	NELLE E. FINNIE, Administratrix of the Estate of DAVID T. FIN- NIE, Deceased, <i>vs. .</i> SARAH H. KELSEY, 	Plaintiff, Defendant.	} <i>Action at Law. Reply.</i>
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The reply of the plaintiff residing in the City of Plainfield, Union County, says, that:

- 20 1. The plaintiff denies that the note referred to in paragraph two of the defendant's answer was given as a means of financing the sale of the policy therein referred to, or that the said A. S. Herenden paid or agreed to pay said note at maturity.
2. The plaintiff denies that the said policy was sold by David T. Finnie to said defendant as alleged in paragraphs 3, 4 and 7 of the defendant's answer.
- 30 3. The plaintiff denies that the matters and things set forth in the complaint are *res adjudicata* against the plaintiff as alleged in paragraphs 8 and 9 in defendant's answer.

E. A. MERRILL,
Attorney of Plaintiff.

TRANSCRIPT OF THE EVIDENCE

Mr. English. I have an amendment to the answer that I would like your Honor to sign (handing paper to the court).

Mr. Merrill opens for plaintiff.

40 *Mr. English.* May it please your Honor, before

Colloquy

I open to the jury I would like to reserve to your Honor, or, rather, not seem to waive the right to object, because I have quite some definite views in my mind about the rules of evidence that are applicable in this case, under *Naumberg vs. Young*. We have here an assignment, perfectly fair on its face, without any of those defects which create a situation where evidence to explain or change a written contract is applicable, and my thought is that when your Honor comes to deal with the evidence you will want to consider the matter that I have in mind; but in view of the matter being opened by the plaintiff, it is my right to open, and I do not want your Honor to consider that because I open I have waived any right. There can be no question about that, can there? 10

The Court. No, because you open to the jury only on the facts, and all questions of law will be considered by the court. 20

Mr. English. Yes, sir; I just wanted that understood.

Mr. English opens for the defendant.

(During the course of the defendant's opening):

Mr. Merrill. If your Honor, please, counsel for the defendant says that he wants to urge as a defense that it is *res adjudicata*. It seems to me that if that is proper defense, that is an end of the case, and that should be decided first. 30

Mr. English. Your Honor cannot decide it, of course, until the evidence is before you. I am opening now. I did not want to do anything improper. It seemed to me, in view of the answer, that it was a proper matter for me to open.

Mr. Merrill. I will want to bring that up later.

Mr. English concludes his opening.

Mr. Merrill. I would like to submit in evidence the certificate of the Surrogate of Union County, certifying that letters of administration on the es- 40

Colloquy

tate of David T. Finnie were issued to Nelle E. Finnie, the plaintiff in this case, on October 26, 1919.

(The paper referred to is marked Ex. P. 1.)

Mr. Merrill. I have asked for the production of the original of a letter dated October 1, 1919.

Mr. English. I have it here, but I cannot find it.
10 You can use your copy.

Mr. Merrill. That is a letter addressed to Miss Sarah H. Kelsey, by me on behalf of the Plaintiff, Nelle E. Finnie.

Mr. English. I would like to ask counsel the object of the offer.

Mr. Merrill. That is, as evidence of the demand upon the plaintiff for the amount claimed in this action.

Mr. English. I will admit on the record that a
20 demand was made on Miss Kelsey to repay this money.

Mr. Merrill. As of October 2, 1919.

Mr. English. And that the demand was refused.

The Court. That demand was made upon whom, Miss Kelsey?

Mr. English. Upon Miss Kelsey.

Mr. Merrill. I would like, nevertheless, to put this letter in evidence.

Mr. English. I object to that, because the letter
30 contains misstatements of fact.

Mr. Merrill. I would like to show the date of the note, the number of the policy, issued by whom and—

Mr. English. That is all admitted in the pleadings.

Mr. Merrill. I would like to ascertain what counsel terms a misstatement of fact, because I think everything there is a statement of fact.

Mr. English. I object to the letter. I do not
40 think it is material, in view of my admission.

Colloquy

Mr. Merrill. For the purpose of getting on the record a certain amount, I presume there would be no objection to including as part of that admission the amount paid Miss Kelsey—

Mr. English. I admit that in the answer.

Mr. Merrill. Also the amount of the note, plus interest to the date of demand, and the difference between—

10

Mr. English. I think you had better prove those facts, because we say that note has nothing to do with this transaction, as I outlined it to the jury.

Mr. Merrill. Do I understand that counsel admits not only the demand, but the amount of the demand?

Mr. English. I admit, your Honor, that on October 2nd, or thereabouts, 1919, Mr. Merrill, as counsel for Mrs. Finnie, administratrix, wrote a letter to Miss Kelsey, the defendant, and demanded that she repay, or pay, to him for the estate, or to the estate, the sum of money that she had received from the Insurance Company, and in that letter authorized her to deduct out of it the amount of \$215, with interest from the date of payment, back in 1915, to the date of the demand.

20

Mr. Merrill. If your Honor please, in paragraph 15 of the complaint will be found a statement of the demand made, including the amount of the demand, and it seems to me it is proper to place this letter in evidence as to the amount of the demand, as well as the fact of the demand.

30

The Court. Well, the amount stated in that letter from you does not prove the amount at all; that is not evidential.

Mr. Merrill. No, it is not positive proof, but it is a part of the paragraph, which is denied.

The Court. Well, if it is part of the paragraph, it is part of the proof. You cannot prove it that way.

40

Colloquy

Mr. Merrill. I am not offering this as proof of what is due and owing, but it seems to me that I should be allowed to put in evidence the fact of the demand as it was made.

The Court. The demand has been admitted.

Mr. Merrill. Merely the fact of a demand, but I think I ought to be able to put in evidence the demand as made.

10

The Court. I would suggest that the way to clear up the difficulty would be to admit the amount of the demand, Mr. English, as stated in that letter.

Mr. English. I do, your Honor.

The Court. What is the amount in the letter?

Mr. English. \$5,123.54.

Mr. Merrill. Less the amount of the note, with interest. The amount of the demand was \$4,847.77; is that right?

20

Mr. English. Yes, I admit that.

Mr. Merrill. Subject to adjustments.

The Court. What is that amount?

Mr. English. \$4,847.77.

Mr. Merrill. Yes, the difference between \$5,123.54, the amount received, and the face of the note, with interest, amounting to \$275.77.

Mr. English. My admission is that that amount of money was demanded; I do not admit that it was properly demanded—

30

The Court. No, you admit that demand was made on you.

Mr. English. Yes, and on our refusal they brought this suit.

Mr. Merrill. Now, if the court please, the plaintiff will rest, with the admissions and the evidence before the jury, leaving it with the jury to ascertain the amount due.

This amounts in effect to a plea in confession and avoidance. If you will refer to the complaint, you will see that in paragraph 1 it is admitted that the

40

Colloquy

policy in question was issued to Finnie for the sum of \$5,000, and in paragraph 2 it is admitted that on January 18, 1915, Finnie was indebted in the sum of \$120, being the balance of premium due on that policy, and in paragraph 3 it is admitted that Herenden received—

The Court. You do not have to read all that. It is on the record. 10

Mr. Merrill. In other words, all the facts are admitted, and it is simply a question, as I understand it, if from those facts the jury may come to the conclusion that there was a collateral loan, and that the amount demanded in the complaint, with interest, is due and payable to the plaintiff.

Now, I think that a statement made by Chief Justice—

Mr. English. Is counsel arguing the case now?

The Court. I thought you had rested. 20

Mr. Merrill. I would like to state my understanding of the law, so that the court may have it before it.

Mr. English. I object to that. When counsel rest, they usually rest and sit down.

Mr. Merrill. The situation is a little unusual here, because the pleadings have not been placed before the jury, and probably the court has not carefully examined the case.

There was a motion before the Chief Justice to strike out the complaint, and the Chief Justice held that there was a cause of action stated, without any argument on my part. Now, if the complaint states a cause of action and if every fact in the complaint is admitted, I cannot see that there is anything to place before the jury, or to discuss, rather, until the defense is brought out. Every fact and allegation is admitted. 30

PLAINTIFF RESTS

40

Colloquy

Mr. English. Now, if your Honor please, I move for a non-suit.

The point of the case, of course, is whether an assignment, which the complaint admits was absolute, was in fact collateral.

The Court. That is not admitted in the pleadings.

10 *Mr. English.* No, certainly not. I want to get in your Honor's mind my conception of the case.

The complaint says that a policy was taken out by Mr. Finnie and it was made payable to his estate or his assigns; that he assigned it to Miss Kelsey by an assignment, absolute in form, and then it says that the assignment was collateral security for a note of \$215. There is nothing to show that. The complaint shows that the note was not given to Miss Kelsey, but to Mr. Herenden.

20 The assignment reads this way (reading).

Now, that is a paper which was filed and which the plaintiff goes to court on, and he says in that complaint that the assignment was collateral.

The Court. That assignment is not in evidence; at least, if it is, I haven't it here.

Mr. English. Then there is nothing before the court at all.

The Court. I have not anything but the Surrogate's certificate.

30 *Mr. English.* I was giving him the benefit of assuming that the assignment was before the court. It is not before the court, there is nothing here, and the motion must prevail.

Assuming that it is before the court, for the sake of the argument, because he says in the fourth paragraph that it was assigned by an assignment absolute in form, the question is: Was or was not that a collateral assignment?

40 I made a motion before the Chief Justice in the nature of a demurrer, and I said to the Chief Jus-

Colloquy

tice that the allegation that the assignment was a collateral assignment was a mere conclusion of the pleader, and there was nothing before the court to sustain that, and the Chief Justice said that he thought that the allegation was sufficient to carry the case over the motion. The Chief Justice says (reading). In other words, the Chief Justice says that "On the face of the paper I cannot say that it was not collateral;" but he did not say when we get into a trial like this, with that fact denied, as it is denied in the answer, that the mere tendering of the complaint in evidence, which is all that the plaintiff has done, entitles him to get past a motion for non-suit. He has got to prove, if he can prove, that this paper, which assigns everything that this gentleman has, and warrants and defends the assignee, was a collateral assignment. 10

The Court. I am not called upon to pass on this assignment. The assignment is not before me. I am deciding whether or not the plaintiff should be non-suited on the paragraphs in the complaint that are admitted and the evidence submitted by you. The assignment is no part of the evidence, so why should I consider the assignment? 20

I will overrule your motion.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal. 30

(Defendant's counsel calls Arthur S. Herenden as a witness.)

Mr. Merrill. If the court please, before this witness is sworn, I would like to move an amendment making Mr. Herenden a party defendant.

It was alleged in the complaint that Mr. Herenden was the agent of Miss Kelsey, and the facts seem to bear that out, but at the last moment counsel amended his answer, denying that Mr. Herenden was the agent. 40

A. S. Herenden, direct

Mr. Herenden was part and parcel of this transaction; he took the note and advanced the money. If he were not her agent, facts may come up modifying the course of the trial and making it desirable to make him a party defendant.

The Court. (After argument.) Why did you not make your motion at the opening of the case?

10 *Mr. Merrill.* Because at that time I did not know that Mr. Herenden would be brought into it.

The Court. I will overrule your motion.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

ARTHUR S. HERENDEN, sworn in behalf of defendant.

Direct examination by Mr. English.

20 Q Mr. Herenden, what is your business?

A Life insurance.

Q With what company?

A Equitable.

Q You have been with them a good many years?

A About thirty.

Q Your office is where?

A 120 Broadway.

Q Do you know Miss Kelsey, the defendant in this case?

30 A I do.

Q She is connected with your office?

A She has been my secretary for about twelve years.

Q And still is?

A She is now.

Q Did you know Mr. David T. Finnie in his lifetime?

A I did.

40 Q Did you as an agent issue to him a policy of insurance in the Equitable Life, number 1,778,975?

A. S. Herenden, direct

A I did.

Mr. English. Counsel have agreed that photographic copies may be used with the same force and effect as the original, your Honor.

Q I show you photographic copy of a policy, number 1,778,975 on the life of David T. Finnie. (Shown to witness.) That is a photograph of the policy taken out by him? 10

A It is.

Q This policy, it appears, was payable originally to his wife; is that correct?

A Yes, sir.

Q Have you any knowledge as to whether he made any application to the company to have it changed so that it would be payable to his estate or his assigns?

A Yes.

Q Was such change ratified by the company? 20

A Yes, sir.

Q I call your attention on the outside of the policy to an entry of the change of beneficiary, apparently signed by the assistant register.

A That is the usual form.

Q And that made it payable to his estate?

A Yes.

(The photographic copy of policy identified by witness is marked Ex. D. 1.)

Q Do you know whether or not Mr. Finnie expressed any desire to sell this policy? 30

Mr. Merrill. I object, if your Honor please. Mr. Finnie is dead. I do not think it is a proper question to ask. I object on the further ground that Mr. Herenden under the circumstances ought to be made a party.

The Court. Well, you have not shown any grounds why he should have been made a party. I will admit the question.

A. S. Herenden, direct

Q The question is whether you know whether Mr. Finnie expressed any desire to sell that policy.

A He came into my office—

Mr. Merrill. I object to the form of the answer. The answer should be yes or no.

Witness. Yes, he wanted to sell it.

10 Q And when was it that he expressed the desire to you with reference to this assignment to Miss Kelsey, was it before or after?

A Before, when he could go no further with the payments.

Q This policy was dated in August, 1912. Do you know when the premium in 1915 came due?

A On the anniversary of the policy, due in August.

20 Q What rule did the Equitable have with reference to the payment of a premium? How much time did they give the policyholder?

A The policy gave five months time by paying ten per cent. of the premium each month, and then the balance had to be paid.

Q Did Mr. Finnie make any payments from time to time on that ten per cent. basis?

A He did.

Q Did he pay the entire premium?

A He did not.

30 Q And when was it that he told you he wanted to sell it?

A When he came into my office with the policy, he said he was broke and could not go on with the policy.

Mr. Merrill. I object and ask to strike out that part of the answer that is not responsive.

The Court. The objection is overruled. Plaintiff's counsel prays an exception to this ruling of the court. Exception noted as ground of appeal.

A. S. Herenden, direct

Mr. Merrill. I take exception further to any statement as to what Finnie said.

Of course, I could not assume what questions would be asked Mr. Herenden, and I would like to renew the motion that he be made a party, on the ground that, under the circumstances of the case, he ought not to be allowed to testify as to transactions with or statements by the intestate, because it would be in effect a fraud on the statute, which provides that unless the representative party comes in and testifies the other party shall not testify, and in view of the provisions of that statute it would be a fraud to permit testimony of the man that should be made a party, for the specific purpose of preventing him from testifying. 10

The Court. If your reasoning was carried out nobody could ever prove anything against an estate in any way. I do not see any reason at this time why he should be made a party. It looks to me as though the whole case turned on the so-called assignment. I have not seen it yet. You may make your objections to each question. 20

Mr. Merrill. I would like to object at this time on the ground that the question of propriety of making him a party was brought up, and the objection that I now make is a part of that proceeding. I want to ask for an exception on the last objection. 30

Exception noted as ground of appeal.

(Question and answer read.)

Q That was in January, 1915?

A It was.

Q Then this premium which was due came due in August, 1914. I think I misread it; I said August, 1915.

A It was due annually, every August, and he 40

A. S. Herenden, direct

paid in August, four or five months, and then the balance was due under the rule.

Q So that the third year premium became due in August, 1914, but he took advantage of the extension to carry it along up to this time?

A Yes.

10 Q And then in January, 1915, he came in and said he wanted to sell the policy; is that right?

A He said he couldn't pay the premium, and he wanted me to find a purchaser so that he could get a little money out of it.

Q Did you in fact find a purchaser for the policy?

A I did.

Q Who was that?

A Miss Kelsey, my secretary.

20 Q Do you know whether the policy was sold by Mr. Finnie to Miss Kelsey?

Objected to as calling for a conclusion.

Objection sustained.

(Question withdrawn.)

Q Do you know whether the policy was transferred by Mr. Finnie to Miss Kelsey?

A Miss Kelsey—

Q Just answer the question. Was it transferred or not?

A It was transferred.

30 Q I show you, Mr. Herenden, a photographic copy of a duplicate assignment of the policy D. 1, signed by David T. Finnie, dated January 18, 1915, and acknowledged by Mr. Finnie before W. K. Woerner, notary public (shown to witness.) Is that a photographic copy of the assignment which Mr. Finnie executed and gave to Miss Kelsey?

A Yes, it is in the regular form of the society's assignment.

40 *Mr. English.* I offer that assignment in evidence.

(Marked Ex. D. 2.)

A. S. Herenden, direct

Q When these assignments are executed are they executed in duplicate?

A They are.

Q One goes to the company?

A Yes.

Q And one to the purchaser?

A Yes.

Q The paper that I showed you is a photograph of the duplicate that goes to the company? 10

A Yes.

Q Now, I show you a photographic copy of the duplicate that goes to Miss Kelsey; is that it (shown to witness)?

A Yes, sir.

Mr. English. I offer that in evidence.

(Marked Ex. D. 3.)

(Mr. English reads Ex. D. 3.)

Q At the time that this policy was sold by Mr. Finnie to Miss Kelsey, did it have a surrender value? 20

A It did not.

Q What was necessary to be done to give it a surrender value?

A To pay the balance of the premium.

Q Do you remember about how much that amounted to?

A \$120, I believe.

Q If it got the surrender value, or if it earned the surrender value, do you know how much the value would be? 30

A \$190 plus the \$25 dividend, making it \$215.

Q If it earned the surrender value, it also carried with it a dividend?

A Yes, sir; it would earn the dividend payable at the end of the year.

Q And then the value would be \$215?

A Yes, sir.

A. S. Herenden, direct

Q But before that could be done \$120 had to be paid to the Society?

A Yes.

Q Do you know how much was agreed upon between Mr. Finnie and Miss Kelsey for the sale price of the policy?

10 *Mr. Merrill.* I object. That is not the best evidence.

Mr. English. I ask him if he knows.

A Yes.

Q Were you present at the time?

A Yes, I was.

Q And participated in the transaction?

A I did.

Q I show you a receipt dated January 18, 1915, signed "David T. Finnie" (showing paper to witness). Do you know whose signature that is?

20 A That is Mr. Finnie's signature.

Q Was that signed by him in connection with the transaction?

A It was.

Mr. English. I offer the receipt in evidence.

(Marked Ex. D. 4.)

(Mr. English reads Ex. D. 4.)

Q Was \$95 in fact paid to Mr. Finnie for this assignment?

30 A The \$95 was the value Miss Kelsey—

Q No, you do not understand my question. I want to know whether Mr. Finnie got \$95 for the assignment?

A He did.

Q And did the Equitable get its \$120?

A It did.

Q Whose money was it that paid to Mr. Finnie \$95 and paid to the Equitable \$120?

40 A Miss Kelsey's.

A. S. Herenden, direct

Q Do you know whether or not Miss Kelsey paid the subsequent premiums on that policy?

A She did pay them.

Q I show you a premium receipt of the Equitable Life for the premium due August 20, 1914 (shown to witness). Is that one of the original receipts?

A That is the regular form.

10

Q And was that issued following the payment of that \$120?

A It was.

Mr. English. I offer that in evidence.

(Marked Ex. D. 5.)

Q Now, I show you a similar receipt for the premium due August 20, 1915 (shown to witness). Is that the genuine original?

A That is the original.

20

Mr. English. I offer that in evidence.

(Marked Ex. D. 6.)

Q Now, I show you premium receipt for August 20, 1916 (shown to witness). Is that the original receipt?

A It is.

Mr. English. I offer that.

(Marked Ex. D. 7.)

Q I show you the receipt dated August 20, 1917 (shown to witness). Is that the genuine one? 30

A It is.

Mr. English. I offer that in evidence.

(Marked Ex. D. 8.)

Q Did Mr. Finnie survive until August, 1918, or did he die in the meanwhile?

A I think he died in 1918.

Q Before the premium became due?

A Yes.

40

A. S. Herenden, direct

Q Now, at the time Miss Kelsey purchased this policy and took the assignment, did she personally and physically hand over the money, or did she have to raise the money in some other way?

Objected to as to form.

Q At the time Miss Kelsey received this assignment which is in evidence—

10

Objected to.

Q At the time Miss Kelsey received the assignment which is in evidence, and paid or caused to be paid the \$95 to Mr. Finnie did she personally and physically have the money available or did she have to take some steps to raise it?

20

Mr. Merrill. I object. This illustrates again the injustice done the dead in this particular case by permitting Mr. Herenden to testify about Miss Kelsey's transaction with Mr. Finnie.

30

The Court. That is the only way in the world that any claim against any estate can ever be proved. The Evidence Act of 1900, provides that no party shall be a witness in his own behalf unless the representative of the deceased is put on the witness stand. Unless that is done, the only way to prove any transaction with the deceased is where some other person is permitted to testify.

40

Mr. Merrill. That is true, and if Mr. Herenden was a disinterested person I wouldn't raise the question, but Mr. Herenden is the agent of Miss Kelsey. You cannot escape that conclusion. He is interested in the transaction. An amendment has been made denying that he is the agent, and if he is not the agent, he is a proper party. Notwithstanding he is practically one person with Miss Kelsey, nevertheless by being permitted to testify he can

A. S. Herenden, direct

destroy the effect of the protection of the law, that the law has always thrown around the dead.

The Court. I will overrule the objection.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(Question read.)

10

A She had to take some steps to raise it.

Q From whom did she borrow the money?

A From me.

Q At that time did it happen to be convenient for you to hand her the cash, or what did you do?

A Might I be permitted to tell—

Q No. At that time were you in a position to draw your check and give it to her without anything further?

