

mark, and that they lost, on all the lots making up the 900 barrels, except one, \$43, and on that one made only \$7.50. All questions as to the weight of conflicting evidence were for the master. The defendants might get 25 cents per barrel more on account of the trade-mark, and still lose on the whole transaction. The profits due to the trade-mark only, and not the profits of the whole business, were the subject of inquiry. *Garretson v. Clark*, 15 Blatchf. 70; S. C. 111 U. S. 120, and 4 Sup. Ct. Rep. 291. The general loss would be less on account of what the trade-mark brought more.

It is argued that the evidence does not show that the orator would have made this profit if the defendants had not. This might be true, and not affect the rights of the parties. If the defendants made profits by their invasion of the orator's rights, the orator is entitled to them whether the same profits would have been made by the orator or not, and not to any more if they would, for the same profits could not be made by both. But the master seems to have inferred that they would, and therefore to have found that the orator was damaged by the loss of profits to the same extent that the defendants saved by them. The fact that the flour of the orators bearing this mark was in the same market would seem to be sufficient to warrant this finding. *Faber v. Hovey*, 1 Wkly. Dig. 529; S. C. 73 N. Y. 592.

Exceptions overruled, report accepted and confirmed, and decree to be entered accordingly.

CAFFERY v. JOHN HANCOCK MUT. LIFE INS. CO.

(Circuit Court, E. D. Michigan. March 15, 1886.)

1. LIFE INSURANCE—WAIVER OF STATUTORY PROVISION.

An act of the legislature provided that, upon the payment of the first premium upon a policy of life insurance, the policy should remain in force for a certain time for the full amount thereof, "anything in the policy to the contrary notwithstanding." *Held*, that this act might be waived by the express agreement of the parties, by the substitution of a non-forfeitable policy of a different character.

2. SAME—BENEFICIARY BOUND BY ORIGINAL CONTRACT.

The beneficiary of a policy is bound by all the terms of the original contract entered into between the insured and the company.

This is an action upon a policy of life insurance for \$1,000. The facts were all stipulated, and were substantially as follows:

(1) The defendant is a corporation, organized and existing under the laws of the state of Massachusetts prior to the dates of any of the statutes of the state hereinafter mentioned.

(2) On the fifteenth day of November, 1880, one John F. Mills, of Michigan, made his written and printed application to the defendant for insurance on his life for \$1,000, for the term of 20-year endowment, and in said application agreed as follows, to-wit:

"In consideration of the agreement of said company that the policy to be issued on this application, if accepted, shall not be forfeited for non-payment of any premium, but in case of failure to pay any premium shall become a paid-up policy for an amount proportional to the premium paid, it is hereby agreed that every person accepting or acquiring any interest in said policy waives the benefit of chapter 186 of the Laws of 1861 of the commonwealth of Massachusetts, if it should be held that said chapter applies thereto; and agrees that said chapter shall constitute no part of said policy, and will accept said provision for a paid-up policy in lieu of the provisions of said chapter."

(3) After the execution and delivery of said application by said Mills to the defendant, on December 4, 1880, it issued to him its policy of insurance, whereby, in consideration of the premium of \$47.98, to be paid on or before December 4th, in every year, it promised to pay \$1,000 to said Mills 20 years from date, or, in case of his prior decease, to his sister, the plaintiff, 60 days after due notice and proof of his death, deducting the premium, if any, for the balance of the policy year. It was further provided in said policy as follows:

"After one or more premiums shall have been paid, this policy shall not become forfeited or void by the non-payment of any subsequent premium, but shall remain in force for an amount *pro rata* to the number of premiums paid, to-wit, for one-twentieth of the amount insured for each and every premium paid. This contract is made and to be performed in the commonwealth of Massachusetts."

(4) After the payment of the first premium, and the failure to pay the second, and on the twenty-seventh day of October, A. D. 1882, the insured died, and due notice and proof was made. The policy was then in force to the full amount if chapter 186 hereinafter mentioned applied thereto. Thereupon the plaintiff claimed the application of the statute of 1861, c. 186, and demanded the full amount of insurance, \$1,000; but the defendant contended that chapter 186 of the Laws of 1861 did not apply to said policy; or, if it did, that by reason of the waiver of the statute, and the agreement by the insured to accept the provision made for a paid-up policy for an amount ratably proportional to the number of premiums paid, to-wit, one-twentieth of \$1,000 for each premium paid, the plaintiff was entitled to receive \$50, which it offered to pay the plaintiff.

(5) Judgment is to be rendered for the plaintiff for \$50, without costs or interest, in case the court sustains the contention of the defendant; and for \$1,000, and interest from December 27, 1882, and costs, in case the court sustains the contention of the plaintiff.

A jury was waived.

Chas. A. Kent, for plaintiff.

Alfred Russell, for defendant.

BROWN, J. The question is as to the applicability of the statute, and as to whether it was waived by the provisions of the policy. The statute of Massachusetts, passed in 1861, to which this policy was