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ORIGINAL ENTRIES FOR PROFESSIONAL PERSONS

Attorneys

Whether a book account can be used by an attorney-at-law as proof of his services to the client, and of the value of them, has not undergone decision by the Supreme Court. "Were the question squarely before us," said Strong, J., "we should hesitate before pronouncing them receivable. The nature of such a service is peculiar. A book entry of it must be indefinite. There is no measure by which its value can be ascertained. Unlike physical labor, it is incapable of being gauged by the time it occupies, or by comparing it with other similar service with which a jury is supposed to be acquainted. Nor is it capable of such certainty in description as is essential to an ordinary charge for work done. No one would contend that a charge of a certain sum "for work" or "for merchandise" without specifying the work or the time consumed in it or specifying the articles sold, would be admissible in evidence. It lacks certainty, and the utmost implication of the law, if any would be made, would be of a promise to pay the smallest possible sum. But a charge for advice is equally uncertain, and still more out of the usual course of business. It has been decided that lit-

erary labor is not a fit subject for book entries. It is not within the necessity that opened the door for the admission of a party's own books. In what respect does professional advice given by an attorney differ?"[1] Even if an attorney might establish a claim for services against his client by book entries, the following entries were not sufficient to sustain a claim. "May 24th, 1852, cash item, $100, 5 per cent. on same, $5;" "1856 February 5th, to going to your house at your request per T. Keagy $10." "May 16th, 1860, to fee in equity proceedings, Souder v. Lapsley, seeing Judge Cadwalader and examining papers, and going to your house, $10." Of the first, Strong, J., remarks, cash is not a proper subject of a book charge, neither is interest or commission on cash. The entry of 5 per cent. does not show whether the charge was for services or interest, or commissions. The second charge is said to be insufficient to show indebtedness. The law implies no promise to pay an attorney for a visit made in compliance with an invitation. So far as appears, the visit was one of friendship. The charge for a fee in the case of Souder v. Lapsley, is, standing by itself, no evidence of Dr. Ard's indebtedness. How was he connected with the case? Whether he requested the rendering of the services the book is no evidence.

Physicians

Referring particularly to the books of physicians, Mitchell, J., remarked in 1896, "How far books of original entry may be received as evidence of services of a professional character, has not been settled in this state." After quoting from Hale's Exec. v. Ard's Exec., 48 Pa. 22, he adds, "How far, if at all, subsequent practice has enlarged the strict limits thus laid down, we do not need

[1]Hale's Exec. v. Ard's Exec., 48 Pa. 22. Cf. Fulton's Estate, 178 Pa. where no distinction seems indicated between a lawyer's book and the book of other professional men; e. g. physician's. Cf. German's Estate, 16 Phila. 818.

to consider."[2] Judges in the Inferior Courts have occasionally expressed doubt of the admissibility of physicians' book entries, e. g. Hawkins, J.[3] Penrose, J.[4] A considerable number of judges however, have conceded that a physician's book would be competent in support of his claim; if properly kept.[5] The Superior Court's judgment in Staggers' Estate[6] assumes the admissibleness of the physician's book.

Reasons For The Admission of Physicians' Books

The reasons for refusing recognition as evidence of the books of an attorney, have been found by Ashman, J. inapplicable to those of a physician. Of the entries in a lawyer's book he quotes the remarks of Strong, J., that they must be incapable of certainty in description, because the services themselves are indefinite in their nature, and can neither be gauged by the time they occupy, nor compared with other similar services with which a jury is supposed to be acquainted. But he adds, "This objection can scarcely be said to apply to the record kept by a physician. It may cover a daily entry of each visit with the name of each patient, a list of the medicines furnished, and the price which custom has fixed for the particular service. Such a record will comprise all the incidents of certainty of time, person, labor and value, and each entry will be complete in itself. No more than this is required in the books of an artizan, and the measure of necessity

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[2]Fulton's Estate, 178 Pa. 78.

[3]Finch's Estate, 49 Pittsb. L. J. 170. The particular book was excluded because not a proper book.

[4]Perhaps he distinguishes between physician and surgeon. The admissibility of books of a lawyer or surgeon, he remarks, "Is more than doubtful." Foreman's Estate, 7 Dist. 214.