A I was as soon as this note was discounted.

20

Q What was your custom with reference to discounting notes in connection with your business?

Mr. Merrill. I object to that. His custom has no connection with this.

The Court. No. I sustain the objection.

Q Was any suggestion made by anybody about a note as a convenient means of financing this matter?

A There was.

Q What was the suggestion and who made it?

30

A It wasn't convenient for me to let Miss Kelsey have the money—

Mr. Merrill. I object. I would like to have an answer to the question.

(Question and answer read.)

Q Go on.

A It was not.

Q Go ahead and finish your answer.

A I don't know—

40

A. S. Herenden, direct

Q Well, I want to know who suggested this note.

A Well, when I couldn't let Miss Kelsey have this money I suggested to Finnie a way of financing it. I said, "If you lend me your note, which I previously had in the bank, I will endorse it, have it discounted at the bank, they will credit me with the proceeds, and I will immediately lend that amount to Miss Kelsey; \$120 she can use to pay the premium, and \$95, the amount of the purchase price of the policy, she can give to Mr. Finnie."

Q Was that done?

A That was done.

Q Did Finnie give you his note?

A He gave me his note.

Q Did you discount it at the bank?

A I discounted it at the bank.

Q What bank?

A The Coal & Iron.

Q Of New York?

A New York.

Q With the money thus raised then what did you do?

A I immediately drew two checks, one for \$95 and one for \$120.

Q To whose order was the \$95 check?

A To Finnie.

Q And the \$120 check?

A The Equitable Life.

Q Did Miss Kelsey afterwards repay you that money?

A She did.

Q At the time you took Mr. Finnie's note did you give him a letter or agreement of any kind?

A I did.

Mr. English. I ask the other side to produce the agreement of January 18, 1915.

(Not produced.)

A. S. Herenden, direct

Q I show you a carbon copy of a paper dated January 18, 1915. (Shown to witness.) Did you sign and give to Mr. Finnie a paper of which that is a copy?

A I did.

Mr. English. I offer that in evidence.

Mr. Merrill. I object. If the court, please, this is an unsigned carbon copy presented by counsel for the defendant. The original is not produced. 10

Mr. English. You have got that.

Mr. Merrill. We deny that we have ever seen it or received it. There is no evidence that we ever did. Perhaps it would be proper for me to say that I have personally looked over the papers—

Mr. English. I object to that sort of thing.

Mr. Merrill. There is no evidence whatever that I have been able to find in Finnie's effects of the original of that or that he ever had it in his possession. 20

By the Court.

Q Did you sign the original of this?

A I did.

Q What did you do with it?

A I gave it to Mr. Finnie.

The Court. You have got the original? 30

Mr. Merrill. Not only have not got it, but I have not got anything to indicate that Finnie ever had it.

The Court. I will admit the secondary evidence.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(The paper referred to is marked Ex. D. 9.)

(Mr. English reads Ex. D. 9.) 40

A. S. Herenden, direct

By Mr. English.

Q When that note became due did you pay it?

A I did.

Q Did Mr. Finnie pay it?

A He did not.

Q You paid it?

A I paid it.

10 Q Did you take up the note from the bank?

A I did.

Q Did you send it to him?

A Sent it to him with a letter.

Mr. English. I ask the other side for the production of a letter dated May 18, 1915.

Mr. Merrill. We have not got it.

Q Did Mr. Finnie live in Westfield at that time?

20 A I do not know where he lived at that time; I believe Westfield was his post-office address.

Q I show you a copy of a letter dated May 18, 1915, and ask you if that is a carbon copy of a letter which you addressed to Mr. Finnie? (Shown to witness.)

A It is.

Mr. English. I offer that in evidence.

Mr. Merrill. I object.

By the Court.

30 Q Did you send the original to Mr. Finnie?

A I did.

Q Did you send it yourself?

A Through my office—a typed letter.

By Mr. English.

Q Who attended to the mailing?

A Miss Kelsey.

40 *Mr. Merrill.* This is also a carbon copy, unsigned, of which there is no evidence that the original was ever in the possession of Mr. Fin-

A. S. Herenden, direct

nie. It also calls for an answer, and there is no evidence of any answer, and I call upon the defendant to produce the answer to this letter, if there is one.

The Court. You cannot do that at this time. We are arguing as to the admissibility of a paper.

Mr. Merrill. I will stop then at that. 10

The Court. The witness says, "I signed a letter and sent it to the deceased through my office, in the mail." Then the other side asks you to produce the letter, and you say you cannot produce it, and then they say, "All right; we want to put in evidence a copy of the letter." Now, what is the objection? They have called upon you to produce the letter.

Mr. English. Yes, I have the notice right here. 20

Mr. Merrill. The plaintiff goes back to the other ground. The plaintiff is dead. There is no possible way of our putting in his evidence, and this is simply an unsigned carbon copy.

The Court. Mark it in evidence.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

(The paper referred to is marked Ex. D. 10.)

(Mr. English reads Ex. D. 10.) 30

Q Did he return you the note, as you requested in your letter?

A We never could find it.

Q On the death of Mr. Finnie did Miss Kelsey make proof of death and receive the proceeds of the policy, to your knowledge?

A She did.

Q Do you know whether or not she personally

A. S. Herenden, cross

paid these premiums following the assignment to her January, 1915?

A I do.

Q With her money?

A With her money.

Q And she received the proceeds of the policy?

A Yes, sir.

Q The Company paid it to her,

10

A Yes, sir.

Cross examination by Mr. Merrill.

Q Did Miss Kelsey repay this \$215 within a few weeks after this transaction?

A No, sir; not within a few weeks.

Q When was it paid?

A I couldn't tell; in small amounts, whenever it was convenient.

20

Q Was it all paid back to you prior to the time when the note became due?

A I can't tell you that; I credited it in small amounts as she paid it.

Q But it was shortly thereafter?

A I couldn't tell you whether it was shortly or long.

Q That assignment was the printed form furnished by the life insurance company, was it?

A The form the Equitable always uses, yes, the printed form in use by all companies.

30

Mr. English. Will you let me interrupt? There is a paper that I want to put in. I will either interrupt now or later on, as you like.

Mr. Merrill. You can do it now.

By Mr. English.

Q Mr. Herenden, the assignment which was given—the assignment which is in evidence here—the duplicate which goes to the company, D. 2, and the duplicate which is kept by Miss Kelsey, D. 3,

40

A. S. Herenden, cross

particularly the latter paper, D. 3, says that it was the form of an assignment otherwise than as collateral security.

A It was.

Q Did the company at that time have a form of assignment as it was when it was collateral security?

A It did.

10

Objected to.

Objection sustained.

Q I show you a paper and ask you whether it is a duplicate of the form when the policy is transferred as collateral security? (Shown to witness.)

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court.

20

Exception noted as ground of appeal.

Mr. English. I will mark the form as collateral security for identification.

(The paper is marked D. 11 for identification.)

By Mr. Merrill.

Q In this form of assignment the statement, "Form of assignment otherwise than as collateral security" is at the very top of the sheet, is it not?

30

A It is.

Q And it is attached to and returned with the policy?

A Two copies, one with the policy—

Q So that that is a mere direction and not a necessary part of the policy itself?

A What is that?

Q That statement at the top is a mere direction and explanation, and not a part of the assignment?

A I think it is a part of the assignment.

40

A. S. Herenden, cross

Q It does not say anywhere in the assignment that they assign it absolutely—

A The Equitable—

Mr. Merrill. No, answer the question.

Witness. It is an absolute assignment and nothing else.

10 *The Court.* The question as to what that is is not for the witness but for the Court to decide.

Q Now, that note was an ordinary negotiable note, was it not?

A Made on an ordinary note form.

Q And it was negotiable; you could discount it?

A I could discount it at the bank.

Q And having discounted it at the bank, the bank could rediscount it, if it had the opportunity, could it not?

20 A I couldn't answer your question; I don't know what their methods are.

Q I have not spoken about methods.

A I don't know about what the bank does.

Q But you know that a negotiable note can be transferred?

A I didn't know, no.

Mr. English. I object to that as a pure question of law.

30 *The Court.* I sustain the objection.

Q The bank paid value to you for that note?

A They credited me with the proceeds of the note, taking out the discount, their usual form of discounting paper.

Q So that they acquired the ownership of the note?

Objected to as calling for a conclusion.

Objection sustained.

A. S. Herenden, cross

Q Did you intend to transfer the title to that note from yourself to the bank?

Objected to as immaterial.

Objection overruled.

A I simply had the note discounted, as is my habit. I can't answer the question in the phraseology that you ask it, as I am not an expert in those things. They credited me with the note, as they always do, when I put them in the bank. That is as far as I can answer. 10

Q And you regarded the payments that you made to the insurance company and to Finnie as repaying the loan to Miss Kelsey—

A I didn't make any payment to him or to the insurance company.

Q Was it not your check that went to the Equitable and to Finnie? 20

A I made Miss Kelsey a loan of the amount that was credited to the note. She was to have that to carry this transaction. I was independent of the whole thing.

Q So that you took Finnie's note to the bank and discounted it, and then you took the proceeds—

A I did not take them; they were credited to my account; I checked against the proceeds of the note.

Q Then you checked against the proceeds of the note? 30

A For Miss Kelsey's benefit.

Q And it was Mr. Finnie's note that was discounted?

A Certainly.

Q Now, as to that agreement. Do you recall that in the Ryan case I asked you concerning the agreement that, although you discounted the note at the bank, the agreement was that you would not 40

A. S. Herenden, cross

permit the bank to press Mr. Finnie for payment, and you answered that that was right?

A Well, I gave him that paper to protect him. I don't know how I answered that question.

Q Would you recall if I showed you the stenographer's minutes of the testimony that that was my question?

10 *Mr. English.* Whatever he agreed to is in writing and is in evidence. Here is the paper, D. 9.

The Court. You may proceed.

Q Do you recall that I asked you, "Although you discounted this note at the bank, the agreement was that you would not permit the bank to press him for the payment?" and you said that that was true?

20 A You might have put the question that way and I might have answered it. The questions that you ask me sometimes are very tangled. The fact is that I discounted the note and loaned her the money. What I said there is the same thing that I said now. I don't know how you might have put the question before. I might have said off-hand, "Yes," to those questions of yours that were too deep in law for me to get the significance of.

Q Doesn't that seem to be a simple question?

30 Objected to as argumentative.
Objection sustained.

Q But in view of the minutes here, you probably did answer this question that way, did you not?

A I can't tell what question I answered several years ago, or several months ago.

Q I think you stated that at the time the assignment of this policy was made it had no value?

A It had a value, certainly, because Miss Kelsey made a value by paying this premium. The pay-

40

A. S. Herenden, cross

ment would not have been made unless the transaction was carried out in that way.

Q It did have a value?

A She made a value.

Q Yes or no.

A It had a value six months afterward.

Q Did it have a value at that time?

A No.

Q It did not have a value at that time? 10

A No.

Q Couldn't Finnie have gone directly to the insurance company at that time and secured a loan on that policy of \$190?

A Certainly not.

Q He could not?

A He could not; it wasn't worth a nickel.

Q Do you recall the following provision: "At any time while this policy is in force, after three full years' premiums have been paid, the Society will advance, on the proper assignment and delivery of this policy and on the sole security thereof, a sum not exceeding the loan value at the end of the then current policy year as stated in the above table?" 20

A That would be the case if the premium was paid.

Q Then by the payment of the premium Finnie could have gone to the company direct? 30

A Certainly, if he had the money. He was broke; he didn't have the money.

Q But at the time that he did come to you in this transaction he couldn't have—

A It wasn't worth a nickel.

Q He couldn't have borrowed from the company?

A Certainly not.

Q I notice that there are certain alternatives stated. It says here, "The term for which extended 40

A. S. Herenden, cross

insurance will be granted remains the same without regard to the amount of the policy," and then to get the value of that extended term you multiply the amount stated in the table by the face value of the policy. These are in \$1,000 amounts.

A What is your question?

10 Q There is a table giving certain values. As I understand it, the values here are for each \$1,000 of the face value of the policy?

A At what time are the values good, when are they good?

Q At the time stated in the table.

A After three years?

Q Pardon me.

A I can't answer the question. I don't know what the table is or anything about it.

Q Will you please examine the table.

20 A These values are not good until three premiums have been paid. Anyone knows that; you know that. There were not three premiums paid when he sold it to Miss Kelsey. The table does not signify anything until the three premiums have been paid. I don't know what you are driving at. I am willing to answer questions honestly. You are tangling me up on something that isn't material.

Q I think the difficulty is that you have in mind one purpose and I have in mind another purpose.

30 A Make yourself plain and I will try to answer.

Q Now, in this policy there is a table of values.

A Different options in the policy.

Q And the values here given, irrespective of the term, are for each \$1,000 face value.

A Multiplied by the amount of insurance the man has.

Q Now, after the premiums have been paid for three years, the cash value for each \$1,000 by this table is \$38.

40 A All right.

A. S. Herenden, cross

Q And that multiplied by five gives \$190, which is the—

A Which is the value.

Q —which is the loan and cash value, after three annual premiums have been paid. Now, in the same table and in the same line it says that the paid up extended term insurance is three years and eleven months. Does that mean that after the third premium has been paid the policy will be carried for three years and eleven months without further premium payment?

10

A It would, if Miss Kelsey so elected.

Q If she elected, that would have been the case?

A Yes.

Q In the same line it gives the column of the paid up life insurance. Do I understand that after the third annual premium had been paid that might have been exchanged for a paid-up policy in the principal sum of \$79 for each \$1,000 face value, which would make a value of \$395 on this policy, without any further payment of premium?

20

A It could have been surrendered for that value in paid-up insurance, if she had elected to do so.

Q Then after the third premium had been paid there were three alternatives?

A That is true.

Q The first alternative was to continue paying premiums on this particular policy, and second alternative was to discontinue premium payments in which case the policy would have remained a \$5,000 policy—

30

A Oh, no, \$400—

Q No. In which case at any time within three years and eleven months after the due date of third premium and without further payments of premiums the company would have paid that whole principal sum of \$5,000?

A If Miss Kelsey so decided.

40

A. S. Herenden, cross

Q And the third alternative was that that policy could have been surrendered and a paid-up policy given for \$395, without any further payment of premiums?

A That table says so.

Q And that is true, is it not?

A It is supposed to be.

Q Well, you admit that it is true?

10 A It is true.

Mr. Merrill. Now, if the court please, I want to ask two or three questions to lay the foundation for a question as to the recollection and credibility of the witness. I speak of that because otherwise the questions might seem susceptible of objection.

Q At the same time that this policy was issued were other policies issued to Finnie by the Equitable Life Insurance Company?

20

Objected to as immaterial.

Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q You say that at the time this assignment was made Mr. Finnie could not have borrowed from the Equitable Life Assurance Society the amount of \$190 on that policy?

30

A The premiums hadn't been paid up to the third year, and he couldn't borrow until they were paid. You know that by reading the contract.

Q If Finnie could not have borrowed on this policy, he could not have borrowed on any similar policy, could he?

Objected to as immaterial.

Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the court.

40

Exception noted as ground of appeal.

A. S. Herenden, cross

Q I show you a premium notice and ask you to note the number of the policy stated thereon (shown to witness).

A I don't know anything about what number it is or what it pertains to.

Mr. English. I object to it because it appears on the face of it that it does not refer to this policy.

10

Mr. Merrill. I ask the witness to look at this notice and see what the number is on it.

The Court. I do not know what you are trying to do.

Mr. Merrill. Mr. Herenden said that at the time that Mr. Finnie assigned this policy he could not have borrowed \$190 from the Equitable Society, and I propose to show that he could.

The Court. No, he said that he could not borrow on this policy.

20

Mr. Merrill. I propose to show that he could have borrowed at that particular time that particular amount of money.

The Court. On that policy?

Mr. Merrill. On a policy identical in every way with that policy.

The Court. Well, suppose he could borrow?

Mr. Merrill. I propose to show that he did borrow.

30

The Court. Well, suppose he did, what then?

Mr. Merrill. These policies are all alike, and I can show that at the same time, on a policy identical in form, in which there had been a default in the payment of a premium, Finnie went to the company and borrowed \$190. I say that the jury can infer that he could have done so on this policy. It goes to the credibility of the witness.

The Court. I do not see how it does. As-

40

A. S. Herenden, cross

suming that Finnie could have borrowed money on another policy—

Mr. Merrill. And did.

10 *The Court.* —and did borrow money on another policy, what I have difficulty in is seeing how you are going to get away from this written assignment which, it seems to me, precludes the jury from any part in the consideration of this case. That is the point; that is where your case hinges, on that assignment. You say it was given as collateral security, and that is what you have got to prove, because on its face it is not.

20 *Mr. Merrill.* I go further than that, if the court please. The assignment itself is not the contract; it is only evidence of a contract; and if the assignment is shown to have been only a part of the entire transaction, and not an isolated transaction by itself, then I may show the entire contract. If it was not for that, every single collateral loan made in a bank could be held to be the property of the bank; the security could be held on that same theory. I suppose the practice of every bank in the country, where collateral is put up, to permit the bank to sell that security—

30 *The Court.* I am only discussing this particular writing which was handed to me, which I have read and which is in English, and which I construe to be anything but given as collateral.

40 Now, you are cross-examining this gentleman, and my only suggestion is that you do not waste time on more or less extrinsic matters, but that you get down to this agreement, to prove that that agreement, which I have read, is not an outright sale, but collateral security; because if you do not prove that to me,

A. S. Herenden, cross

I am not going to let this jury have the case. Courts are inclined to take instruments under seal, written solemnly by a man, as indications of what he meant.

Mr. Merrill. I will take an exception on the exclusion of those questions, because I feel that it is a question of the entire transaction, as an entirety, and not the question of an isolated element in it. 10

Exception noted as ground of appeal.

Mr. Merrill. I would like to ask this question, your Honor, so that I can have it as a matter of record.

Q Mr. Herenden, this question is asked for the purpose of getting it on the record; do not answer it. I will ask you to look at that paper and then tell me whether Mr. Finnie did or did not borrow from the Equitable Life Assurance Society \$190 on a policy exactly similar to the policy in question here, for the same amount, issued about the same time, and out of that loan if the Equitable Life Assurance Society did not deduct the amount he was then in default on his insurance premium? 20

Mr. English. I object. In the first place, counsel concedes that his question is wrong, and, secondly, the paper bears a totally different date from this paper. This paper is dated March 14, 1915, and our policy is dated August 20, 1912. 30

The Court. He said that Finnie said that he was broke. Do you want to prove that he was not?

Mr. Merrill. I do not.

The Court. Or that he could have borrowed on this policy?

Mr. Merrill. I want to prove that Finnie could have gone to the Equitable Life Assurance Society and borrowed \$190 at that time; 40

A. S. Herenden, re-direct

that the company would have deducted the amount that he was in default and given him a check for the balance.

Mr. English. I suggest that the question is what he did and not what he might have done.

The Court. I will admit the question.

10 Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(Plaintiff's counsel hands another paper to witness.)

Mr. English. What is that?

Mr. Merrill. The letter that accompanied this.

The Court. Can you answer that question?

20 *Witness.* I don't know what the question is. That is all Greek to me, that thing that he has in his hand there; I wouldn't pronounce on it in any way. We have millions of these every year. I don't know what it is all about. I say this man could not have gone to the Equitable Life and got anything without his third premium, and I stand on that. I say that is not the same condition.

Re-direct examination by Mr. English.

30 Q Mr. Herenden, these premium receipts which I put in evidence all bear the name "David T. Finnie, care of Hecker-Jones, Produce Exchange Building." That was his official address, was it?

A Yes, sir; that was his address on our books.

Q At the time of this transaction, in January, 1915, did Mr. Finnie borrow any money of Miss Kelsey for which this policy was put up as collateral?

Mr. Merrill. I object. That is a conclusion.

The Court. No, that is not a conclusion if he knows.

40 A He did not.

A. S. Herenden, re-direct

Q Did she borrow any?

A I never knew of her borrowing any money of Mr. Finnie.

Q I do not mean any other time; I mean on this occasion.

A No, he didn't have any money to lend and she didn't borrow it.

Q Now, did Mr. Finnie ever borrow any money of her? 10

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q On the occasion of January 18, 1915, did Mr. Finnie borrow any money of Miss Kelsey?

Objected to.

The Court. When he was present? 20

Mr. English. Yes, sir.

The Court. I will admit it.

Q You were there all through this?

A Yes, sir.

Q Did she borrow any money from him?

A This transaction is the only deal that they ever had.

Q And on that occasion did Miss Kelsey borrow any money from Mr. Finnie?

A She did not. 30

Objected to.

The Court. The objection is too late.

Q Or did he borrow any money?

A No.

Sarah H. Kelsey, direct

SARAH H. KELSEY, defendant, sworn in her own behalf.

Direct examination by Mr. English.

Q Miss Kelsey, I show you Exhibit D. 3, which is the assignment from David T. Finnie to Sarah H. Kelsey, and ask you if you are the Sarah H. Kelsey mentioned in that paper? (Paper shown to witness.)

A I am.

Q And are you the Sarah H. Kelsey mentioned in the duplicate assignment, D. 2? (Paper shown to witness.)

A Yes.

Q I show you Exhibit D. 4, which is a receipt from Mr. Finnie to Sarah H. Kelsey for the net amount of \$95, and I ask you if you are the Sarah H. Kelsey mentioned in that paper? (Paper shown to witness.)

A I am.

Q I show you Exhibit D. 9, which is the agreement from Mr. Herenden to Mr. Finnie to protect his note at maturity (paper shown to witness). Did you ever see that paper before to-day?

A Yes, sir.

Q Do you know who physically prepared that paper on the typewriter?

A Yes.

Q Who did?

A I did.

Q Do you know whether Mr. Herenden signed it and gave it to Mr. Finnie at the time?

A Yes.

Q Did he?

A Yes.

Q I show you a paper of May 18, 1915, D. 10, and ask you who physically wrote that on the typewriter? (Paper shown to witness.)

40

Sarah H. Kelsey, direct

A I did.

Q Do you know whether it was mailed to Mr. Finnie at the address stated?

A It was.

Q And did it inclose the note which Mr. Finnie had given to Mr. Herenden?

A It did.

Q Do you know that of your own knowledge? 10

A Yes.

Q Following the execution and delivery of the assignment who paid the premiums on the policy for the years 1915, 1916, and 1917?

A I did.

Q I show you the receipts, Exhibits D. 6, D. 7 and D. 8 (papers shown to witness). Did you receive those as a result of paying those premiums?

A Yes.

Q And did you also, after the transfer to you 20 of the policy, receive the premiums receipt for August, 1914?

A Yes.

Q That is Exhibit D. 5 (paper shown to witness)?

A Yes.

Q Following the closing up of the transaction on January 18, 1915, did Mr. Finnie ever come to you and demand that the policy be returned to him?

A No. 30

Q Did he ever claim to you that he had paid this note?

A I never saw him after that.

Q He went out of your orbit after that, did he?

A Yes.

Q When the policy became due on the death of Mr. Finnie did you present the proofs of death and secure the payment of the money?

A Yes.

Sarah H. Kelsey, cross

Cross examination by Mr. Merrill.

Q Did you file proofs of death with the company?

A Yes.

Q When did Mr. Finnie die?

A In September, 1918.

10 *Mr. English.* 1917.

Witness. 1917.

Mr. English. That is admitted in the case, your Honor. I think that this is immaterial.

Mr. Merrill. I understand that counsel has no objection to offering a photographic copy of the proofs of death.

20 *Mr. English.* No, I don't object to the copy, but I object on the ground that it is immaterial. The complaint states that he died in September, 1917, and that she collected the money, and we admit that. I object because it is immaterial.

Mr. Merrill. I think it bears on the reasons for his not paying these premiums and for his practically abandoning the policy. At least, there are statements of fact here which would permit an inference to be drawn to that effect. I can see no objection to putting in the policy and the assignment and the other papers, and also the complete transaction, including proofs of death.

30

The Court. I will admit it.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

(Paper marked Ex. P. 2.)

Q Where did Mr. Finnie die?

Objected to as not cross examination and as immaterial.

40

Objection sustained.

Sarah H. Kelsey, cross

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q Do you know what Finnie's condition was at the time of this transaction, his physical condition.

Objected to.

Mr. Merrill. They testified that he did not pay any premiums after that, and I think I may show on cross examination why he did not, or facts from which the jury may infer why he did not.

10

Mr. English. There is no allegation of fraud, your Honor.

Mr. Merrill. It seems to me that the whole situation of the case is an implied fraud; it seems to me it is necessary implication, for the defendant has converted this money to her own use.

20

The Court. I do not see how you can allege that. There has been no proof of fraud. Any man can take an insurance policy for which he has no further use, and, without fraud, dispose of it. If you are prepared to show fraud, all right, but you ought not to assert it unless you can stand behind it.

Mr. Merrill. I will not press that element of it.

30

Q The statements made in this paper, which is signed by you, are all, so far as you know, to the best of your knowledge and belief, true?

A Yes.

Objected to as not cross examination.

Objection overruled.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

40

Sarah H. Kelsey, cross

Q This states that Finnie had been suffering from consumption for about six years.

A I didn't state any such thing.

Q But you signed the proof of death, to which the certificate of the attending physician is attached.

A Yes.

10 Q And it also shows that he died in the Loomis sanatorium.

Objected to as immaterial.

Objection sustained.

Mr. Merrill. In this claimant's statement the proof of death shows that Mr. Finnie died at quarter past—

Mr. English. I object to his stating the contents of a paper.

The Court. I sustain the objection.

20 *Mr. Merrill.* This is the claimant's statement, which was submitted to the Equitable Life Insurance Company as justification for the amount of the claim—

Mr. English. I object to his stating that to the jury.

Mr. Merrill. This has been put in evidence, and I wish to state to the jury—

Mr. English. He cannot offer evidence on my case, your Honor.

30 *Mr. Merrill.* Then for that purpose I will make the witness my own and submit this in evidence.

The Court. You cannot do it. This is Mr. English's case.

Mr. Merrill. I was going to make her my witness in rebuttal.

The Court. I presume you can when you get to it.

40 *Mr. Merrill.* Then I will ask no further questions on cross examination. That is all.

Sarah H. Kelsey, rebuttal—direct

Mr. English. Now, I want to offer in evidence the original files of the United States District Court for the District of New Jersey, which has been produced here by the clerk of the court, in the case of William Ryan against Sarah H. Kelsey, as supporting the third and fourth defense set out in the answer. I particularly call your Honor's attention to the bill of complaint, the petition of Mrs. Finnie to be made a party and the final decree. 10

(Ex. D. 12—not marked.)

DEFENDANT RESTS.

Mr. Merrill. In connection with the defense just put in, I wish to call the attention of the court in the case referred to, which is set up as a defense by way of *res adjudicata*—

Mr. English. I object to this. This is not rebuttal, your Honor; it is an address. 20

The Court. If you have any witnesses, put them on and argue afterward.

SARAH H. KELSEY, recalled in behalf of plaintiff in rebuttal.

Direct examination by Mr. Merrill.

Q Miss Kelsey, the case of Ryan against Kelsey has been referred to. That was tried in the United States District Court, and that was a case in equity and on a bill to establish a trust. Now, the William Ryan, who was the plaintiff there, has nothing to do with this case, has he? 30

Objected to as not rebuttal and as immaterial.

Objection sustained.

Mr. Merrill. If the court please, I would like to ask a question. The defendant has put in as proof of his second defense the proceed- 40

Sarah H. Kelsey, rebuttal—direct

ings of the United States District Court and the Circuit Court of Appeals. Now, if I cannot show anything in connection with that and Miss Kelsey cannot say anything concerning it, I do not see how I am going to meet that defense.

10 *The Court.* I do not know what you want to meet.

Mr. Merrill. I want to deny that that is *res-adjudicata* or has anything to do with this case.

The Court. That is a legal argument. You do not want to ask her anything about that; she does not know anything about that. What questions do you want to ask her?

Mr. Merrill. I will offer in evidence the claimant's proof of death.

20 *The Court.* That has already been marked P. 2.

Q This is a photographic copy of your statement, and it has your signature at the bottom there (shown to witness)?

A Yes.

Q You did make a statement in this form?

Objected to as not rebuttal.

Mr. Merrill. It seems to me that the question of his death has been brought up by this witness.

30 *The Court.* You allege that he died, and the other party admitted in their pleadings that he is dead.

Mr. Merrill. Do I understand the court to rule that it is inadmissible to question this witness on this proof of death as my witness?

The Court. I do not see what good it is going to do you.

Mr. Merrill. Does the court rule it out?

40 *The Court.* Well, you have put it in evidence.

Sarah H. Kelsey, rebuttal—direct

You ask any questions that you want to and I will rule on your questions.

Mr. Merrill. And being in evidence, am I permitted to read it to the jury?

The Court. Yes, but this rebuttal, you know. You are supposed to read something to rebut the defense. I do not know what you are trying to rebut. You have put in your case, and you are now to put in evidence to contradict evidence that the defendant put in. 10

Q How soon after this transaction did you repay this \$215 that you borrowed from Mr. Herenden?

Objected to as not rebuttal and as immaterial.

Objection sustained.

Plaintiff's counsel prays an exception to this ruling of the court. 20

Exception noted as ground of appeal.

Q Did you regard the money advanced by Mr. Herenden, this \$215, as being paid by you?

A I did.

Objected to.

The Court. She has answered it.

Q Have you figured the interest on that note?

Objected to as not rebuttal.

Objection sustained. 30

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q You paid a premium due August 20, 1915, of \$159.55. Have you figured the interest on that from the date when you received the money from the life insurance company?

Objected to as not rebuttal.

Objection sustained. 40

Verdict

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

PLAINTIFF RESTS.

10 *Mr. English.* If the court please, I move for the direction of a verdict in favor of the defendant, first, on the ground that the matter is *res adjudicata*, and, secondly, that the complaint alleges a collateral assignment, whereas the proof is most positive and complete that it was an out and out sale, and there is nothing on which the minds of reasonable men could differ or which would create any question of fact to be solved by the jury.

20 *The Court.* (After argument.) Gentlemen of the jury. I direct that you bring in a verdict for the defendant.

(A verdict is accordingly rendered for the defendant.)

Plaintiff's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

30

40

Judgment

NEW JERSEY SUPREME COURT

ESSEX COUNTY

NELLE E. FINNIE, Administratrix of the Estate of DAVID T. FIN- NIE, Deceased, <i>Plaintiff,</i>	}	<i>Action at</i>	10
<i>vs.</i>		<i>Law.</i>	
SARAH H. KELSEY, <i>Defendant.</i>	}	<i>Postea.</i>	

This case was tried before Hon. Worrall F. Mountain, Circuit Judge, to whom said action was referred for trial by the Chief Justice, with a jury, at the Essex Circuit, on March 15th, 1920.

The jury rendered a general verdict against the plaintiff, and in favor of the defendant. 20

EXHIBIT P. 1.

STATE OF NEW JERSEY, }
UNION COUNTY. } ss.

I, Charles N. Coddling, Surrogate of said County, do certify, That letters of Administration on the Estate of David T. Finnie, late of the County of Union, deceased, were on the Twenty-sixth day of October, 1917, granted and issued by the Surrogate of said County to Nelle E. Finnie of the City of Plainfield, N. J., who is duly authorized to administer the same agreeably to Law. 30

Witness my hand and seal of office, the Fifteenth day of November, in the year of Our Lord one thousand nine hundred and Nineteen.

CHARLES N. CODDING,
(SEAL) *Surrogate.* 40

Policy

Statutory Standard Provisions
The
EQUITABLE
LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

Number 1,778,975 Amount \$5,000

10 Hereby insures the life of David T. Finnie, of
Westfield, N. J., and agrees to pay at its Home
Office in the City of New York.

Five Thousand Dollars.

to his wife, Nellie E. Finnie, beneficiary (with . . .
the right on the part of the Insured to change the
Beneficiary) upon receipt of due proof of the death
of the Insured, provided this policy is then in force
and is then surrendered properly released.

20

THERE ARE NO RESTRICTIONS

under this policy on travel, residence, occupation,
or military or naval service.

THE POLICY SHALL BE INCONTESTABLE

after one year from its date of issue, provided pre-
miums have been duly paid.

30

ANNUAL DIVIDENDS

This policy shall participate annually in the dis-
tribution of the Surplus of the Society as ascer-
tained and apportioned by it.

Dividends, at the option of the Insured (or of
the assignee if any) shall in each year, on the an-
niversary of the register date
hereof, be either—

40

1. Paid in Cash; or, 2. Applied toward the
payment of any premium or premiums; or 3.

Policy

Applied to the purchase of paid up Additional Insurance; or, 4. Left to accumulate at 3% compounded annually, and payable at the maturity of this policy, but withdrawable at any anniversary of its register date.

Unless the Insured (or the assignee if any) shall elect one of the foregoing options within three months after the mailing by the Society of a written notice requiring such election, the dividend shall be applied to the purchase of paid-up Additional Insurance (Option 3). This Additional Insurance may be surrendered at any time for the amount of the Original Cash Dividend. 10

SECOND PAGE.

BENEFICIARY. If the right to change the beneficiary has been reserved and there is no written assignment of this policy on file with the Society, the Insured may from time to time during its continuance, change the beneficiary or beneficiaries by a written request, upon the Society's blank, filed at its Home office, but such change shall take effect only upon the endorsement of the same hereon by the Society. 20

If there be no beneficiary surviving at the death of the insured, the proceeds of this policy shall be payable to the executors, administrators or assigns of the insured. 30

ASSIGNMENTS. No assignment of this policy shall be binding upon the Society unless in writing and until filed at its Home office. The Society assumes no responsibility for the validity of any assignment.

REINSTATEMENT. If this policy shall lapse in consequence of the non-payment of any premium when due, it may be reinstated at any time upon 40

Policy

the production of evidence of insurability satisfactory to the Society, and the payment of all overdue premiums, with interest at 5% per annum, and upon the payment or reinstatement of any indebtedness to the Society, secured by this policy, with interest at the same rate.

- 10 AGE. The amount of insurance payable under this policy, if the age has been misstated, shall be the amount which the premium charged would have purchased at the Society's rates in use at the register date hereof, for the insured's correct age.

THE CONTRACT. This policy constitutes the entire contract between the parties hereto.

Self-destruction, sane or insane, within one year from the date of issue hereof, is a risk not assumed by the Society under this policy.

- 20 AGENTS are not authorized to modify, or in event of lapse to reinstate this policy, or to extend the time for payment of any premium or instalment thereof.

PREMIUMS

- 30 This insurance is granted in consideration of the payment in advance of ONE HUNDRED AND FIFTY-NINE AND 55/100 DOLLARS—and of the payment ANNUALLY thereafter of A LIKE SUM upon each TWENTIETH day of AUGUST until the death of the insured.

PAYMENT. All premiums are payable in advance at the Home office or to any Agent or Agency Cashier of the Society, upon delivery on or before their due date, of a receipt signed by an executive officer of the Society (the President, a Vice-President, Secretary, Assistant Secretary, Comptroller, Deputy Comptroller, Treasurer, or an Assistant

Policy

Treasurer), and countersigned by said Agent or Agency Cashier. This policy is based upon the payment of premiums annually; but, premiums may be paid, subject to the Society's written approval in semi-annual or quarterly instalments at the Society's adopted rates for fractional premiums, provided that in the event of the death of the Insured any unpaid portion of the premium for the then current policy year shall be deducted from the amount of the death claim payable hereunder. 10

GRACE. A grace of thirty-one days, subject to an interest charge at the rate of 5% per annum will be granted for the payment of every premium after the first, during which period the insurance hereunder shall continue in force. If death occur within the days of grace, the premium for the then current policy year or any unpaid instalments thereof shall be deducted from the amount payable hereunder. 20

Except as herein expressly provided, the payment of any premium or instalment thereof shall not maintain this policy in force beyond the date when the succeeding premium or instalment thereof becomes payable.

30

40

Policy

**TABLE OF LOAN AND SURRENDER VALUES
PER \$1,000 OF INSURANCE.**

As this policy is for \$5,000 the values will be five times those stated below.

The term for which extended insurance will be granted remains the same without regard to the amount of the policy.

10

	After pol- icy has been in force.	Loan & cash value.	Paid up extended Insurance	Paid up Life Insurance
			Yr. Mo.	
	3 yrs.	\$ 38	3 11	\$ 79
	4 "	\$ 51	5 1	\$105
	5 "	\$ 70	6 9	\$141
	6 "	\$ 87	8 0	\$173
	7 "	\$107	9 4	\$209
	8 "	\$128	10 6	\$244
	9 "	\$149	11 6	\$279
	10 "	\$170	12 3	\$313
	11 "	\$189	12 9	\$341
	12 "	\$209	13 2	\$369
	13 "	\$228	13 6	\$396
	14 "	\$248	13 9	\$423
	15 "	\$269	13 10	\$449
	16 "	\$289	14 0	\$474
	17 "	\$309	14 0	\$498
	18 "	\$330	14 0	\$522
	19 "	\$351	13 11	\$545
	20 "	\$372	13 10	\$567
	21 "	\$392	13 9	\$589
	22 "	\$413	13 7	\$609
	23 "	\$434	13 5	\$629
	24 "	\$454	13 3	\$649
	25 "	\$475	13 0	\$667
	30 "	\$574	11 10	\$749

20

These values are exclusive of dividend additions, and are for completed policy years. They will be reduced if there is any indebtedness hereon.

If there are any dividend additions to this policy, these values will be increased thereby.

30

The loan obtainable at the end of any given end of any given year may be secured during that year, if the premium for the entire year has been paid.

Values for later years will be on the same basis and will be furnished on request.

**PROVISIONS RELATING TO THE FORE-
GOING TABLE.**

LOANS. At any time, while this policy is in force, after three full years' premiums have been paid, the Society will advance on proper assignment.

40

Policy

and delivery of this policy, and on the sole security hereof a sum not exceeding the loan value at the end of the then current policy year as stated in the above Table (increased by the cash value of dividend additions to this policy if any) less any indebtedness to the Society hereon, provided all premiums or instalments of the same have been fully paid. Interest at the rate of 5% per annum shall be payable in advance upon such loan to the end of the then current policy year, and annually in advance thereafter at the same rate. Unless the loan is for the purpose of paying premiums due the society, the granting of the same may be deferred by the Society, for a period not exceeding ninety days after receipt of application therefor. Failure to repay such loan or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal the total loan value nor until thirty-one days after notice shall have mailed to the Insured, and to the assignee of record if any, to their addresses last known to the Society.

OPTIONS ON SURRENDER OR LAPSE. After three full years' premiums have been paid hereon, upon any subsesquent default in the payment of any premium or instalment thereof, and within three months after such default, this policy may be surrendered by the Insured (or assignee if any) who may elect one of the following options:

(a) To receive the Cash Surrender value of this policy the payment of which may be deferred by the society for a period not exceeding ninety days after the receipt of the application therefor; or

(b) To continue the insurance for its face value (and any outstanding dividend additions) as paid-up extended term insurance for the period shown in the above Table, or for such further period, as

Policy

the dividend additions (if any) will purchase, but without future participation, or right to loans; or

(c) To purchase non-participating paid-up life insurance payable at the same time and on the same conditions as this policy.

10 In the event of default in the payment of any premium or instalment thereof after this policy has been in force three full years, if the Insured (or assignee if any) does not select one of said options within three months of such default, the insurance shall be continued as provided under Option (b).

If there be any indebtedness against this policy, the cash surrender value shall be reduced thereby, the paid-up insurance shall be reduced proportionately, and the extended term insurance shall be for the face value of the policy less the indebtedness and for such period as the reduced cash value will
20 purchase.

BASIS OF COMPUTATION. The values stated in the foregoing Table are mathematical equivalents and each is equal to the full Reserve as computed upon the American Experience Table of Mortality with 3% interest at the end of the then current policy year, less a surrender charge of not more than 1½% of the face of this policy until the completion of the tenth policy year at which time and thereafter there is no deduction made as a sur-
30 render charge.

MODES OF SETTLEMENT AT MATURITY OF POLICY.

The insured (or the beneficiary after the Insured's death in case the Insured shall have made no election) may, by written notice to the Society at its Home office, elect to have the net sum due under this policy upon the death of the Insured, either;

40 Option 1. Paid in Cash; or,

Policy

Option 2. Paid in a fixed number of Annual Instalments as set forth in the following table; or,

Option 3. Converted into a fixed Income to the beneficiary for life, by the payment of a fixed amount annually for twenty years certain, said payments to be continued thereafter during said life as shown by the following table, provided that if this option be availed of, the Society will require satisfactory evidence of the age of the payee. 10

If Option 2 or 3 is elected, this policy must be surrendered upon its maturity and a supplementary non-participating contract issued for the purpose of carrying out said Option.

TABLE OF INSTALMENTS FOR EACH \$1,000.

Option 2. Instalments certain.		Option 3. Life Income.			
No. of annual instal- ments	Amou of each instal- ment	Age of Payee when policy matures	Amount of each instal- ment	Age of Payee when policy matures	Amount of each instal- ment
5	\$212.00	17 or under	\$40.00	47	\$54.00
		18, 19, 20, 21	\$41.00	48, 49	\$55.00
10	\$113.82	22, 23, 24	\$42.00	50	\$56.00
		25, 26, 27	\$43.00	51, 52	\$57.00
15	\$ 81.33	28, 29, 30	\$44.00	53	\$58.00
		31, 32	\$45.00	54, 55	\$59.00
20	\$ 65.26	33, 34	\$46.00	56	\$60.00
		35, 36	\$47.00	57, 58	\$61.00
25	\$ 55.76	37, 38	\$48.00	59, 60	\$62.00
		39, 40	\$49.00	61, 62	\$63.00
30	\$ 49.53	41	\$50.00	63	\$63.00
		42, 43	\$51.00	64, 65, 66	\$64.00
40	\$ 42.00	44	\$52.00	67, 68	\$64.00
50	\$ 37.73	45, 46	\$53.00	69 or over	\$65.00

Executed this TWENTY-FIRST day of AUGUST, 1912, at the Home office of the Society in New York.

EXAMINED BY

W. Alexander, Secretary W. A. Day, President.
James Welsh, Asst. Registrar.

Policy

COVER
THE
EQUITABLE
LIFE ASSURANCE SOCIETY
of the United States.
120 Broadway
New York.

ORDINARY LIFE POLICY.

10

Amount of Insurance Payable at death.

Premiums payable during life.

Annual dividends.

No. 1,778,975

—David T. Finnie—

Amount \$5,000

Age 39

Annual premium \$159.55

Due 20th, August

Register date: August 20th, 1912.

20

A. S. HERENDEN,
149 Broadway, N. Y.

CHANGE OF BENEFICIARY REGISTER.

NOTE.—Entries in this register are to be made only by the Society at its Home office in New York. No other entries will be recognized.

Date endorsed—Jan. 14th, 1915.

Beneficiary—The executors, administrators or assigns of the Insured.