[5]Baker's Estate, 11 North. 9, Stewart, J; Kready's Estate, 21 Lanc. 13; Bingaman v. Lewis, 47 Pitts. L. J. 369; German's Estate, 16 Phila. 318; Ashman, J.; Kelley's Estate, 5 Dist. 263, Hanna, P. J.; Moffett's Estate, 11 Phila. 79; Wilson's Estate, 29 Lanc. 45.

[6]8 Super. 2660. Cf. also, Paist v. Spittall, 56 Super. 408.

is at least as great in the one instance as in the other."[7] That patients die, so closing the mouth of the physician, is mentioned, along with the impossibility of his taking a witness with him whenever he makes a visit or dispenses medicine, as a reason for allowing the physician's books to be received as evidence.[8]

Distinct Charge

A charge 1875 January 11, to medical attendance upon Mrs. Isaac Loewengrund for pleuritis, $2.00, was held not inadequate because it did not mention Isaac Loewengrund as a debtor. It is not necessary that the entry should show a debtor and creditor account and a debit against the defendant.[9]

Value of the Services

The values of his services, as expressed in the entries of the physician, are not necessarily to be accepted by the jury,[10] or auditor, or other tribunal. "Gross excess in amount or price," is, says Hare J., "evidence of fraud, and will justify disregarding a claim sustained by such doubtful evidence." The whole book, it seems, may be examined for evidence of illiteracy, ignorance, charlatanry, in order to convince the jury that the physician did not have the necessary skill. "Admitting what ought probably to be conceded, that his employment was *prima facie* evidence of his competency, it might still be disproved by evidence adduced by the defendant, but above all by the plaintiff himself. No man who examines the account given in the plaintiff's book, of the diseases of his patients and his own remedies, can deny that it justifies

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[7]German's Estate, 16 Phila. 318. Hanna, J., describes the admissible record, as showing a charge for attendance with the date, the name of the person charged, and the amount of compensation for the services or attendance, Kelley's Estate, 5 Dist. 263.

[8]Kready's Estate, 21 Lanc. 13.

[9]Tiedman v. Loewengrund, 2 W. N. 272.

[10]Langolf v. Pfromer, 2 Phila. 17.

doubt or disbelief of his possessing the requirements necessary for the responsible office which he undertook to fulfil." In O'Bold's Estate,[12] the physician, after several demands, rendered a bill in a lump sum of $1250. Three years later, at the audit of the account of the administrator of the patient, he presented an itemized claim for $1685.50. In his examination, asked whether the charges were the regular charges for that kind of work, he said, "I have charged more and I have charged less. I charge according to the ability of the man to pay me for my services." The auditor and orphans' court nevertheless allowed him the amount claimed, $1685.50. The Supreme Court affirming, remarks that though the inconsistency between the charges was "discreditable, as showing a desire for special profit rather than for fair compensation," there was no estoppel against making the larger claim. "The auditor and court made an examination (of the evidence as to the value of the services) and while it would have been more satisfactory if the physician had been held to a higher standard of professional ethics, we cannot say that the result was erroneous as a matter of law." An affidavit of defense, to a physician's charges alleged that they were excessive, in fact twice the proper and legal charges for such services. Allison, P. J., declined to enter judgment for want of a sufficient affidavit saying, the charges for visits were so varied, and in some cases so large, that they should not be deemed conclusive.[13] Evidence, as to the value of the visits and services, may of course, be heard, by reference to the value of similar services of other physicians of equal experience and ability. The charges in the book were un-

[11] Id. The motion for a new trial, was overruled, the judge saying whatever the "enormous quantity of medicine" charged in the bill might have cost the physician, the defendant had paid quite as much as it was worth to the patient ,and I certainly do not dissent from their opinion."

[12] 221 Pa. 145.

[13] Thomas v. Askin, 6 W. N. 501.

iformly $2.50 per visit, and 50 cents for medicine. Physicians testified that the charges usual in such a case were from $1.00 to 1.50 per visit. The Orphans' Court thought $1.50 per visit a full compensation.[14] The fact that the remedies administered have failed to cure; and that the claimant acknowledges that he is not satisfied with the results of the treatment, and that he hopes that some one else will be more successful in treating the patient does not affect the right to recover for services rendered unless actual want of skill be specifically shown.[15]

Book Entries from Memoranda

The entries need not be made by the physician himself. They may be made by a clerk from memoranda furnished by the physician, and at the time the latter are handed to him. Thus made, they will be evidence as original entries.[16]

Visiting List

The "visiting list" is described by Hanna, J., as containing simply a name accompanied by a succession of hieroglyphics, to be explained and translated only by the person

[14]Kready's Estate, 21 Lanc. 13. The court disallowed a claim of $10.00 for a post mortem "aspiration." This was made at the instance of the undertaker who was bound to pay for it. Even in the Orphans' Court, the physician, if no objection is made, may testify in support of his claim, Haas Estate, 16 Dist. 251.