30 Endorsed by—Asst. Regis.

It is not necessary for the insured or beneficiant to employ any person, firm or corporation to collect the insurance or secure any benefit under this policy. Write direct to the Society, 165 Broadway, New York, or communicate with the nearest authorized agent of the Society whose duty it is to facilitate all settlements without charge.

40

Policy

FORM OF ASSIGNMENT OTHERWISE THAN
AS COLLATERAL SECURITY.

To be attached to and retained with the policy for use as evidence when required.

FOR ONE DOLLAR, to me in hand paid, and for other valuable consideration (the receipt of which is hereby acknowledged) I hereby assign, transfer and set over all my right title and interest in Policy No. 1,778,975 on the life of DAVID T. FINNIE issued by THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and all money which may be payable under the same to SARAH H. KELSEY, whose P. O. address is No. 360 North Grove St., East Orange, N. J., and for the consideration above expressed I do also for my executors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the abovenamed assignee, her executors, administrators and assigns; and her title to the said policy will forever warrant and defend.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this eighteenth day of January, 1915.

DAVID T. FINNIE.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

On this 18th day of January in the year of Our Lord 1915 before me personally came DAVID T. FINNIE to me known and known to me to be the individual described in and who executed the foregoing assignment, and acknowledged that he executed the same.

W. R. WARNER,
Notary Public.

Receipt and Agreement

EXHIBIT D. 4.

No. (Copy)

New York, January 18, 1915.

Received from S. H. Kelsey, Ninety-five and 00/100 Dollars, representing the cash value under policy No. 1,778,975, on the life of David T. Finnie, per following statement:

10	3rd year guaranteed cash value.....	\$190.00
	3rd annual cash dividend due Aug. 20, 1915	25.00
		<hr/>
		215.00

	less amount paid Society by S. H. Kelsey a/c	
	3rd annual premium	120.00
		<hr/>

	Net amount paid D. T. Finnie January 18,	
	1915	\$95.00
		<hr/>
	\$95.00	

20

(Signed) DAVID T. FINNIE.

EXHIBIT D. 9.

January 18, 1915.

Received from David T. Finnie his note for Two Hundred Fifteen and 00/100 (\$215.00) dated January 18, 1915, drawn to my order at four months, payable at the Coal & Iron National Bank, New York. This is my agreement to protect the said note at maturity, the maker being duly released from all liability thereunder.

30

40

Letter and Premium Receipt

EXHIBIT D. 10.

May 18, 1915.

Dear Mr. Finnie

Herewith you will find your note for \$215.00 which I lifted today in accordance with the agreement, dated January 18, 1915, given you at the time this note was drawn. Will you be good enough to return said agreement to me in enclosed envelope.

10

Trusting this letter finds you in good condition, with kind regards, I remain

Yours very truly,

MR. DAVID T. FINNIE,
Chestnut Street,
Westfield, N. J.

EXHIBIT D. 5.

20

THE
EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES.

165 Broadway, New York City.

Received the Annual Premium described below

Date Due	Policy Number	Premium
1914 Aug. 20	1,778,975	\$159.55

Mr. David T. Finnie,

c/o Hecker Jones Mlg. Co. Produce

Exch. Bldg. Bway, New York City.

30

Countersigned

C. U. Webster, Metropolitan Cashier

By C. W. Rowe

A. R. Howe

Treasurer.

This receipt is not binding unless countersigned by a cashier or collecting agent of the Society.

40

Premium Receipts

EXHIBIT D. 6.

THE
EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES.

165 Broadway, New York City.

Received the Annual Premium described below

10	Date Due	Policy Number	Premium
	1915 Aug. 20	1,778,975	\$159.55

Mr. David T. Finnie,

c/o Hecker Jones Mlg. Co. Produce

Exch. Bldg. Bway, New York City.

Countersigned

C. U. Webster, Cashier

By C. Krommullen, Jr.

A. R. Howe,

Treasurer.

20 This receipt is not binding unless countersigned
by a cashier or collecting agent of the Society.

EXHIBIT D. 7.

THE
EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES.

120 Broadway, New York

Received the Annual Premium described below

30	Date Due	Policy Number	Premium
	1916 Aug. 20	1,778,975	\$159.55

Mr. David T. Finnie,

c/o Hecker Jones Mlg. Co. Produce

Exch. Bldg. Bway, New York City.

Countersigned

C. U. Webster, Cashier

By C. Krommullen, Jr.

A. R. Howe,

Treasurer.

40 This receipt is not binding unless countersigned
by a cashier or collecting agent of the Society.

Premium Receipt and Statement

EXHIBIT D. 8.

THE
EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

120 Broadway, New York

Received the annual premium described below

Date Due	Policy Number	Premium	
1917 Aug. 20	1,778,975	\$159.55	10

Mr. David T. Finnie

c/o Hecker, Jones Mlg Co. Produce

Exch. Bldg. Bway, New York City.

Countersigned,

C. U. Webster, Cashier

By W. H. Smith

A. R. Howe

Treasurer

This receipt is not binding unless countersigned
by a cashier or collecting agent of the Society. 20

EXHIBIT P. 2

CLAIMANT'S STATEMENT

Notice is hereby given to THE EQUITABLE
LIFE ASSURANCE SOCIETY of the UNITED
STATES. That David T. Finnie of Westfield Coun-
ty of Union and State of New Jersey has died; that
said David T. Finnie was the same person whose
life was insured by said Society by its Policy No.
1,778,975. Dated August 20, 1912, for the sum of 30
\$5000 Dollars and in proof of claim under said
Policy, does answer as follows:

1. Name of decedent—David T. Finnie.
2. Residence—Westfield, N. J.
3. Occupation—Invalid; no occupation for past 2
years.
 - a. Date of birth—October 22, 1873.
4. b. Place of birth—Harrisburg, Kentucky.
 - c. Parents' names, giving mother's maiden name. 40

Claimant's Statement

5. Whence is the date of birth derived—from family record, certificate of birth or otherwise?—Personal knowledge and records.
6. Place and date of death—Loomis Sanatorium, Liberty, N. Y., Sept. 18, 1917.
7. How many years have you known the decedent? "All my life" is not an answer—4 years.
- 10 8. State all facts regarding cause and circumstances of death—Chronic diffuse Nephritis and Pulmonary Tuberculosis.
9. State the precise duration of the last illness of the decedent.—Several months.
- a. In what capacity, or by what title do you claim the Insurance.—a. As assignee.
10. b. State your present age.—b.
- c. State who has possession of the policy.—c. I have as assignee.
- 20 11. Had the decedent any other insurance on his life? If so state in what companies and for what amount and the dates of the Policies, respectively.—Equitable Life, \$30,000. Issued Aug. 20, 1912 and Sept. 13, 1912.
12. Unless the policy is on the Life Income, Bond or Non-commutable Instalment Plan, state settlement desired, whether certificate of Deposit, Instalment, Life Income, Gold Bond or Cash. (See various modes of settlement on back hereof)—Cash settlement desired.
- 30

Dated at New York this twentieth day of September, 1917.

(Signed) SARAH H. KELSEY.

350 No. Grove Street, East Orange, N. J.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

40 On this 20th day of September, 1917, personally appeared before me SARAH H. KELSEY, to me known, and known to me, and made oath that the

Certificate of Death

answers to the foregoing questions are true and full, to the best of her knowledge, recollection and belief.

S. C. DRESCHER,
Notary Public, No. 1872, Queens County,
New York Co., 121.

STANDARD CERTIFICATE OF DEATH 10
STATE OF NEW YORK

County—Sullivan.

Town or Village or City—Liberty.

Registered No.

No. Loomis Sanatorium. . . . St. Ward)

2. Full name—David T. Finnie.

Personal and Statistical Particulars.

3. Sex—Male.

4. Color or Race—White.

5. Single, married, widowed or divorced.—Married. 20

6. Date of Birth—Mo., October; Day, 22; Year, 1874.

7. Age—42 yrs., 10 mos., 27 da.

8. Occupation—(a) Trade profession or particular kind of work—Sales manager.

(b) General nature of industry, business or establishment in which employed (or employer)

9. Birthplace—Kentucky.

10. Name of father—David J. Finnie.

11. Birth place of father—Scotland. 30

12. Maiden name of mother—Sarah Stinnet.

13. Birthplace of mother—Scotland.

14. The above is true to the best of my knowledge.

(Informant) Loomis Sanatorium

(Address) Loomis, N. Y.

15. Filed—Sept. 19, 1917, W. B. Hand, Register.

Medical Certificate of Death.

16. Date of death—Mo., Sept.; Day, 18; Year, 1917.

17. I hereby certify, that I attended deceased from 40

Certificate of Death

Sept. 14, 1917 to Sept. 18, 1917, that I last saw him alive on Sept. 18, 1917, and that death occurred, on the date stated above at 6:15 P. M. The CAUSE OF DEATH was as follows: Chronic Diffuse Nephritis. Duration, 6 Yrs. Contributory Chronic Pulmonary Tuberculosis. Duration, 6 Yrs. (Signed) Henry L. Shively, M.D., Sept. 18, 1919 (Address) Loomis, N. Y. State the Disease causing death or deaths from Violent Causes, state (1) Means of Injury, and (2) whether Accidental, Suicidal or Homicidal.

10

18. Length of residence (for Hospitals, Institutions, Transients, or recent residents).

At place..... in the of death.....
Yrs....Mos. 4 Da..... Where was disease contracted if not at place of death? Former or Usual residence—Westfield, N. J.

20

19. Place of Burial or Removal—New York City.

20. Undertaker.

21. Date of Burial—Sept. 19, 1917. Address—Liberty, N. Y.

Burial or Transit—Permit issued by W. B. Hand.
Date of issue—Sept. 19, 1917.

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Bill of Complaint

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE DISTRICT OF NEW JERSEY.

 WILLIAM RYAN,

Complainant,

vs.

SARAH H. KELSEY,

Defendant.

 } *Bill to Establish a Trust,
and for other Relief.*

10

To the Judges of the District Court of the United States, for the District of New Jersey:

William Ryan, a citizen of the State of New York, and residing in West New Brighton, City of New York, County of Richmond, and State of New York, brings this, his bill, against Sarah H. Kelsey, a citizen of the State of New Jersey, and residing in the City of East Orange, County of Essex, and State of New Jersey.

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And thereupon complainant complains and says that:

1. There is a diversity of citizenship between complainant and defendant; the amount in controversy is in excess of \$3,000, exclusive of interest and costs; and the complainant has no adequate remedy at law.

30

2. On or about August 21, 1912, the Equitable Life Assurance Society of the United States issued to one David T. Finnie, its life insurance policy, believed to be numbered 1,778,975, but this the complainant does not aver, insuring the life of the said David T. Finnie in the principal sum of \$5,000. The said principal sum of \$5,000 was made payable to Nelle E. Finnie, wife of said David T. Finnie, as beneficiary, but the right to revoke the designa-

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Bill of Complaint

tion of said beneficiary was reserved to said David T. Finnie. Thereafter, and on or about January 14, 1915, the said David T. Finnie, acting upon the right to revoke thus reserved, revoked the designation of said Nelle E. Finnie as beneficiary, and the policy thereupon became payable, upon the death of the assured, to his estate or assigns.

10 3. On or about January 18, 1915, the said David T. Finnie assigned said policy to Sarah H. Kelsey, the defendant herein, by an assignment absolute in form, and for the expressed consideration of \$1.00.

4. At the time the said David T. Finnie assigned said policy of life insurance to said Sarah H. Kelsey, the said Sarah H. Kelsey did not have, nor did she thereby obtain, nor has she since acquired, the interest, insurable or other, necessary
20 to support said absolute assignment of said life insurance policy.

5. After the death of said David T. Finnie, and on or about September 20, 1917, the said Sarah H. Kelsey, the defendant herein, being still the assignee in possession of said policy, collected from the Equitable Life Assurance Society of the United States, the whole principal sum of the face of said policy, amounting to \$5,000.

30 6. On or about October 10, 1917, Nelle E. Finnie, widow of said David T. Finnie, was appointed administratrix of the estate of said David T. Finnie, and on or about October 26, 1917, letters of administration upon said estate were issued to her by the Surrogate of Union County, New Jersey, as more fully appears by the certificate of said letters of administration annexed hereto.

7. Thereafter the said Nelle E. Finnie, as administratrix of the said estate of David T. Finnie,
40 deceased, demanded of said Sarah H. Kelsey, the

Bill of Complaint

defendant herein, that she deliver to her, the said Nelle E. Finnie, administratrix, the proceeds of said policy, less any claim or claims which she, the said Sarah H. Kelsey, might have against said estate of David T. Finnie, deceased, and which claim or claims said Nelle E. Finnie, administratrix, should approve or admit. But said Sarah H. Kelsey utterly failed and refused to deliver to said Nelle E. Finnie, administratrix, said proceeds of said insurance policy, or any part thereof, and has not yet delivered same, or any part thereof. 10

8. On January 17, 1918, complainant herein obtained a judgment in the District Court of the City of Elizabeth, County of Union, and State of New Jersey, against said Nelle E. Finnie, as administratrix of the estate of David T. Finnie, deceased, which said judgment was on February 7, 1918, duly docketed in the Court of Common Pleas in and for the County of Union, and State of New Jersey. Execution issued out of said Court of Common Pleas on February 7, 1918, and was returned unsatisfied on February 9, 1918, as more fully appears by the certified copy of said judgment, execution, and return annexed hereto. Neither said judgment, nor any part thereof, has since been paid. 20

9. The said David T. Finnie was not, at the time his decease, seized of lands, or any interest therein, to which the lien of said judgment can attach, or out of which the said judgment may be satisfied, as more fully appears by the affidavit of Nelle E. Finnie, annexed hereto. 30

10. Complainant further demanded of said Nelle E. Finnie, administratrix, that she forthwith bring suit against the said Sarah H. Kelsey, defendant herein, to establish the proceeds of said policy as a trust fund in the hands of said Sarah H. Kel- 40

Bill of Complaint

sey for the benefit of said estate of David T. Finnie, deceased, in order that the complainant's said judgment might be satisfied therefrom; but the said Nelle E. Finnie, administratrix, refused, and has utterly failed to bring such, or any, suit for the purpose aforesaid.

11. Thereafter the complainant herein, as a
10 judgment creditor of said estate of David T. Finnie, deceased, demanded of said Sarah H. Kelsey, defendant herein, that she deliver to said Nelle E. Finnie, administratrix, the proceeds, over and above her just claims, of said insurance policy upon the life of said David T. Finnie, amounting to \$5,000, so collected from the Equitable Life Assurance Society of the United States, and held by her. But said Sarah H. Kelsey utterly failed and refused to
20 deliver said proceeds, or any part thereof, to said Nelle E. Finnie, administratrix, and has not yet delivered same, or any part thereof.

12. So long as the proceeds of said life insurance policy are vested in said Sarah H. Kelsey by a legal title, the complainant is unable to collect his said judgment therefrom, or fasten his said judgment as a lien thereon.

13. Complainant is informed and believes, and therefore avers, that said defendant has mingled
30 the said proceeds of said life insurance policy with her general funds, and further is informed and believes, and therefore avers, that said general funds are, or may become, an insufficient security for said proceeds.

And complainant prays that a Rule to Show Cause why a receiver should not be appointed to conserve the assets of said defendant pending the determination of this suit be granted forthwith, or that defendant give a sufficient bond therefor, and that upon final hearing of this cause, it be
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Bill of Complaint

ordered and decreed that the said absolute assignment made by the said David T. Finnie to Sarah H. Kelsey of said policy (so believed to be numbered 1,778,975), issued by said Equitable Life Assurance Society of the United States upon the life of said David T. Finnie, in the principal sum of \$5,000, be declared to be as security only for such sums as shall appear, upon proof thereof within a competent jurisdiction, to have been advanced to, or on behalf of, said David T. Finnie, during his lifetime, by said Sarah H. Kelsey, together with interest thereon; that, as to any balance then remaining in the hands of said Sarah H. Kelsey, with interest thereon from date of payment thereof by said Equitable Life Assurance Society of the United States to said Sarah H. Kelsey, the said Sarah H. Kelsey be declared to be trustee for the benefit of the said estate of David T. Finnie, deceased; that said Sarah H. Kelsey forthwith make an accounting to said Nelle E. Finnie, administratrix, and pay over to her, as administratrix, any balance such accounting shall show is then remaining in her hands, with interest; and for such other and general relief as may to the court be deemed just and equitable.

E. A. MERRILL,

*Solicitor for, and of Counsel
with, Complainant.*

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Petition

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF NEW
JERSEY.

10	WILLIAM RYAN, <div style="text-align: right;"><i>Complainant,</i></div>	}	<i>Bill to Establish a Trust, and for Other Relief.</i>
10	<div style="text-align: center;"><i>vs.</i></div> SARAH H. KELSEY, <div style="text-align: right;"><i>Defendant.</i></div>		<i>Petition to be admitted as Party-Complainant.</i>

The petition of Nelle E. Finnie respectfully shows:

- 20 1. Your petitioner resides in the City of Plainfield, County of Union, and State of New Jersey.
2. Your petitioner is the widow of one David T. Finnie, who died intestate September 18, 1917. And inasmuch as there were no children of the marriage, your petitioner is the sole distributee under the laws of the State of New Jersey.
- 30 3. On March 5, 1918, William Ryan filed his bill of complaint against Sarah H. Kelsey, for the purpose of having established as a trust fund in the hands of said Sarah H. Kelsey, and for the benefit of the estate of said David T. Finnie, a part or all of the proceeds of a certain policy of life insurance upon the life of said David T. Finnie, in the principal sum of \$5,000, which said policy was assigned to said Sarah H. Kelsey by said David T. Finnie, and the proceeds of which were collected by said Sarah H. Kelsey after the death of said David T. Finnie.
- 40 4. Your petitioner, as sole distributee, has an interest in said proceeds of said life insurance

Consent

policy, or in so much of said proceeds as may be decreed to be a trust fund in the hands of said Sarah H. Kelsey for the benefit of the estate of said David T. Finnie.

Your petitioner, therefore, prays that she may be admitted as a party-complainant in the above entitled cause; and, if so admitted, is willing to, and does accept as her own the bill of complaint filed in said cause by the complainant, William Ryan. 10

NELLE E. FINNIE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

WILLIAM RYAN, <p style="text-align: center;"><i>vs.</i></p> SARAH H. KELSEY, 	Complainant, Defendant.	} <i>Bill to Establish a Trust, and for Other Relief.</i> } <i>Consent to be Bound by Decree.</i>	20
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I hereby consent to be bound by any final decree entered in the above entitled cause, now pending in the District Court of the United States for the District of New Jersey. 30

NELLE E. FINNIE,
Administratrix of the Estate of David T. Finnie, deceased.

Witness:

ROBERT NEWTON CRANE.

Decree of District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

	WILLIAM RYAN, <i>et al</i> ,	} <i>Plaintiff,</i>	<i>In Equity.</i>
	<i>vs.</i>		<i>On Bill to</i>
10	SARAH H. KELSEY,	} <i>Defendant.</i>	<i>Establish a</i>
			<i>Trust.</i>
			<i>Final Decree.</i>

This cause came on to be heard at the November, 1918, Term of this Court, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the Bill of Complaint be and it is dismissed, with costs to the defendant to be taxed.

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JOHN RELLSTAB,
Judge.

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Excerpt—Decree of Appellate Court

WILLIAM RYAN, <i>Complainant-Appellant,</i> <i>vs.</i> SARAH H. KELSEY, <i>Defendant-Appellee.</i>	}
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Appeal from the District Court of the United States for the District of New Jersey.

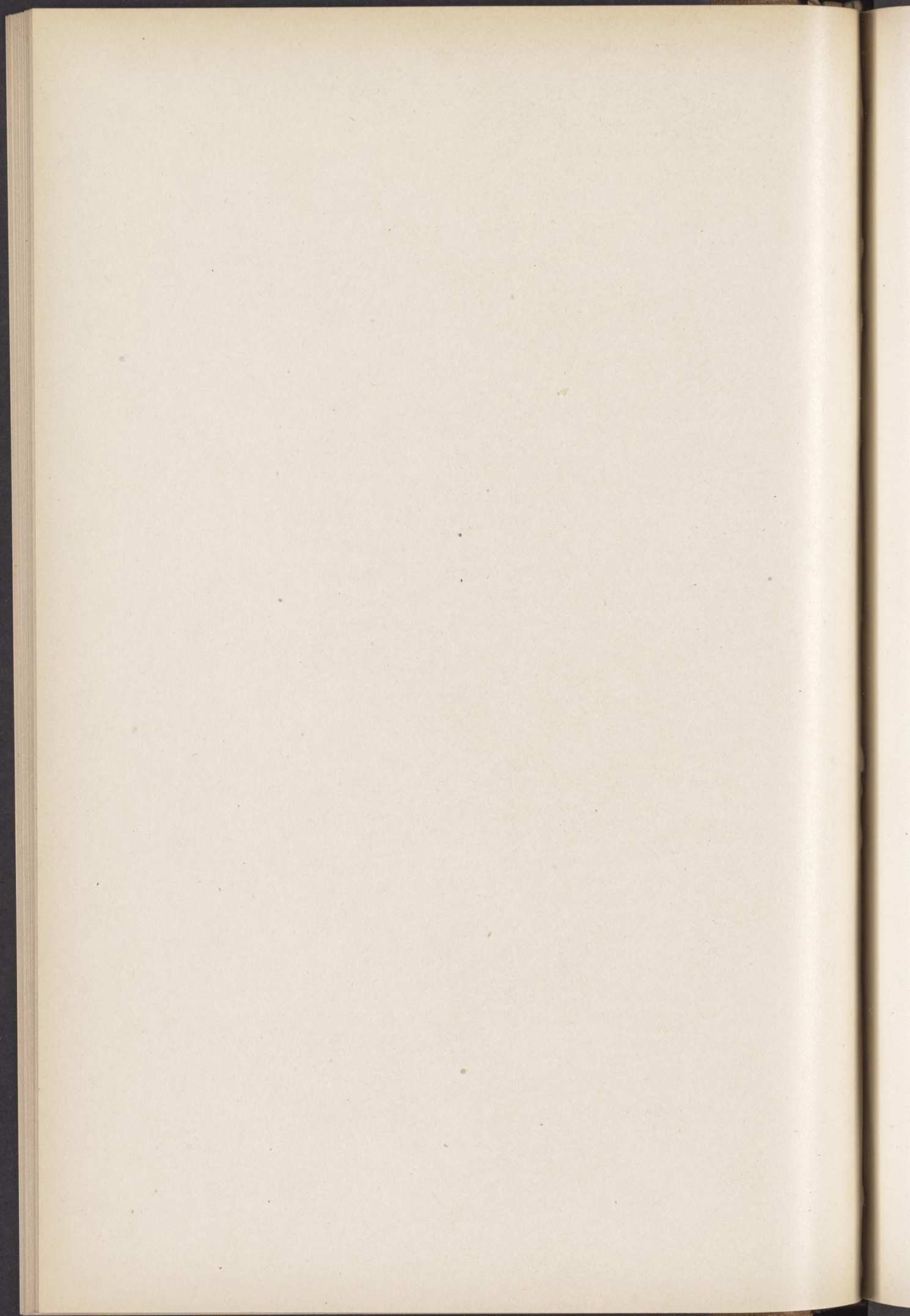
Except from the decree of the United States Circuit Court of Appeals for the Third Circuit.

“We are of opinion that the administratrix of the insured is an indispensable party to this action. As her absence from the record deprives the court of jurisdiction, and as her presence would, because of identity of citizenship with that of the defendant, instantly oust the court of jurisdiction otherwise properly acquired, we affirm the decree dismissing the bill without discussing or deciding the merits of the controversy.”

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New Jersey Court of Errors and Appeals

NELLE E. FINNIE, Administratrix
of the Estate of DAVID T.
FINNIE, deceased.

Plaintiff-Appellant,

vs.

SARAH H. KELSEY,

Defendant-Respondent.

Action-at-Law.

On Appeal.

BRIEF FOR PLAINTIFF-APPELLANT

This is an appeal from a directed verdict in the Essex Circuit of the Supreme Court. The plaintiff alleged that a certain assignment of a life insurance policy was made as a collateral security, while the defendant claimed that the assignment was a sale of the policy. The trial judge directed a verdict for the defendant.

ADMITTED FACTS

One David T. Finnie was, on January 18, 1915, the holder and owner of a life insurance policy in the principal sum of \$5,000, issued to him by the Equitable Life Assurance Society of the United States.

On that date Finnie was indebted to the Society in the sum of \$120.

On that date Finnie assigned his policy to Sarah H. Kelsey, the defendant-respondent, by an assignment in writing, and for the expressed consideration of one dollar.

Co-incidentally with the assignment, and as a part of that transaction, Finnie made his promissory note in the principal sum of \$215 to one A. S.

Herenden, who thereupon discounted the note at his bank, had the proceeds credited to his personal account, and against his personal account drew two checks. One check, in the principal sum of \$120, was made payable to the Society and was delivered to the Society in payment of Finnie's indebtedness to it. The other check, in the principal sum of \$95, was made payable to and delivered to Finnie. The two checks aggregated \$215, the amount of Finnie's note.

No other or further payment was made to David T. Finnie by A. S. Herenden or Sarah H. Kelsey.

In this transaction Herenden acted on behalf of Sarah H. Kelsey, the defendant-respondent.

The note was not paid.

Finnie died September 18, 1917, and on September 20, 1917, the said Sarah H. Kelsey collected the proceeds of the policy, amounting to \$5,123.54.

Thereafter the plaintiff-appellant herein was appointed administratrix of the estate of David T. Finnie, and demanded that the defendant-respondent herein pay to her, as administratrix, the difference between the proceeds of the policy and the note with interest, plus the costs, if any, of keeping the policy alive.

Upon the refusal of the defendant-respondent to comply with the demand this action was brought.

There are five Grounds of Appeal:

1. Because the trial judge, upon the trial of said cause, directed a verdict in favor of the defendant and against the plaintiff, whereas said trial judge should have submitted the case to the jury for its verdict.

2. Because the trial judge denied the motion of the plaintiff that the complaint be amended by adding one Arthur S. Herenden as a party defendant.

3. Because the following papers were admitted in evidence:

a. An unsigned carbon copy dated January 18, 1915.

b. An unsigned carbon copy dated May 18, 1915.

4. Because the following questions were overruled:

a. At the time that this policy was issued were other policies issued to Finnie by the Equitable Life Insurance Company?

b. If Finnie could not have borrowed on this policy he could not have borrowed on any similar policy, could he?

5. Because the following questions were admitted:

a. Do you know whether or not Mr. Finnie expressed any desire to sell this policy?

b. And when was it that he told you he wanted to sell it? (*i. e.* this policy.)

c. At the time Miss Kelsey received the assignment which is in evidence and paid or caused to be paid the \$95 to Mr. Finnie, did she personally and physically have the money available or did she have to take some steps to raise it?

FIRST GROUND OF APPEAL

The solution of the question raised by a directed verdict has been clearly stated by this Court in *Anderson vs. Central R. R. Co.*, 68 N. J. L., 269. There the Court said: "The bill of exceptions discloses that a verdict in favor of the defendant was directed by the trial judge, and the sole question presented on this argument is whether the trial judge erred in such direction. This question will be solved by determining whether the evidence,

viewed in the aspect most favorable to the plaintiff, would have supported any other verdict than that which was directed."

POINT I.

The Admitted Facts Set Forth a Collateral Loan

It is the contention of the plaintiff that the admitted facts made out a *prima facie* case for the plaintiff, and that the defendant's evidence, even that admitted over objection, not only failed to justify a directed verdict for the defendant, but left the plaintiff's *prima facie* case unimpaired, if not strengthened.

In the admitted facts we have all the elements of an ordinary collateral loan transaction. The giving of the note for \$215; the receipt of \$215; and the co-incident assignment of a valuable security for a nominal consideration. The only unusual element is the fact that the note was made to one party, while the assignment was made to another party, and this is explained by the parties themselves as having been so done for their mutual convenience (R. 28, l. 3).

When one simultaneously assigns a valuable security for a nominal consideration and executes and delivers his negotiable note, and receives a single consideration which is the face amount of the note, the transaction *is* a collateral loan. The obligee, even by the usual absolute form of assignment, acquires merely the title to, and a contingent interest in, and not the absolute ownership of, the security. The vesting of title gives the right, *upon default in the payment of the note*, and by virtue of the contract to repay the amount of the note, and not by virtue of any vesting of ownership given by the contract of assignment, to vest ownership in another by a sale of the security; but this

does not give the obligee the ownership of the entire proceeds of the sale, but only of so much of the proceeds as will satisfy his claim.

Immediately it is admitted that there is but one consideration for the co-incident delivery of a note and a thing of value, and that the consideration is the amount of the note, the presumption arises that the thing of value secures the amount of the note, and this *is* a collateral loan.

POINT II.

The Evidence Supports the Admissions

Upon the admitted facts, and viewing the transaction in the aspect most favorable to the plaintiff—as required by the rule—the jury must have concluded that the transaction was a collateral loan. Was, then, the testimony on behalf of the defendant, also viewed in the aspect most favorable to the plaintiff, nevertheless so “conclusive” of a sale as to annihilate the *prima facie* case made out upon the admitted facts; for on no other hypothesis can the direction of a verdict be supported under the rule laid down by this Court in *Meyers vs. Birch*, 59 N. J. L., 238, where you say: “The rule is well settled that a jury should be controlled in its verdict by a peremptory instruction only where the testimony is of such conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony.”

And first as to the *form* of the assignment, which was on a printed blank provided by the Society (R. 65, l. 1). Mr. Herenden testified, “It is in the regular form of the Society’s assignment” (R. 22, l. 37); and in answer to the question: “That assignment was the printed form furnished by the Life Insur-

ance Company, was it?" he replied: "The form the Equitable always uses, yes, the printed form in use by all companies" (R. 32, l. 27).

It is well known that, upon the transfer of a policy, insurance companies require an absolute assignment to be filed with the company issuing the policy, in order to protect the company from claims by others than the policyholder, irrespective of the purpose of the assignment as between the parties thereto. In *Page vs. Burnstine*, 102 U. S., 664-670, the Court remarked of an absolute assignment of a life insurance policy, that it "may be construed as simply appointing Burnstine, upon the death of the assured, to receive from the company such sum as would then be due on the policy, and, after reimbursing himself to the extent of his loans to Page, to repay the balance to the persons entitled thereto."

Nowhere in the assignment does the word "sell" occur, and this is significant. The ordinary form of assignment, where a sale is intended, is—"sell, assign, transfer, and set over," but this assignment reads—"I hereby assign, transfer, and set over," without more (R. 65, l. 9). It may fairly be inferred that the Society, having no interest in the purpose of an assignment to a third party, designedly omitted the word "sell" from the form which it required for its own protection.

Merely to "assign" is not necessarily to "sell." Doubtless the Court will take judicial notice of the well-known fact that it is customary business practice to require absolute assignments of collateral securities for the express purpose of vesting title, and to give the assignee the power to deal with the securities as if they were his own after the default of the assignor in his engagement to repay, but without vesting ownership. If the security is sold prior to default, such assignment protects an inno-

cent third party, but it does not protect the assignee from an action for fraud or conversion.

The recital of a merely nominal consideration, and the omission of the alleged real consideration, is also highly significant. The recital of a consideration of one dollar is not only common practice where the assignment is by way of collateral security, but it is also common practice to state the real consideration upon a sale, and, under the circumstances existing here, the recital of the real consideration, if a sale, was imperative. The absence of the alleged consideration supports the inference that the transaction was a collateral loan, and repels the inference that the transaction was a sale.

The suggestion put forward (R. 11, l. 5) that the assignment embodies the entire contract, and is the only evidence to be considered, under the rule laid down in *Naumberg vs. Young*, 44 N. J. L., 331, that where the parties have put their *entire* contract in writing the written contract shall be the only evidence of the contract, simply begs the question. To admit that the instrument of assignment is conclusive evidence of the fact of assignment is not an admission that the assignment encompassed the entire transaction, and no such conclusion necessarily follows. In fact not only does the assignment bear internal evidence that it does not embody the entire contract, but the respondent introduced evidence to prove that there were other terms, based in part upon oral agreement, and in part upon other writings. It is admitted in the pleadings that the making and delivery of the note was a part of the transaction, and that there was but one consideration, and supplementing the pleadings the respondent put in evidence a so-called receipt and agreement as also being a part of the transaction and necessary to its understanding.

Both parties are agreed, and the pleadings and evidence show, that the assignment must be read and considered in the light of all the facts constituting a part of the *res gestae*.

The fact and form of assignment are, therefore, not conclusive, but the purpose of the assignment as between the parties may be shown, or may be implied from the surrounding circumstances.

Taken by itself this instrument of assignment is merely evidence that the policy was *assigned*; it is *not* evidence that the policy was *sold*, and no such determination can possibly be made without holding that every assignment transfers the absolute ownership unless it bears indisputable internal evidence that it is given by way of collateral security. Such a decision would bring down the whole structure of commercial collateral loans, because such assignments are, practically without exception, absolute in form, and the assignor must rest upon evidence *dehors* the instrument of assignment to prove his beneficial interest in the security.

Courts constantly admit evidence of attending circumstances in order to explain the purpose of assignments. In *Bacon, Admr. vs. Kienzel, et al.* 21 Atl. Rep., 37 (N. J.), two life insurance policies, each in the principal sum of \$5,000, were assigned by the assured to his attorney in the following terms:

"For value received I hereby transfer, *sell*, assign, and set over to Geo. Wm. Caruth my two policies in the Mutual Benefit Life Insurance Co. of Newark, N. J., * * * with full power in the said Caruth to sell and dispose of the same when and how he deems best."

Thereafter Caruth assigned these policies to Kienzel and Holmes, two judgment creditors of Brown, in the following terms:

"For value received I do hereby assign, transfer, and set over to Jacob Kienzel and John S. Holmes of Bridgeton, N. J., the above named policies of insurance, and all sum or sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise, to be had or made by virtue thereof, to have and to hold unto the said Jacob Kienzel and John S. Holmes, their executors, administrators, and assigns."

The assignees, upon the death of the assured, claimed the entire proceeds, but the Court said: "The fact that the assignment is absolute upon its face is not controlling. The Court may nevertheless consider all the circumstances which the evidence shows attended the transaction whether they be of an affirmative or of a negative character. If these circumstances show that the transfer was only designed to secure an existing indebtedness, it is the duty of the Court to so declare."

In *New Jersey Produce Co. vs. Gluck*, 79 N. J. L., 115, the Court said that, as all the evidence had not been certified to it, "it may well have been that the trial judge had before him evidence, other than the written assignment, warranting his finding of an assignment of the book account."

And in the present case the Chief Justice, upon denying a motion to strike out the complaint, said: "On the face of the paper I cannot say that it was not collateral" (R. 17, l. 9).

The so-called "receipt" offered by the defense reads as follows:

"New York, January 18, 1915.

"Received from S. H. Kelsey, Ninety-five and 00/100 Dollars, representing the cash value under

policy No. 1,778,975 on the life of David T. Finnie,
per following statement:

Third year guaranteed cash value.....	\$190.
“ Annual Cash dividend due August 20, 1915	25.

\$215.

Less amount paid Society by S. H. Kelsey a/c third annual premium.....	120.
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Net amount paid D. T. Finnie, January 18, 1915	\$95.
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(Signed) DAVID T. FINNIE. (R. 66, l. 1.)

This is simply a memorandum showing how the amount of \$95, which was paid directly to Finnie, was arrived at. It is significant that the word “sell” or “sale” nowhere appears. In fact, it is significant, if not conclusive, that the words “purchase,” “sell” or sale” do not appear in a single document; not one of these words is found in the assignment, in this receipt, or in the correspondence between the parties. Surely, nothing would have been more natural, if a sale were contemplated, than the recital somewhere that Finnie was selling, or that Miss Kelsey was buying, this policy. The jury might fairly ask: Why, if this was a sale did not the receipt read: “being the purchase price”; or: “Received \$95 in consideration of the sale of, etc., etc.” But the receipt merely says: “Representing the cash value,” that is the cash going directly to Finnie, “per following statement,” which simply shows how the loan value of \$215 was arrived at, and its distribution. As Herenden said, as soon as \$120 was paid the company the policy became worth \$190 plus the \$25 dividend, making it \$215 (R. 23, l. 30).

The defense also put in evidence, over the plain-

tiff's objection, an unsigned carbon copy of an alleged agreement made by Herenden reading as follows:

January 18, 1915.

"Received from David T. Finnie his note for Two Hundred Fifteen and 00/100 (\$215.00) dated January 18, 1915, drawn to my order at four months, payable at the Coal & Iron National Bank, New York. This is my agreement to protect the said note at maturity, the maker being duly released from all liability thereunder" (R. 66, l. 24).

There were three parties to this transaction—Finnie the plaintiff's intestate, Miss Kelsey the defendant, and Hereden. Finnie is dead, and Miss Kelsey and Herenden, arrayed in opposition to Finnie, are the only living witnesses to the transaction. The plaintiff labors under the disability that Finnie's testimony is not available to explain, qualify or contradict, while the defense can submit in evidence what it deems to be to the defendant's advantage and suppress what it deems to be to her disadvantage.

Nevertheless the paper, if proper evidence, is subject to a clear and convincing explanation provided by Herenden and Miss Kelsey themselves.

An action was brought against this defendant in the United States District Court by one Ryan, a creditor of the decedent Finnie, to impress a trust upon the proceeds of the policy, but the complaint was dismissed for want of jurisdiction (R. 81, l. 15). In the trial of that case Herenden testified that the purpose of this agreement was to protect Finnie from being pressed for payment by the bank at which Herenden had discounted the note (R. 36, l. 14).

Nothing could have been more natural. Finnie had given his negotiable note for \$215 to Herenden

under an agreement that Miss Kelsey, the real creditor and the holder of the collateral security, should pay over to Herenden the \$215 with which to take up the note from the bank at maturity, and this Miss Kelsey did (R. 28, l. 32). Of course, therefore, Herenden agreed to protect Finnie from being pressed by the bank for the payment of the note, as Herenden was to have in hand the funds provided by Miss Kelsey for that purpose.

This left the transaction just where, as a matter of law, it began, with an existing indebtedness of Finnie to Miss Kelsey, protected by the assignment of his policy, and with the elimination of Herenden as a further party to the transaction.

Nor need any conclusion adverse to the plaintiff be drawn from the fact that, after the assignment, the defendant paid the premiums. It appears in the claimant's statement that Finnie was without occupation, and an invalid for two years prior to his death (R. 69, l. 35) and this sufficiently explains his failure to pay the premiums and take up the loan.

As a matter of fact, however, it was optional with the defendant to pay, or not to pay, further premiums, for she had three options none of which required further premium payments. She could elect whether she would surrender the policy and get her money back, or exchange the policy for a paid-up life policy in the sum of \$395, or carry the policy at its full face value for a period of three years and eleven months from the succeeding August 20th (R. 39, l. 25). Furthermore, if the transaction was, in its inception, a collateral loan, it remained such unless thereafter modified by agreement between the parties. It is not claimed that the original transaction was subsequently changed, and the collateral therefore remained subject to redemption. "Once a mortgage always a mortgage."

There is nothing in evidence, then, to disturb the *prima facie* case made by the pleadings.

In *Carroll vs. Central R. R. Co.*, 81 N. J. L., 567, this Court said: "Where there is a substantial dispute as to the facts or the inferences to be drawn therefrom, it is not the province of the court to determine with whom the preponderance of evidence lies; that is for the jury to determine."

The same position was taken by this Court in *Broame vs. N. J. Conference*, 83 N. J. L., 621, where you said: "A trial court cannot direct a verdict where there is a substantial dispute as to the facts or the inferences to be drawn therefrom."

It is the plaintiff's contention that this case presents such substantial dispute, and that the trial judge erred in directing a verdict.

That the trial judge insisted on limiting the issue to a consideration of the assignment as an isolated and independent transaction, and erroneously withdrew from the jury the consideration of the effect of the surrounding circumstances, clearly appears from the following remarks addressed to counsel for the plaintiff: "What I have difficulty in is seeing how you are going to get away from this written assignment, which it seems to me, precludes the jury from any part in the consideration of this case. That is the point; that is where your case hinges, on that assignment. You say it was given as collateral security, and that is what you have got to prove, because on its face it is not" (R. 42, l. 7).

"I am only discussing this particular writing (the assignment) which was handed to me, which I have read, and which is in English and which I construe to be anything but given for collateral. Now you are cross-examining this gentleman, and my only suggestion is that you do not waste time on more or less extrinsic matters, but that you get down to this agreement, to prove that that agreement, which I have read, is not an outright sale, but col-

lateral security; because *if you do not prove that to me I am not going to let this jury have the case. Courts are inclined to take instruments under seal, written solemnly by a man, as indications of what he meant*" (R. 42, l. 28).

The plaintiff-appellant not only insists that it was for the jury, and not for the court, to pass upon the sufficiency of the proof, but further insists that the admitted facts made out a *prima facie* case of a collateral loan which shifted to the defendant the burden of going forward with evidence to prove a sale.

The plaintiff's case is further supported by the inferences drawn from common, every day, experience. It is a matter of common knowledge that great numbers of policyholders borrow on their policies, and that this ability to so borrow is one of the stock arguments of the life insurance solicitor. On the other hand it is most unusual for a policyholder to sell his policy.

It is every day business practice to pledge collateral as a security for a note, but it is unheard of and incredible that one should deliver to another his note and a valuable security for a single consideration, the exact equivalent of the note, and at the same time intend to divest himself of all interest in the security.

The very allegation that the plaintiff's intestate intended such violation of all business precedents raises, at once, an irresistible inference that *the defendant has not disclosed the whole transaction*. Clearly, if Herenden could discount Finnie's note he could equally as well have discounted his own note, or Miss Kelsey's note. The note was discounted at Herenden's bank and upon the strength of the credit given Herenden's name. The insistent question arises—if this was a sale to Miss Kelsey, why did not Herenden discount Miss Kelsey's note, give

the purchase price to Finnie, send him on his way rejoicing, and have an end of the transaction so far as Finnie was concerned? That was the easy way and the natural way. Miss Kelsey was there in Herenden's office, had agreed to pay over to Herenden the amount of the note, and paid Herenden as agreed (R. 28, l. 32). The only way the acceptance and discount of Finnie's note can reasonably be explained is to take the transaction for what it appears to be on its face—a collateral loan.

In the case of *Chism vs. Schipper*, 51 N. J. L., 1-12, Mr. Chief Justice Beasley quoted with approval Chief Justice Gibson of Pennsylvania, who said that the best construction of a contract follows from "viewing the subject of the contract as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention." The jury had the right to examine the transaction in the light of human experience, to determine from the defendant's admissions and the evidence what was the intention of the parties, and to raise inferences from the facts before it. There was here a substantial dispute with respect both to the facts and the inferences properly to be drawn therefrom, and the trial judge erroneously withdrew it from their consideration.