[15]Tiedeman v. Loewengrund, 2 W. N. 272. Cf. Tyson v. Baizley, 35 Super. 320.

[16]Haines' Estate, 10 Dist. 677. Penrose, J., cites Kline v. Gundrum, 11 Pa. 242; Schollenberger v. Seldonridge, 49 Pa. 83; Ingraham v. Bockius, 9 S. & R. 285; Hoover v. Gehr, 62 Pa. 136.

making them.[17] Ashman, J., describes it as containing on each page a list of names of patients, with tally marks opposite, in colums which are headed with the days of the week, the name of the month being at the top of the page, and the year on the cover. One column at the head of the space for each week was headed "amount." Preceding these lists, as a preface to the book, was a "Table of Signs." This table embodies a series of hieroglyphics and figures intended to denote visits made, visits repeated, consultations proposed or made, services at the office, visits at night, medicines furnished, etc."[18] Such visiting lists are not admissible in evidence as equivalent to books of original entries.[19] Although Hanna, J., held in Moffatt's Estate[20] that the visiting list if the entries are regularly proved, is admissible to show the number of visits made. If no objection is made to the reception of the visiting list, and it is accepted as correct as to dates and number of visits by the executor of the patient, in a proceeding in the Orphan's Court, and the physician having, without objection, supported his claim without objection, the auditor properly considers both the visiting list and the physician's testimony.[21]

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[17]Kelley's Estate, 5 Dist. 263. Not decided because unnecessary whether a visiting list was a book of original entries; Haas' Estate; 16 Dist. 257. In Finch's Estate, 49 Pitts. L. J. 179, the physician presented, in the Orphans' Court; what he termed a "call-book." Under the heading of each month, was entered the name of each patient, and the number of visits paid. The services were rendered between 1882 and 1894, after which there was no entry until April, 1896, when credit for a small payment was given. Hawkins, P. J., held that the "call-book" was not a book of original entry, receivable as evidence; but, if it was, the statute of limitations had barred the claim.

[18]German's Estate, 16 Phila. 318.

[19]Haines' Estate, 10 Dist. 677; German's Estate, 16 Phila. 318; Kelley's Estate, 5 Dist. 263; Foreman's Estate, 7 Dist. 214.

[20]1 W. N. 518.

[21]O'Bold's Estate, 221 Pa. 145.

Particularity

Extreme particularity in describing the service or thing rendered does not seem to be necessary. To state that the thing furnished is "medicine," is apparently specific enough.[22] The nature of the disease is sometimes indicated in the entries[23] but not often. Apparently, the value in money of the service, the medicine, etc., must be expressed in the entry.[24]

Intelligibility

Sometimes an entry is objected to for want of explicitness and certainty. An entry was "Jan. 7, 1893, John R. Foreman, snared off anterior internal polypoid." To it various objections were made by Penrose, J. It did not state the value of the service. It did not say that the service was done by the claimant. Did it not mean that Foreman (the person against whose estate the physician was claiming) snared off the polypoid? What polypoid? Polypoid in whose person? When did the "snaring" occur? What is "snaring off?" The judge objects also, that there is nothing to show the character of the operation; or of the object snared off, or the time required for the operation; nor therefore, by which the value of the service could be estimated.[25]

Visits on Sundays

Charges for services rendered on Sunday are not for that reason to be rejected. "It would be contrary to public policy," says Reeder, J., "and detrimental to public health if courts should hold that people who were taken seriously ill on Sunday, calling on a physician to care

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[22]Fulton's Estate, 178 Pa. 78.

[23]Tiedeman v. Loewengrund, 2 W. N. 272. Stated to be pleuritis.

[24]Penrose, J., Foreman's Estate, 7 Dist. 214.

[25]7 Dist. 214.

for them, should not be obliged to pay for such services.[1]

Lumping Charges

The charges must be separate for each separate service. A chiropodist's book entry was:

Mr. S. Geddis to Dr. J. Davidson, Dr.