POINT III.

The denial of plaintiff's motion that Arthur S. Herenden be made a party defendant was an abuse of judicial discretion.

There were three parties to this transaction: the plaintiff's intestate, the defendant, and Mr. Herenden. Herenden was more than the agent of the defendant; up to the time the defendant paid over to him the money with which to take up

Finnie's note, he was a joint adventurer with the defendant; the note was made to Herenden, it was discounted by Herenden, and he testified that he "participated in the transaction" (R. 24, l. 15); he was a proper party; he could not be joined at the outset because he was out of the jurisdiction; and the motion that he be made a party was made immediately it appeared that he was present at the trial and would be made a witness (R. 17, l. 32).

On these grounds alone the plaintiff had a right to make Herenden a party.

But a further reason was urged. Notwithstanding Herenden was a party to the transaction, he was allowed to testify both as to transactions between himself and the intestate, and as to transactions between the intestate and the defendant, although the plaintiff did not offer herself as a witness. His testimony concerning transactions and conversations between himself and the intestate was, in effect, a fraud on the statute prohibiting an adverse party from so testifying unless the personal representative shall first offer himself as a witness. His testimony concerning transactions and conversations between the intestate and the defendant violated, in effect, the rule that parties shall not testify interchangeably, each as to transactions of the intestate with the other. *Larison vs. Polhemus*, 36 N. J. Eq., 506; *Matthews vs. Hoagland*, 48 N. J. Eq., 455-475.

Furthermore the same underlying principle which impelled the court in *Platner vs. Ryan, Excr.*, 76 N. J. L., 239, and *Moosebrugger vs. Swick*, 86 N. J. L., 419, to require the assignor to be made a party defendant with the assignee, solely to close his lips and prevent a fraud on the statute, may be invoked here to close the lips of Herenden.

It may be that the first ground of appeal is decisive in this case, and that it is unnecessary to

urge this ground of appeal to secure reversal, nevertheless the question ought to be decided, as it might be important upon a retrial. Herenden should be made a party in order that the plaintiff be not left defenseless against that coloring of testimony which seems inevitable when the memory of the witness is fed by a lively imagination, and is stimulated by an interest in the event, and fear of contradiction is absent.

The denial of the motion that Herenden be made a party defendant was an appealable abuse of judicial discretion.

POINT IV.

Evidence Proper to be Admitted Was Excluded, and Improper Evidence Was Admitted

The third, fourth and fifth grounds of appeal all go to testimony of Herenden, and will be argued together.

Herenden was a party to the transaction in question and should have been made a party to the action. It was reversible error to permit him to give testimony and answer questions which would have been excluded if he had been made a party. In fact the carbon copies of the so-called agreement of January 18, 1915 (R. 66, l. 24), and the letter of May 18, 1915 (R. 67, l. 4), should have been excluded in any event. Although alleged to have been signed by Herenden they were a part of the defendant's transaction with the decedent, were written by Herenden as the defendant's agent, and should have been offered by the defendant herself. To permit the introduction by Herenden of unsigned carbon copies of letters alleged to have been sent to the decedent, but of which the originals could not be found and to which answers were not produced, not only gave the defendant the power to offer what she pleased, and to suppress what she pleased, but opened wide the door for fraud.

The agreement and the letter were of no value as evidence except as proof of the truth of the statements therein made, and the letter would have been inadmissible, even if received by Finnie, under the rule referred to in *Hand vs. Howell*, 61 N. J. L., 142-146, affirmed by this court in 61 N. J. L., 694, and referred to with approval by this court in *Fritz vs. Penna. Fire Ins. Co.*, 85 N. J. L., 171-174.

The subject was fully discussed by this court in *State vs. MacFarland*, 83 N. J. L., 474, where you say, page 481, that "the defendant's assent to the truth of the contents of the letters * * * was essential to their use against him." From the judgment rendered in that case the conclusion here follows that these carbon copies were not legal evidence and were erroneously admitted. There was absolutely no evidence of the receipt of the originals by the plaintiff's intestate, or that he admitted the truth of their contents, or that he acted upon them (R. 29, ll. 20 and 31; R. 30, l. 38).

To admit such papers in evidence against a deceased person is not only to open the door for fraud, but is an invitation and an incitement to fraud.

The plaintiff should not have been exposed, and should not again be exposed, to that hazard.

Even if properly admitted, however, the statements in the papers not only do not have that conclusive finality with respect to a sale which would compel a court to set aside a verdict for the plaintiff, but, on the contrary, are wholly consistent with the claim of a collateral assignment. Upon the admitted facts and Herenden's testimony the jury would be quite justified in reaching the conclusion that the agreement was made, as Herenden said in the Ryan case, to protect Finnie from being pressed for payment by the bank, and that it was in pursuance of the further agreement, which was carried out, that the defendant should provide the

funds with which Herenden should repurchase the note from the bank.

Whether Herenden did, or did not, return the note to Finnie does not affect the fact that Finnie still remained in Miss Kelsey's debt, nor does it prevent an inference that the defendant has not disclosed the whole agreement with Finnie.

The questions excluded were material, and relevant (R. 40, l. 17 and R. 40, l. 33). On behalf of the defendant it was urged, with considerable vehemence, that Finnie could not have gone directly to the insurance company for his loan (R. 37, l. 12). The evident purpose of the witness was to create the impression that Miss Kelsey was Finnie's only resort for relief, and that, but for her aid, Finnie's policy would have lapsed and his investment been irrevocably lost. Nothing could be further from the truth. The plaintiff offered to prove, and was prepared to prove, that Finnie had borrowed directly from the insurance company \$190 (R. 41, l. 14), the same amount that Miss Kelsey advanced less the dividend, upon a policy identical in every particular with the policy in question, and where he was in default under similar circumstances, and that the transaction went through Herenden's office. The plaintiff was prepared to prove that the insurance company loaned Finnie \$190, debited the loan with the amount he was in arrears on the premium, and gave him a check for the balance. This was the exact procedure followed by Miss Kelsey. The questions excluded were for the purpose of laying the foundation for such proof, and should have been admitted. Such proof was material and relevant both upon the question of Finnie's ability to borrow on the policy, and upon the question of Herenden's credibility.

This line of questioning also had a bearing upon

the question of the value of the policy. The defense insisted strenuously that the policy "wasn't worth a nickel" (R. 37, l. 17), when brought to Miss Kelsey by Finnie, and that such value as it thereafter acquired was created by Miss Kelsey. It is idle to argue over the refinement of distinction between an existing actual value and an existing potential value, when the potential value can be made actual by merely presenting the policy at the office of the insurance company and requesting a loan sufficient to leave a balance to the policyholder after deducting the premium payment, and the plaintiff should have been permitted to show that such was the fact, and that the witness knew it.

These further errors, set forth in the second, third, fourth and fifth grounds of appeal, emphasize the appellant's contention that "the facts, and the inferences to be drawn therefrom," "viewed in the aspect most favorable to the plaintiff," show a substantial dispute which precluded the trial court from withdrawing its consideration from the jury, and that the direction of a verdict was an error which entitles the appellant to relief in this court.

POINT V.

Res Adjudicata Is Not a Defense

The third and fourth defenses in the defendant's answer allege that the issue is *res adjudicata* by reason of certain proceedings in the United States District Court for New Jersey. These defenses were not seriously considered, and will be touched upon in passing only because counsel for defendant-respondent requested the inclusion in this record of a part of the record in the District Court case.

One William Ryan, a creditor of the decedent Finnie, brought a suit in equity against Sarah H. Kelsey, the defendant-respondent herein, to have the proceeds of the policy here in question declared to be a trust fund (R. 73). The District Court dismissed the complaint (R. 80). The case was appealed, and the Circuit Court of Appeals affirmed the judgment of the District Court in the following terms:

“We are of opinion that the administratrix of the insured is an indispensable party to this action. As her absence from the record deprives the court of jurisdiction, and as her presence would, because of identity of citizenship with that of the defendant, instantly oust the court of jurisdiction otherwise properly acquired, we affirm the decree dismissing the bill without discussing or deciding the merits of the controversy” (R. 81, l. 15).

It seems unnecessary to cite authorities in support of this appellant's contention that an action dismissed for want of jurisdiction cannot be set up, as *res adjudicata* upon the merits, in bar of a further suit in another court and between other parties, notwithstanding such suit may involve the same subject matter.

Respectfully submitted,

E. A. MERRILL,

Attorney for Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

NELLE E. FINNIE, administratrix of the estate of David T. Finnie, deceased, <i>Plaintiff-Appellant,</i>	}	<i>Action at Law.</i>
<i>vs.</i>		<i>On Appeal.</i>
SARAH H. KELSEY, <i>Defendant-Respondent.</i>		

BRIEF FOR DEFENDANT-RESPONDENT.

The case was tried before Judge Mountain and a jury at the Essex Circuit.

The plaintiff called no witnesses and submitted no evidence except the admissions in the pleadings; and defendant's admission on the record that the sum of \$4,847.77 had been demanded by the plaintiff of the defendant (pages 14 and 15).

The action was brought to recover the amount paid on a policy of insurance on the life of the plaintiff's intestate, David T. Finnie. The policy had been assigned to the defendant three years before Finnie's death by an absolute assignment.

The complaint, by paragraph 7th alleged (page 4, line 28):

"7. Said assignment of said policy 1,778,975 was a collateral security for the said Note for \$215."

This was denied (answer, pages 6 to 8), and the sole question, apart from a question of *res adjudicata* set up in the pleadings (3rd and 4th defenses, page 8) was whether the transfer of the policy was an out and out sale, or as collateral.

The question of *res adjudicata* arose out of the fact that suit had been brought on behalf of the estate of Finnie in the United States District Court for the District of New Jersey to have the assignment decreed to be a collateral one, but Judge Relstab after hearing dismissed the bill on two grounds:

"1st. That the administratrix was a necessary party, and that if she be made a party there would be a lack of diversity of citizenship;

2nd. That the evidence would not justify changing of the assignment (which was absolute in its terms) into a collateral one.”

See *Ryan v. Kelsey*, 259 Fed. 945, p. 946.

The assignment was absolute in form. It read as follows:

“Form of Assignment otherwise than as Collateral Security.

To be attached to and retained with the policy for use as evidence when required.

For one dollar, to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged) I hereby assign, transfer and set over all my right, title and interest in Policy No. 1,778,975 on the life of David T. Finnie, issued by The Equitable Life Assurance Society of the United States and all money which may be payable under the same, to Sarah H. Kelsey, whose P. O. address is No. 360 North Grove Street, East Orange, New Jersey, and for the consideration above expressed, I do also for my executors, and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators and assigns; and her title to the said policy will forever warrant and defend.

In witness whereof, I have hereunto set my hand and seal, this eighteenth day of January, 1915.

DAVID T. FINNIE [SEAL.]”

Plaintiff offered no evidence to show that the arrangement between the parties was other than as set forth in the assignment.

On the other hand, the defendant demonstrated that the transfer of the policy was an out and out sale.

This being the state of the proofs, the Trial Judge properly directed a verdict for the defendant, there being no facts upon which reasonable minds could differ, for the consideration of the jury.

The Trial Court properly directed a verdict for the defendant.

The plaintiff's contention that the policy was transferred as collateral, and not absolutely, and that that question should have been submitted to the jury, grows out of the fact that at the time the sale of the policy was made, Finnie gave to Mr. Herenden his note for \$215.

The defendant, Miss Kelsey, was the private secretary of Mr. Herenden, and employed in his office in New York. Mr. Herenden was a general agent of Equitable Life Assurance Society,

which had issued the policy through Herenden's office. Finnie came to Herenden and said "he was broke and could not go on with the policy" (page 20, line 32). That was in January, 1915 (page 21, line 35).

The policy was dated August, 1912 (page 63, line 32; page 20, line 15). Premiums were payable annually on August 20th of each year (page 64, line 18).

By the terms of the policy an extension of five months' time for payment of the premiums could be had by paying ten per cent. of the premium each month (page 20, line 22).

Finnie paid the premiums for the first two years, and made payments on account of the third year's premium, which became due in August, 1914. That being the situation, Mr. Herenden testified as follows (page 21, line 40):

"A It (the premium) was due annually, every August, and he paid in August, four or five months, and then the balance was due under the rule.

Q So that the third year premium became due in August, 1914, but he took advantage of the extension to carry it along up to this time? A Yes.

Q And then in January, 1915, he came in and said he wanted to sell the policy; is that right? A He said he couldn't pay the premium, and he wanted me to find a purchaser so that he could get a little money out of it.

Q Did you in fact find a purchaser for the policy? A I did.

Q Who was that? A Miss Kelsey, my secretary."

It appeared that the policy had originally been payable to Mrs. Finnie (plaintiff) as beneficiary, but with the right on the part of the insured to change the beneficiary (page 56, line 15).

On January 14, 1915, Finnie had the beneficiary changed to "the executors, administrators or assigns of the insured" (page 64, line 28).

The complaint admits this also (page 3, line 30).

The change of beneficiary was, undoubtedly, made by Finnie so as to make his policy salable.

At the time that Finnie applied to Herenden to find him a purchaser, the policy had no surrender value and no loan value. There is no contradiction of this. Before the policy could have either a surrender value or a loan value three full years' premiums had to be paid. Thus Mr. Herenden testified (page 23, line 20):

“Q At the time that this policy was sold by Mr. Finnie to Miss Kelsey, did it have a surrender value? A It did not.

Q What was necessary to be done to give it a surrender value? A To pay the balance of the premium.

Q Do you remember about how much that amounted to? A \$120, I believe.

Q If it got the surrender value, or if it earned the surrender value, do you know how much the value would be? A \$190 plus the \$25 dividend, making it \$215.

Q If it earned the surrender value, it also carried with it a dividend? A Yes, sir; it would earn the dividend payable at the end of the year.

Q And then the value would be \$215? A Yes, sir.”

The provisions of the policy with reference to a surrender value contained a series of options, but all of them contingent on three full years' premiums having been paid. The language was (page 61, line 25):

“After three full years' premiums have been paid hereon, upon any subsequent default in the payment of any premium or instalment thereof, and within three months after such default, this policy may be surrendered by the Insured (or assignee if any) who may elect one of the following options:”

So also the policy had no loan value until after three full years' premiums had been paid.

Plaintiff's counsel endeavored to prove the contrary on cross examination of Mr. Herenden, but unsuccessfully. Mr. Herenden's cross examination on this was as follows (page 37, line 12):

“Q Couldn't Finnie have gone directly to the insurance company at that time and secured a loan on that policy of \$190? A Certainly not.

Q He could not? A He could not; it wasn't worth a nickel.

Q Do you recall the following provision: ‘At any time while this policy is in force, after three full years' premiums have been paid, the Society will advance, on the proper assignment and delivery of this policy and on the sole security thereof, a sum not exceeding the loan value at the end of the then current policy year as stated in the above table’? A That would be the case if the premium was paid.

Q Then by the payment of the premium Finnie could have gone to the company direct? A Certainly, if he had the money. He was broke; he didn't have the money.

Q But at the time that he did come to you in this transaction he couldn't have— A It wasn't worth a nickel.

Q He couldn't have borrowed from the company? A Certainly not."

And again on cross examination he said (page 40, line 36):

"Q You say that at the time this assignment was made Mr. Finnie could not have borrowed from the Equitable Life Assurance Society the amount of \$190 on that policy? A The premiums hadn't been paid up to the third year, and he couldn't borrow until they were paid. You know that by reading the contract."

The terms of the policy bear out this (page 61, line 25). There is a schedule of loan values (page 60) beginning "after the policy has been in force three years" (page 60, line 12).

Under the table is a paragraph as follows (page 60, line 35):

"PROVISIONS RELATING TO THE FORE-
GOING TABLE.

LOANS. At any time, while this policy is in force, after three full years' premiums have been paid, the Society will advance on proper assignment and delivery of this policy, and on the sole security hereof a sum not exceeding the loan value at the end of the then current policy year as stated in the above Table."

It thus appears, both from the language of the policy itself, as well as the testimony of Mr. Herenden, that at the time Finnie offered his policy for sale, which was before the third year's full premium had been paid, it had no value whatever, either for the purpose of surrender or of loan.

On the other hand, if the third year's premium should be paid, then the policy would have a surrender value, and this fact furnished the basis of negotiation between Miss Kelsey and Finnie. There was a balance of \$120 still owing on this third year's premium (page 24, line 5). If that \$120 should be paid in time, then the policy would have a surrender value of \$190 which, with the dividend of \$25 which would then accrue, would make the policy worth \$215 (page 23, line 34). The five months' extension of time within which the balance of the premium could be paid expired, according to the terms of the policy, on January 20, 1915, that being five months from August 20, 1914, the date the third annual premium was due. Any payment, therefore, to keep the policy alive and give it a surrender value of \$190 and entitle it to the dividend of \$25, had to be made before January 20, 1915. Miss Kelsey and Finnie met at Herenden's office on January 18, 1915.

Accordingly it was agreed between Miss Kelsey and Finnie that Finnie would sell the policy to Miss Kelsey for the difference between the surrender value of \$215 and the \$120 necessary to be paid to create that surrender value, namely, \$95. This arrangement was carried out, and it was evidenced by a statement in writing as follows:

“New York, January 18, 1915.

Received from S. H. Kelsey, Ninety-five and 00/100 Dollars, representing the cash value under policy No. 1,778,975 on the life of David T. Finnie, per following statement:

Third year guaranteed cash value.....	\$190.
Third annual cash dividend due August 20, 1915..	25.
	\$215.
Less amount paid Society by S. H. Kelsey a/c third annual premium	120.
	\$95.
Net amount paid D. T. Finnie, January 18, 1915	\$95.

(Signed) DAVID T. FINNIE.”

(Exhibit D. 4, page 24, line 26, and page 66, lines 1 to 20.)

Now it so happened that Miss Kelsey was not financially in a position at the moment to pay the \$120 necessary to be paid to the insurance company and the \$95 to Finnie, and she appealed to Mr. Herenden, her employer, to loan her the money.

It so happened also that it was not convenient for Mr. Herenden to hand her that much cash (page 27, line 32) so Mr. Herenden made an ingenious suggestion for financing the transaction.

Finnie was a customer of Herenden. He was in the habit of discounting customers' notes at the Coal & Iron Bank in New York, and he had previously discounted Finnie's notes on this bank. Mr. Herenden's testimony as to what then happened is as follows (page 28, line 4):

“A Well, when I couldn't let Miss Kelsey have this money I suggested to Finnie a way of financing it. I said, 'If you lend me your note, which I previously had in the bank, I will endorse it, have it discounted at the bank, they will credit me with the proceeds, and I will immediately lend that amount to Miss Kelsey; \$120 she can use to pay the premium, and \$95, the amount of the purchase price of the policy, she can give to Mr. Finnie.'”

Q What was done? A That was done.

Q Did Finnie give you his note? A He gave me his note.

Q Did you discount it at the bank? A I discounted it at the bank.

Q What bank? A The Coal & Iron.

Q Of New York? A New York.

Q With the money thus raised then what did you do?

A I immediately drew two checks, one for \$95 and one for \$120.

Q To whose order was the \$95 check? A To Finnie.

Q And the \$120 check? A The Equitable Life.

Q Did Miss Kelsey afterwards repay you that money?

A She did."

In that manner the money was raised by Herenden and loaned by him to Miss Kelsey, and the \$120 was paid to the Equitable Life Assurance Company, which payment kept the policy alive. The \$95, representing the surrender value and dividend which the parties had agreed upon should be paid to Finnie in anticipation of the policy having that value upon the payment of the premium, was paid to Finnie, and he executed the absolute assignment and the transaction was closed, as between him and Miss Kelsey.

Plaintiff's counsel says in his brief (page 14) "if this was a sale to Miss Kelsey, why did not Herenden discount Miss Kelsey's note, give the purchase price to Finnie," etc.?

There are two complete answers to this: Herenden had a line of credit with the Coal & Iron Bank for the discount of his customers' notes; that he had previously discounted Finnie's note and that if he discounted it again no questions would be asked by the bank, whereas if he had undertaken to discount the note of his secretary, some question might have been raised.

As part and parcel of the arrangement between Finnie and Herenden, in which Finnie executed and delivered his note to Herenden, Herenden agreed with Finnie that he would pay the note at maturity and release Finnie from all liability thereunder. This arrangement was evidenced by a letter which Herenden then and there wrote out, signed and delivered to Finnie. (Page, 28, line 35, and page 29, lines 25 to 30.) It read as follows:

"January 18, 1915.

Received from David T. Finnie, his note for Two Hundred fifteen and 00/100 (\$215.00) dated January 18, 1915, drawn to my order at four months, payable at the Coal & Iron National Bank, New York. This is my agreement to protect the said note at maturity, the maker being duly released from all liability thereunder."

(Exhibit D. 9, page 66, lines 1 to 20, and page 29, line 40.)

Not only did Herenden give his guarantee to Finnie that he would pay the note when it became due, but he made good.

The complaint, by paragraph 8 (page 4, line 30), alleges:

“8. Said note for \$215. was not paid by said David T. Finnie during his lifetime.”

The fact was that it was paid by Mr. Herenden under his guarantee. Mr. Herenden's testimony on that was as follows (page 30, lines 1 to 15):

“Q When that note became due did you pay it? A I did.

Q Did Mr. Finnie pay it? A He did not.

Q You paid it? A I paid it.

Q Did you take up the note from the bank? A I did.

Q Did you send it to him? A Sent it to him with a letter.”

The letter which he mailed him, with the original note was dated May 18, 1915 (page 30, line 16), and read as follows:

“May 18, 1915.

Dear Mr. Finnie:

Herewith you will find your note for \$215.00 which I lifted today in accordance with the agreement dated January 18, 1915, given you at the time this note was drawn. Will you be good enough to return said agreement to me in enclosed envelope?

Trusting this letter finds you in good condition, with kind regards, I remain,

Yours very truly

Mr. David T. Finnie,
Chestnut Street,
Westfield, N. J.”

(Exhibit D. 10, page 67, line 1, and page 31, line 30.)

Mr. Herenden said that he sent that letter through his office (page 30, line 34). Miss Kelsey testified that she personally wrote the letter on the typewriter (page 46, line 38) and that it was mailed to Finnie (page 47).

The proper foundation to introduce the defendant's copy of the letter was laid by a notice to produce (page 31, line 20).

Plaintiff's counsel in his brief says that Herenden in his testimony in the Ryan case “testified that the purpose of the agreement was to prevent Finnie from being pressed for payment by the Bank” (his brief, page 11) and he argues from this that the policy in the hands of Miss Kelsey was a collateral security.

Plaintiff's counsel asked Mr. Herenden on cross examination this question:

"Do you recall that in the Ryan case I asked you concerning the agreement that although you discounted the note at the Bank, the agreement was that you would not permit the Bank to press Mr. Finnie for payment, and you answered that that was right?" (page 35, line 36).

Mr. Herenden answered:

"Well, I gave him that paper to protect him. I don't know how I answered your question" (page 36, line 5).

The expression "not permit the Bank to press him" was counsel's language embodied in his question. What Mr. Herenden meant by his agreement with Finnie "to protect the said note at maturity, the maker being duly released from all liability thereunder" is best evidenced by what Herenden did. He paid the note at maturity, took it up from the bank and sent it to Finnie.

Following the sale of the policy to Miss Kelsey, she not only paid the balance of \$120 due on the premium due August 20, 1914, but paid all the succeeding premiums on the policy up to the time of Finnie's death (page 32, lines 1 to 10; page 47, line 15), and the original receipts produced by her were offered in evidence (page 25, lines 1 to 35, and page 47, line 15, and Exhibits D. 5, 6, 7 and 8, and page 67, line 20 to page 69, line 20).

Upon the death of Finnie on September 18, 1917, Miss Kelsey made proper proof to the insurance company and the proceeds of the policy were paid to her (page 47, lines 36 to 40; page 48, lines 1 to 10, and page 69, line 22).

In addition to all of this evidence demonstrating that the transfer of the policy was a sale, and not as collateral for the payment of the note given by Finnie to Herenden, is the positive testimony of Herenden that Finnie did not borrow any money of Miss Kelsey for which the policy was put up as collateral (page 44, lines 26 to 40). He said further that "he (Finnie) did not have any money to lend and she didn't borrow it" (page 45, line 8). And again: "This transaction is the only deal that they ever had" and that on that occasion Miss Kelsey did not borrow any money from Finnie (page 45, lines 26 to 35).

Moreover, although Finnie lived for two years and nine months following the sale of the policy to Miss Kelsey, he never made any effort to pay the note or claimed that he had paid it, or

made any demand for the return of his policy. Miss Kelsey's testimony on that was as follows (page 47, line 26):

“Q Following the closing up of the transaction on January 18, 1915, did Mr. Finnie ever come to you and demand that the policy be returned to him? A No.

Q Did he ever claim to you that he had paid this note?

A I never saw him after that.

Q He went out of your orbit after that, did he? A Yes.”

All of this testimony, which is recited above, is absolutely uncontradicted. Plaintiff herself did not take the stand, nor did she call any witnesses, except that she called Miss Kelsey in rebuttal, and put in evidence the claimant's statement which she had filed with the insurance company, upon which she received payment of the proceeds of the policy following the death of Finnie (page 51, line 25, to page 53, line 40) and claimant's statement Exhibit P. 2 (pages 69 and 72). Miss Kelsey, of course, could not testify to any statements or transactions with Finnie under the Evidence Act, because the plaintiff did not see fit to take the stand.

Plaintiff's argument discussed.

Plaintiff's counsel says (his brief, page 6) that the assignment does not contain the word “sell” but merely the words “assign, transfer and set over.”

There is no significance to the omission of the word “sell.” The form used was the standard form which the insurance company provided for the transfer of policies other than as collateral security. The assignment itself states, in large type, at the top that it is a “form of Assignment other than as collateral security” (page 65, line 1).

The company also had a form of assignment to be used when the transfer was, in fact, as a collateral security. Mr. Herenden so testified (page 33, line 10), although the Trial Judge excluded as an exhibit a copy of this form (page 33, lines 13 to 25).

The words “assign, transfer and set over” used in the assignment here (page 65) are apt words to transfer the owner's entire interest in the policy.

In #1 Bouvier's Law Dictionary, page 260, the word "Assign" is defined as follows:

"Assign: To make or set over to another. 2 Bla. Com. 326; *Watkinson v. Inglesby*, 5 Johns. (N. Y.) 391. To appoint; to select; to allot; 3 Bla. Com. 58."

In #3 Bouvier's Law Dictionary, page 3308, the word "Transfer" is defined as follows:

"TRANSFER: The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter. See *Ex parte Thomason*, 16 Neb. 238, 20 N. W. 312."

The words "set over" are so plain they need no further elucidation.

Moreover, the assignment (page 65) contains a warranty of title in this language (page 65, line 16):

"I do also for my executors and administrators guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators and assigns; and her title to the said policy will forever warrant and defend."

This assignment is identical in terms with that in the case of *Sullivan v. Maroney*, 76 N. J. Eq., at page 107, affirmed 77 N. J. Eq. 567.

Mr. Finnie could have transferred his title to the proceeds of the policy by gift, had he chosen to do so. It is so settled in *Meyer v. Schumann*, 54 N. J. Eq. 414, and *Travelers' Insurance Company v. Grant*, 54 N. J. Eq. 208, page 212.

Perhaps a transfer by gift would have left open some such question as is now raised as to the finality of the transfer. Finnie left no doubt as to that, however. He executed a written assignment, absolutely transferring his interest in the policy, and guaranteeing the title in his assignee. He was careful to select a form of assignment which specifically stated that it was "a form of Assignment otherwise than as collateral security."

There is no suggestion in the case of any fraud or imposition having been practiced upon him whatever, nor is there any allegation or suggestion of fraud in the complaint. The Trial Judge gave plaintiff's attorney an opportunity to assert fraud if he was prepared to stand behind it, and the counsel said: "I will not press that element of it" (page 49, line 30).

Plaintiff's counsel argues (his brief, page 5) that "from the coincident delivery of the note and a thing of value" * * * "the

presumption arises that the thing of value secures the amount of the note, and that this is a collateral loan."

He argues further (his brief, page 14) that "the admitted facts made out a *prima facie* case of collateral loan, which shifted to the defendant the burden of going forward with evidence to prove the sale," and, at the top of page 13 of his brief he makes this astonishing statement:

"There is nothing in the evidence then to disturb the *prima facie* case made by the pleadings."

The "admitted facts" went no further than to admit the giving of the note by Finnie to Herenden, the discounting of the note by Herenden, the payment of \$120 to the insurance company and \$95 to Finnie, and the assignment of the policy to Miss Kelsey.

The answer expressly denied that the assignment was as collateral and set up that it was sold for \$95 by Finnie to Miss Kelsey (pages 6 and 7). The plaintiff joined issue on this allegation of fact (page 10, line 24).

It seemed to us that the plaintiff should have been non-suited, and we so moved the Trial Court (pages 16 and 17), but, however that may be, if any *prima facie* case was made out, the defendant certainly met the burden conclusively and without contradiction.

Now, the note was not made to Miss Kelsey. It was made to Herenden.

These two persons cannot be considered as one person in the transaction. Herenden was not the agent of Miss Kelsey, nor did he have any financial interest in the matter. The amended answer denies the allegation of the complaint (paragraph 6, page 4, line 22) that Herenden was the agent of Miss Kelsey (amendment, page 9, line 26).

Herenden had acted merely as a friend to accommodate his secretary. He had no interest whatever in the transaction; he did not get a dollar out of it, and he said, on cross examination (page 35, line 23):

"I was independent of the whole thing."

Plaintiff's counsel argues (his brief, page 7) that the burden of proof was on the defendant to overcome whatever inferences grew out of the fact that the note was executed and delivered by Finnie coincident with the assignment of the policy. The Trial Judge agreed with him on that in overruling the defendant's motion for a non-suit.

That stage of the case having been passed, proof of the assignment, together with the other evidence in the case, showing the payment of \$95 to Finnie on the sale of the policy and the agreement of Herenden to protect the note at its maturity, which agreement Herenden fulfilled, fully met this burden. The Trial Judge correctly apprehended the point when he said to the plaintiff's counsel that the assignment in the absence of proof to the contrary, would have to be taken as indicating what the parties had meant (page 42, line 35; page 43, line 10), and there was no proof to the contrary.

The observation of Vice-Chancellor Grey, in *Lance v. Bonnell*, 58 N. J. Eq. 259, p. 268, is directly in point here.

In that case two policies were issued directly to Bonnell upon the life of Lance, who was his debtor, and (page 261) "nothing on the face of the policy, or the application therefor, indicated that Bonnell's ownership of it was in any way qualified or that Lance had any interest in it whatever save that the death of his body was to furnish the occasion for its payment."

In dealing with this phase of the case, Vice-Chancellor Grey said (page 268):

"It is to be noted, touching this claim, that Bonnell's title to both the policies was by the written contract, by Lance's consent or action, made absolute, in the origin of each transaction. Not a suggestion appears anywhere upon the application for the Mutual Benefit policy, or the assignment of the Penn. Mutual, which hints at a pledge, or that indicates that Mr. Bonnell's right was any other than what by the written contracts it is shown to be, an absolute ownership. If a title so supported is impugned, the burden of proof to overthrow it must be carried by the party alleging it to be qualified and not absolute. *Vreeland v. Brandhall*, 1 Stew. Eq. 85; *Winters v. Earl*, 7 Dick. Ch. Rep. 52, 588."

In *Winters v. Earl*, 52 N. J. Eq. 52, affirmed p. 588, Vice-Chancellor Van Fleet said (page 53):

"The burden of proof is, of course, on the party claiming that the deed is not what it purports to be on its face."

In *Jones on Collateral Securities*, 3rd Ed. §5, it is said:

"There must, however, be a contract, either express or implied, to constitute a pledge. The mere retaining of property of another, without his consent, does not constitute a pledge of such property as security for its debt of the owner of the property."

See also *Jones on Collateral Securities*, 3rd Ed., Secs. 7 and 11.

31 Cyc. 787.

The fact that Finnie warranted the title to the assignee shows that he intended to deprive his estate of any interest in the policy.

In *Henry v. Thompson*, 78 N. J. Eq. 142 (reversed but on a different point, 79 N. J. Eq. 200) Vice-Chancellor Howell had before him an assignment of a policy identical in form with that at bar.

The assignment was made by the wife to whom the policy was payable, and the husband, who was the insured, signed his consent to the assignment. Vice-Chancellor Howell, after first commenting on the general rule that a policy of insurance on the life of a husband, payable to the wife, for her sole use, if living, and, if not, to her children, etc., gives the wife merely a contingent interest, which is ended by her death prior to the death of her husband, said (page 145):

“There are, however, two elements in this case which take it out of the more general rule, and they are: first, the intention of the parties as manifested in the instruments signed by them to make a complete disposition of the policy and insurance money, and, second, the guarantee made by Mrs. Prince of the validity and sufficiency of the assignment and the warranty of Mrs. Moody’s title by her. It is familiar doctrine that if one conveys real estate with a covenant of warranty and the title turns out to be defective, and the warrantor afterwards has cast upon him a good title, the warranty will estop him from asserting his good title as against his former grantee. The same rule applies to the warranty contained in the instrument signed by Mrs. Prince. If the title to the policy had subsequently become complete in her she would not be permitted to make it the foundation of a claim for the policy. *Kane v. Loder*, 56 N. J. Eq. (11 Dick.) 268. It may therefore be said that whatever right Mrs. Prince had or might at any time in the future have was transferred to Mrs. Moody by the assignment and warranty in question. There being no children of the marriage, the only persons who were or could be interested in the policy were Mr. and Mrs. Prince. His consent that she should make a simple assignment might not be sufficient to carry the title, but when he consented that she should not only transfer her right, title and interest, but should also warrant the title to the assignee, the conclusion must be that he disposed of his interest in the policy in his lifetime

or permitted his wife to so dispose of it, and that therefore his personal representative takes nothing."

In that case it is interesting to note that the language of the assignment is identical in its material parts with the assignment here. Each contains the language

"I hereby assign, transfer and set over, all my right, title and interest" (the word "sell" was not used),

and each contains a covenant of warranty binding upon the executors and administrators, in favor of the assignee, her executors, administrators and assigns, and the agreement that

"her title to the said policy will forever warrant and defend."

The rule as to when a Trial Judge should, or should not, direct a verdict for either party has been entirely settled by this Court.

In *Crosby v. Wells*, 73 N. J. Law 790, this Court said (p. 800):

"Firstly, the trial court should direct a verdict when any number of verdicts, if found otherwise than as ordered, would be set aside as without sufficient evidence to support them (*Hartman v. Alden*, Executrix (1870), 5 Vroom 518, 522; *Baldwin v. Shannon* (1881), 14 *Id.* 596, 602, 603; *Crue v. Caldwell* (1889), 23 *Id.* 215, 218; *McCormack v. Standard Oil Co.* (1897), 31 *Id.* 243, 245); or when the testimony in the case will not support any other verdict as in *Loper v. Somers*, 42 *Id.* 657, 661. Secondly, the trial court cannot direct a verdict when any material facts which the parties have been permitted to introduce are in dispute. See *Delaware, Lackawanna and Western Railroad Co. v. Shelton* (1893), 26 *Id.* 342, 345; *Baumann v. H. A. Packet Co.* (1901), 38 *Id.* 250, 254."

The rule stated as to when the Court cannot direct was reiterated by this Court in *Carroll v. Central R. R.*, 81 N. J. L. 567, and again in *Broame v. N. J. Conference*, 83 N. J. L. 621.

Suppose, for the sake of the argument, that the case had gone to the jury and that the jury had found for the plaintiff—is it conceivable that on this record such a verdict would have been allowed to stand on application to set it aside, or that any number of verdicts thus rendered would have been allowed to stand?

Or again, upon what theory would the testimony in the case support any other verdict than a verdict for the defendant.

The rule is that the Trial Court cannot direct when "there is a substantial dispute as to the facts or the inferences to be drawn therefrom."

Carroll v. Central R. R., supra.

Broame v. N. J. Conference, supra.

Applying that rule, what substantial dispute is there as to the facts in this case?

The facts are all one way. Plaintiff submitted no evidence whatever. The defendant supplied all the proof which the law would permit; the plaintiff as administratrix, having refused to take the stand, undoubtedly in order to, as far as possible, seal the lips of the defendant from testifying in the case. In view of this refusal of the plaintiff-administratrix to take the stand, it hardly becomes plaintiff's counsel to argue as he does (on pages 14 and 19 of his brief), that there is an "irresistible inference that the defendant has not disclosed the whole transaction." The defendant could not by her own testimony disclose the whole transaction until the plaintiff-administratrix took the stand, which she refused to do. Fortunately for the defendant, her witness, Mr. Herenden, could and did disclose the whole transaction which demonstrates that the transfer of the policy was by way of a sale and not as collateral.

There is, therefore, no substantial dispute as to the facts which should have been submitted to the jury.

Now, is there any substantial dispute as to the inferences to be drawn from the facts.

The plaintiff's counsel's whole argument is that the jury should have been permitted to pass upon the inferences which he now says arise.

But the rule is that where reasonable minds cannot differ as to the inferences, there is nothing for the jury to pass upon.

Mumma v. E. & A. R. R. Co., 73 N. J. Law 653, page 658;

Hummer v. L. V. R. R. Co., 74 N. J. Law 196, reversed 75 N. J. Law 703;

McCarthy v. Metropolitan Life Insurance Co., 75 N. J. Law 887.

There can be but one inference from the facts here, namely, that the assignment of the policy was an absolute one, and not as collateral.

The same general state of the facts were submitted to Judge Rellstab in the Ryan case, which was on a bill in equity, and

where the rules of evidence permitted the Court to go behind the written paper, and he concluded, after a full hearing and argument, that the facts would not warrant him, sitting as a court of equity, in changing the assignment from an absolute one to a collateral one.

See *Ryan v. Kelsey*, 259 Fed. p. 945.

Cases cited by the plaintiff in this part of his brief are not at all in point.

Page v. Burnstine, 102 U. S. 664, referred to in plaintiff's brief on page 6, does not hold, as he there seeks to have the Court believe, that the Supreme Court of the U. S. held abstractly that an absolute assignment of a life insurance policy may be construed as something else than what it says. The Page case was a suit in equity. The facts and ruling of the Court appear from the opinion at p. 669, as follows:

“The transactions between Page and Burnstine had their origin, it is conceded, in a loan of money by the latter to the former. To secure that loan an assignment was made of Page's interest in the policy to the extent of the sum borrowed. Each subsequent assignment shows, upon its face, a similar arrangement, until that of Jan. 7, 1873, was executed. The latter assignment, by itself, imports an absolute transfer to Burnstine of all the right, title and interest of the assured in the policy, and to the payments made therefor, and all benefit and advantage to be derived therefrom. But the circumstances disclosed in the record indicate, with reasonable certainty, that the real and only object of the execution of the assignment of Jan. 7, 1873, was to invest Burnstine with the entire control of the policy, to the end that, thereafter, the company might deal directly with him, and, upon the death of the assured, that he might be vested with full authority to receive the proceeds of the policy, and apply them in the repayment of such sum of sums as he had loaned to Page upon the security of the policy. In other words, the last assignment may be construed as simply appointing Burnstine, upon the death of the assured, to receive from the company such sum as would then be due on the policy, and after reimbursing himself to the extent of his loans to Page, to pay the balance to the persons entitled thereto.”

Bacon v. Kienzel, 21 Atl. 37, referred to in plaintiff's brief (pages 8 and 9), was a suit in equity in our Court of Chancery, to recover a portion of the amount that was due on two certain policies of insurance which had been assigned to protect cer-

tain judgments against the assignor. The complaint alleged that there was a surplus after the payment of the judgments to which the administrator was entitled. Apart from the fact that the case was in equity, it was a very different situation from that here. The assignees held judgments against the assignor. The relation of debtor and creditor existed between them and this was not changed in any respect by the parties as the result of the making of the assignment of the policies. The plaintiffs in those judgments were still free to issue execution irrespective of any securities there held through the policy (p. 39). On this state of facts *V.-C. Bird* said (p. 39):

“I think the rule is most reasonable which holds that when property is transferred by a debtor to his creditor in consideration of an existing indebtedness, and the indebtedness continues to exist, such transfer cannot be regarded as a sale. *Judge v. Reese*, 24 N. J. Eq. 397; *Harness Co. v. Schoelkopf*, 71 Tex. 418, 9. S. W. Rep. 336. The fact that the assignment is absolute upon its face is not controlling. The court may nevertheless consider all the circumstances which the evidence shows attended the transaction, whether they be of an affirmative or of a negative character. If these circumstances show that the transfer was only designed to secure an existing indebtedness, it is the duty of the Court so to declare. *Phillips v. Hulsizer*, 20 N. J. Eq. 314; *Crane v. Bonnell*, 2 N. J. Eq. 264; *Melick v. Craemer*, 25 N. J. Eq. 429; *Clark v. Condit*, 18 N. J. Eq. 358; *De Camp v. Crane*, 19 N. J. Eq. 166. I am persuaded that this was held as a security only, and that *Brown* could at any time have redeemed.”

There is nothing in this case to indicate that *Finnie* could have at any time redeemed. He was not the debtor of *Miss Kelsey*, nor had he borrowed any money from her. Whatever rights he had against *Herenden* by reason of having given *Herenden* his note were all cancelled at maturity of the note, when *Herenden* paid it at the bank and took it up.

N. J. Produce Co. v. Gluck, 79 N. J. Law, 15, referred to in plaintiff's brief on page 9, is not at all in point. That case was a certiorari to review a judgment of the District Court. The defendant's contention was that the plaintiff had not proved his case because the written assignment of a book account did not have the effect of transferring the book account to the plaintiff (page 116). Upon this the Court said that only part of the evidence had been certified to the Court, and hence the Court held that it could not say that there was no evidence on which the

Trial Judge could have determined the issue in favor of the plaintiff, and in view of the fact that only part of the evidence had been certified they went on to say "that it may well have been that the Trial Judge had before him other evidence than the written assignment," &c. That is an entirely different situation from the one at bar.

Chism v. Schipper, 51 N. J. L. 1, cited in plaintiff's brief, page 15, came up on demurrer to the declaration and the question was the right of an architect to fraudulently certify as to work done under a contract. This raised a question of law as to the proper construction of the contract, which the Court decided. It is, of course, elementary that the construction of a contract is for the Court as opposed to the jury. So here. The assignment imported in plainest terms an absolute sale of the policy. The construction of that paper was for the Trial Judge, and there was no dispute of facts or possibility of difference of opinion as to inferences to be drawn from the proven facts which could make a jury question.

The Trial Judge's refusal to permit the plaintiff to amend so as to make Herenden a party defendant was not an abuse of judicial discretion.

The only sound theory upon which Mr. Herenden could have been admitted a party defendant was that he was a party in interest in the transaction. Plaintiff's theory of the case was that he was such a party in interest.

There is no proof whatever of any such fact. On the contrary Mr. Herenden testified (page 35, line 24) "I was independent of the whole thing." True, he had loaned to Miss Kelsey \$215 of which he had disbursed for her \$120 to the Equitable and \$95 to Finnie, but it was understood between them that the money was Miss Kelsey's (page 24, lines 30 to 40) and Miss Kelsey afterwards repaid Mr. Herenden for the money thus advanced for her (page 28, line 32).

Thereafter Miss Kelsey paid the successive premiums on the policy for the years 1915, 1916, 1917 (page 47, line 15) and collected the proceeds of the policy on the death of Finnie. Herenden had no share in these proceeds.

Mr. Herenden, therefore, had absolutely no interest in the transaction and there was no reason why he should have been made a party defendant, except the unjust one of closing his

mouth as a witness unless the plaintiff-administratrix should take the stand, which she refused to do. (See colloquy between plaintiff's counsel and Court, page 21, and again on page 26, line 16.)

Plaintiff's counsel argues in his brief (pages 16 and 16) not only that Herenden was Miss Kelsey's agent, but that he was "more than the agent of the defendant" because he said Herenden testified that he "participated in the transaction" (his brief, page 16).

The language quoted in the plaintiff's brief must be taken in its context in the record. Mr. Herenden was called as defendant's witness and asked if he knew how much was agreed upon between Finnie and Miss Kelsey for the sale of the policy, and to show that he was qualified to testify he was asked if he was present and participated in the transaction. His testimony is as follows (page 24, line 5):

"Q Do you know how much was agreed upon between Mr. Finnie and Miss Kelsey for the sale price of the policy?

Mr. Merrill. I object. That is not the best evidence.

Mr. English. I ask him if he knows.

A Yes.

Q Were you present at the time? A Yes, I was.

Q And participated in the transaction? A I did.

Q I show you a receipt dated January 18, 1915, signed 'David T. Finnie' (showing paper to witness). Do you know whose signature that is? A That is Mr. Finnie's signature."

and then defendant's counsel proceeded to prove the receipt signed by Finnie and the other papers in the case. The words "participated in the transaction" therefore do not in any respect relate to a financial participation as plaintiff's counsel seeks to have the Court believe.

There was no "fraud on the statute" as plaintiff's counsel now argues (his brief, page 16), prohibiting an adverse party from testifying.

Section 4 of the Evidence Act is material here. (2 Com. Stat. p. 2218), and prohibits

"testimony to be given by any party to an action as to any transaction with or statement by any testator or intestate represented in said action unless the representative offers himself as a witness on his own behalf and testifies to any transaction with or statement by his testator or intestate."

Under this legislation it is entirely settled that even though the defendant cannot testify to transactions with the deceased, any other witness can and this rule goes so far as to permit the wife of the party to testify.

In *Wooster v. Egan*, 88 N. J. L. 687, this Court by Justice Black said, p. 688.

“It is urged that the wife’s testimony was incompetent under section 4 of the Evidence Act (Comp. Stat., p. 2218) which reads: ‘In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in such action, unless,’ &c. Under this statute the admission of the wife’s testimony in evidence was legal. The point was decided by this court, in the case of *Foley v. Laughran*, 60 N. J. L. 464. That case held that the wife or husband of a plaintiff who sues or is sued in a representative capacity, is a competent and compellable witness in such action to testify to the transactions with or statements by any testator or intestate represented therein. In that case, the evidence shows that the engagements for the board, care and nursing of the children were made between the wife of the respondent and the deceased, who was the grandmother of the children. So, in this case, the engagements were made by the wife and the services performed by her. It was not error for the trial court to admit the wife’s testimony in evidence. The judgment cannot be reversed on that ground. The respondent could not testify himself to any statements made to him by the deceased or any services rendered to her, by him in the presence of the deceased. *Dickerson v. Payne*, 66 *Id.* 35; *Baker v. Bancroft*, 69 *Id.* 223.”

See also *Foley v. Laughran*, 60 N. J. L. 464, pp. 471-475.

If the wife of a party is competent as a witness, certainly Mr. Herenden was a competent witness for Miss Kelsey not only, but it would have been a gross abuse of discretion had the Trial Judge yielded to the plaintiff’s contention and had permitted the pleadings to be amended so as to make Mr. Herenden a party because such an act on his part would have denied to the defendant every opportunity to demonstrate the justness of her case.

The situation is not at all like that in *Platner v. Ryan, Exr.*, 76 N. J. Law 239, or *Moosbrugger v. Swick*, 86 N. J. Law 419, where the Supreme Court in each case held that where a claim against the estate had been assigned and the assignee had called his assignor as his witness to prove conversations with deceased, and it appeared that the assignor was the real party in interest, he should be brought into the case as a party, and the provisions of sections 3 and 4 of the Evidence Act made applicable.

In *Cullen v. Woolverton*, 65 N. J. Law 279, this Court permitted the assignor of a claim against an estate to testify in the suit brought by the assignee. The distinction between the ruling in that case and in the two Supreme Court cases was pointed out by Chief Justice Gummere in the *Platner* case. He said (76 N. J. Law 242):

“This conclusion is not at all in disregard of the decision of the Court of Errors and Appeals in *Cullen v. Woolverton*, 36 Vroom 279. In that case it was held that the assignor of a claim against the estate of a deceased person was a competent witness, for the assignee, in an action brought by the latter against the administrator of the decedent. But this view resulted from the fact that the consideration of the assignment was equal to the amount of the claim, and the further fact that the assignor (according to his own testimony, at the trial) had no interest whatever in the recovery. The case has no application where the beneficial interest in the claim remains in the assignor.”

Herenden has no beneficial interest in this case. He testified that he was entirely independent in the transaction, and the facts show he was. He did not put up any of his own money at the beginning, except as loaned to Miss Kelsey, which was repaid; he did not pay any subsequent premiums and he did not share with her in any of the proceeds of the policy.

No fraud has been perpetrated on the statute, and the Trial Judge properly refused to permit the plaintiff to amend so as to make Herenden a defendant.

There was no error in the rejection or admission of evidence.

Error is assigned that secondary evidence was admitted of Exhibits D. 9 and D. 10 (page 1, line 34, and page 66, line 30, and page 67, line 1).

These two letters were carbon copies of letters signed by Mr. Herenden. He so testified. (As to D. 9, page 29, line 30; as to D. 10, page 30, lines 20 to 30.)

Miss Kelsey testified that she had personally typed out both of those letters, and knew that Mr. Herenden had signed them and that D. 9 had been delivered and D. 10 mailed (page 46, line 22, to page 47, line 10).

Moreover, foundation was laid for this secondary evidence by the service of a notice to produce, which was exhibited to the Court (page 31, line 20).

The mere fact that plaintiff's attorney said he could not produce the original did not overcome the rule that secondary evidence was admissible.

There was nothing in the admission of these letters that offends the rule laid down in *Hand v. Howell*, 61 N. J. Law 142, page 146, affirmed 61 N. J. Law 694, and re-approved in *Fritz v. Pennsylvania Fire Insurance Company*, 85 N. J. Law 171, page 174 (plaintiff's brief, page 18).

The question in *Hand v. Howell*, as stated by this Court in *Fritz v. Pennsylvania Fire Insurance Company*, 85 N. J. Law, at page 174, was

“one of notice on a sheriff who had levied upon chattels that rent was due for the premises on which they were taken in execution. Notice was said to have been given in a letter addressed and mailed to the sheriff.”

The Court held that the letter was not evidence of an implied admission of notice and said

“an unanswered letter not received in the course of a correspondence is not evidence at all against the recipient except to prove notice or demand.”

(61 N. J. Law at page 146; 85 N. J. Law at page 175.)

The Fritz case expressly holds that the letters “were competent evidence of notice or demand in a particular case but that the rest of the matters contained in the letters were not evidence in favor of the parties writing them” (85 N. J. Law, page 175).

State v. MacFarland, 83 N. J. Law 474 (plaintiff's brief, page 18), was a criminal case where the Trial Court was reversed because of certain errors in his charge with reference to the letters which were in evidence, but this Court said (page 478):

“the letters were properly admitted in evidence.”

The papers admitted here (D. 9, which was Herenden's agreement to protect the note at maturity, page 66, line 25, and D. 10, which was Herenden's letter to Finnie, sending him the paid note, page 67, line 1), were material and supplemental to the evidence already given in the case.

Herenden testified, without objection, that at the time he took Finnie's note he gave him a letter or agreement (page 28, line 35). This letter or agreement (Exhibit D. 9), offered in evidence, corroborates that statement, and shows what the agreement was.

Herenden also testified, without objection, that when the note of Finnie's became due he paid it, took it up from the bank and sent it to Finnie with a letter (page 30, lines 1 to 14).

The letter (Exhibit D. 10) simply corroborates that statement. Neither letter was offered in evidence for the purpose of charging any matter on Finnie. Each letter was material to corroborate the testimony of Herenden.

In his brief (page 19) plaintiff's counsel says:

"Whether Herenden did or did not return the note to Finnie does not affect the fact that Finnie still remained in Miss Kelsey's debt, nor does it prevent the inference that the defendant has not disclosed the whole agreement with Finnie."

This statement in the brief ignores the fact that Finnie was never in Miss Kelsey's debt. He did not borrow any money of Miss Kelsey. He did not even borrow any money of Herenden. He simply gave his note as an accommodation, which note was discounted, the money raised thereby applied as agreed, and on the due date of the note the same was paid by Herenden. The money thus advanced by Herenden to take up the note was repaid him by Miss Kelsey.

The innuendo in the brief that defendant has not disclosed the whole agreement with Finnie is manifestly unfair in view of the fact that the plaintiff, administratrix, refused to take the stand and thereby necessarily closed the mouth of the defendant to any transactions or statements with Finnie.

Error is also assigned that the Trial Judge overruled the following questions:

"At the time this policy was issued, were other policies issued to Finnie by the Equitable Life Assurance Society" (page 1, line 40; page 40, line 18)?

This was clearly immaterial. The proceeds of no other policy of insurance which might have been upon Finnie's life were in issue here. No claim was made that any other policy of Finnie's had been assigned to Miss Kelsey.

The other question:

"If Finnie could not have borrowed on this policy, he could not have borrowed on any similar policy, could he" (page 2, line 4; page 40, line 36)?

This question, in addition to being immaterial, called upon the witness to speculate in his answer.

Counsel in his brief says (page 19):

"Plaintiff offered to prove, and was prepared to prove, that Finnie had borrowed directly from the insurance company \$190."

There is no offer of proof to be found in the record.

Counsel tried to prove this from Mr. Herenden, but unsuccessfully. He showed Mr. Herenden a policy in the Equitable Life Assurance Society dated March 14, 1915, and asked him if Finnie did or did not borrow \$190 on that policy (page 43, line 20).

Over defendant's objection, Mr. Herenden said (page 44, line 22):

"I don't know what it is all about. I say this man could not have gone to the Equitable Life and got anything without his third premium, and I stand on that. I say that is not the same condition."

It, obviously, was not the same condition, because the policy in question was dated March 14, 1915 (page 43, line 30), which was three months after the date of the sale of the policy to Miss Kelsey. He certainly could not have borrowed on that policy three months before it was issued. If his capacity to borrow on some other policy was material at all, it could only have applied to some policy in existence at the time of the sale of the policy in question to Miss Kelsey, and even then such proof would have had no materiality unless the conditions of the supposed other policy were identical with those of the policy in question.

If, therefore, the plaintiff was prepared to prove (and there is no suggestion that he was prepared to prove anything else) that Finnie could have borrowed \$190 on some policy issued March 14, 1915, three months after the sale of the policy in question to Miss Kelsey, such proof, if offered, was obviously immaterial.

Error is also assigned because Herenden was permitted to answer these questions:

“Do you know whether or not Mr. Finnie expressed any desire to sell this policy (page 19, line 30)?

And again:

“When was it that he told you he wanted to sell it (page 2, line 12; page 20, line 30).

No objection was noted as a ground of appeal to the overruling of the objection as to the first question (page 19, line 40), and the objection to the second question was made after the answer had been given (page 20, line 35).

But in addition to that, the questions were entirely material and proper, the issue being whether the assignment was by way of collateral or as a sale.

It will appear from what counsel said on objection to the first question (page 19, line 33), that the ground of objection was that the testimony was contrary to sections 3 and 4 of the Evidence Act and that Mr. Herenden ought to be made a party. No other ground of objection was urged.

Error is also assigned because Herenden was permitted to answer this question:

“At the time Miss Kelsey received the assignment which is in evidence, and paid or caused to be paid, \$95 to Mr. Finnie, did she personally and physically have the money available, or did she have to take some steps to raise it” (page 2, line 14; page 26, line 13).

This question was material in the history of the transaction to explain why it was that Finnie had given his note to Herenden, and it is the giving of this note upon which counsel for plaintiff rests his entire argument.

The objection again, as to the other questions, was that Mr. Herenden ought to be made a party so as to prevent his giving any testimony at all (page 26, lines 16 to 40).

The defense of res adjudicata was well taken and the direction of a verdict for the defendant can be rested on that alone.

This defense is set up by the third and fourth defenses in the Answer (page 8, lines 27 to 40), and is supported in the proof by the offer in evidence of the original files of the United States District Court, for the District of New Jersey, in the case of *Ryan v. Kelsey* (page 51, lines 1 to 14; page 73, etc.) and was one of the grounds of motion for a direction (page 54, line 10).

Long prior to the bringing of this action, William Ryan as a creditor of the estate of David T. Finnie, and on behalf of the said estate, filed a bill in the United States District Court for the District of New Jersey (pages 73 to 77) alleging (page 75, line 35) that he had demanded that the administratrix bring suit against Miss Kelsey, but that she had refused (page 76; line 5) and that he, as a judgment creditor of said estate of David T. Finnie, deceased, demanded of said Sarah H. Kelsey "that she pay over to the administratrix the proceeds of the policy," but that she had refused and hence he filed his bill.

The prayer of the bill (page 77, line 1) was that:

"It be ordered and decreed that the said absolute assignment made by said David T. Finnie to Sarah H. Kelsey of said policy * * * in the principal sum of \$5,000 be declared to be as security only for such sums as shall appear upon proof thereof within a competent jurisdiction to have been advanced to or on behalf of said David T. Finnie during his lifetime by said Sarah H. Kelsey."

The decision of the case on the merits turned on whether or not the assignment of the policy vested the title in Miss Kelsey or whether it was in the nature of a collateral or pledge. Judge Rellstab heard the case and made a final decree dismissing the bill on two grounds, as follows (*Ryan v. Kelsey*, 259 Federal 945, at page 946):

"First, that the administratrix was a necessary party, and that if she be made a party there would be a lack of diversity of citizenship; second, that the evidence would not justify the changing of the assignment (which was absolute in its terms) into a collateral one."

The plaintiff here, Mrs. Finnie, applied to be and was made a party defendant to the Ryan suit, and, in connection with her petition to be admitted a party, filed her consent to be bound by the decree, as follows (page 79, line 29):

"I hereby consent to be bound by any final decree entered in the above-entitled cause, now pending in the District Court of the United States for the District of New Jersey.
Nelle E. Finnie,
Administratrix of the Estate of David T. Finnie."

The final decree is in the form prescribed by United States Equity Rule No. 71, and dismissed the bill, with costs to the defendant to be taxed (page 80, lines 1 to 20).

In *Hughes v. United States*, 4 Wall. 232, page 237, Justice Field said:

“In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties *or their privies*, and the point of controversy must be the same in both cases, and must be determined on its merits.”

The final decree in the Ryan case measures up to that test exactly. It was rendered, if not between the same parties, at least between their privies, and it was heard and determined on its merits.

In *Foote v. Gibbs*, 1 Gray 412, Chief Justice Shaw said (page 413):

“The authorities, both in England and in this country, are decisive, that a general entry of ‘bill dismissed’, with no words of qualification, such as ‘dismissed without prejudice’ or ‘without prejudice to an action at law’ or the like, is conclusively presumed to be upon the merits and is a final determination of the controversy.”

So here, the final decree made by Judge Rellstab contained no words of qualification, but was a final determination of the controversy.

See to the same effect:

Brown v. Fletcher, 182 Fed. 963 (C. C. A.) at p. 980;

Swift v. McPherson, 232 U. S. 51, at p. 55;

United States Fastener Co. v. Bradley, 143 U. S. 523, at p. 530.

In *Story's Equity Pleading*, 8th Ed., Sec. 793, it is said:

“A decree or order, dismissing a former bill for the same matter, may be pleaded in bar to a new bill, if the dismissal was upon the hearing, and was not in terms directed to be without prejudice.”

In addition to all this is the fact that the plaintiff here, as administratrix of the estate of David T. Finnie, deceased, signed and filed with the United States District Court in the Ryan case her formal consent “to be bound by any final decree entered in the above-entitled cause” (page 79, line 30).

Nelle E. Finnie filed a petition in the Ryan case (page 78) to be made a party “as sole distributee” (page 78, line 39). An order was made to that effect, and, in addition, she filed her consent as administratrix of the estate of Finnie to be bound by any decree entered in the cause.

What more could she have done to make the decree *res adjudicata* as against her? In view of that consent, how can she now be heard to argue, as her counsel does (his brief, pages 20 and 21), that the decree in the Ryan case is not *res adjudicata*?

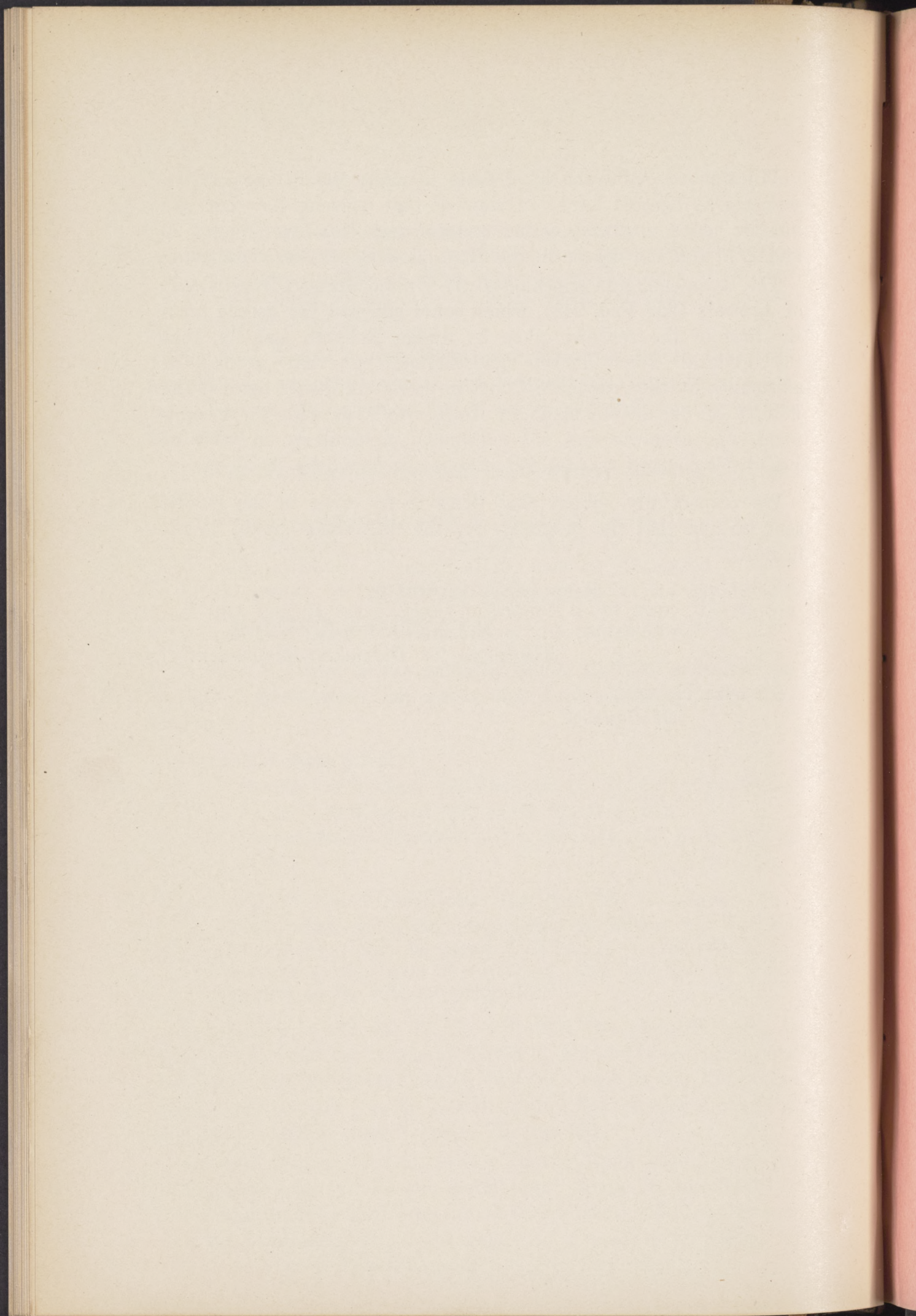
The Ryan case was appealed to the United States Circuit Court of Appeals (259 Fed. 945), which court affirmed the decree upon the first of the reasons given by Judge Rellstab, namely, that the Federal Court lacked jurisdiction, but that ground of affirmance by the Appellate Court in nowise militates against the finality of the decree made by Judge Rellstab, that the assignment was absolute and not collateral, particularly in view of plaintiff's consent as administratrix to be bound by the decree.

We respectfully submit that there is no error in the record sent up and that the judgment for the defendant should be affirmed.

Respectfully submitted,

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