1873—Jan. 1 To attending his feet one month_____$15
Feb. 1. To attending his feet one month_____$15

This combination of the frequent services of a month into one charge, vitiated the book as evidence.[2] In Borah v. Gregory,[3] a physician's book contains entries like this:

Cornelia Gregory Dr. to John P. Borah, M. D.

1877—Sept. 28.. To visit and medicine_____$1.50
Sept. 29. To two visits and medicine_____.3.00

The court refused a judgment for want of an affidavit of defence, because the charge for visit and that for the medicine were not distinguished. "A lumping charge" it said "for visit and medicine is not good." In Mathews v. Glenn,[4] each of the charges was for two visits, medicine and vaccinating $4.50. Among the objectons to it was that it was lumping. The court refused judgment for want of a sufficient affidavit of defence. No fault apparently was found with the following charge: 1881 January 6, Four visits including one night visit, one detention at night, and one consultation.

Then followed a series of charges from January 6th to March 8th, 1881. No specific sum of money was set out in each charge. The court refused to require a more explicit

bill of particulars.[5] One of the objections to a physician's visiting list was that one column at the end of the space for each week was headed "amount," and that in this column the sum of the charges for all of the visits of the week appeared; the charge for each visit, or each day's visit not separately appearing. "As original entries," says Ashman, J., "even if decipherable, they were incomplete, because their form admitted only of a weekly charge of money, and in point of fact, no charge at all appeared to have been made.[6] A charge "April 1st, 13th, 14th, 18th, 23d, five visits and medicine at $2.00 per visit, $10 was apparently not objectionable to the Supreme Court.[7]

Signs, Etc.

Marks intended to denote visits, consultations, medicines, services at the office, etc., explained in a table of signs, were used in the visiting list, to state the number of visits, etc. Ashman, J., observes "the law cannot tolerate as self-proving an entry of services which can be translated only by means of a glossary. Such a writing would be as unintelligible to an ordinary jury as a Hebrew Bible to a deputy sheriff.[8] But, the table of signs could be easily applied. If a Polish or Russian physician used his own language in keeping his books, would they be excluded, because a "glossary" or an interpreter would be necessary? Hanna, P. J., joins in the objurgations of the visiting list, saying such a book, containing simply a name, accompanied by a succession of hieroglyphics, is inadmissible. But, he conceives it unintellible unless "explained and translated by the person making the marks.[9] The court refused judgment for want

[5]Van Bibber v. Merrit's Exec., 12 W. N. 272. Nothing is said about the charges in the physician's book.

[6]German's Estate, 16 Phila. 318.

[7]Staggers' Estate, 8 Super. 260. See several lumping charges in Fulton's Estate, 178 Pa. 78.

[8]German's Estate, 16 Phila. 318.

[9]Kelley's Estate, 5 Dist. 263. Apparently it cannot be assumed without proof, that the marks used, are used in the sense indicated by the table of signs.

of a sufficient affidavit of defence, because the original entries were "made up of abbreviations and hieroglyphics, and is entirely unintellible except as to the figures, and the words in the beginning."[10] Mitchell, J., declines, in Fulton's Estate to discuss the "self-sustaining character of the charges in dispute." They need not be such as to be understood by the general public; if they are intelligible to persons in the business; but, where they are not intelligible to the common understanding, it would seem to be necessary to support them by evidence as to their meaning and character.

Other Persons Charged Than the Defendant

The entries must be made in the physician's regular course of business. A series of charges against one person only, will not be admissible. If the patient is alleged and proved to have requested that a separate book be kept charging him, possibly the book could be received, but proof of the request would need to be given. The patient being dead, the physican himself would not be competent to prove it.[12]

Self Serving Statement of Credit Not Receivable

A self-serving statement entered in the book of original entries of a physican is not receivable in evidence, unless it be concerning services or medicines rendered. B, a physician, had given three promissory notes to A. In an action on these notes, B attempted to show that the understanding, when one of them was given was, that it was not to be paid unless A adminstered on his wife's estate. A witness for B, entered a memorandum of the alleged agreement in B's book of original entries under the charges against A. B acknowledged to have received of A the sum of $500 on account of the above indebtedness, but on condition that if her legal heirs administered on her estate,

[10]Mathews v. Glenn, 7 W. N. 213. The use of med. for medicine, will not bar the entries; Staggers' Estate, 8 Super. 260.

[11]178 Pa. 78.

[12]178 Pa. 78.

he B should collect the bill of her estate, and pay back the amount of the note and interest. This was not signed by A. Being a memorandum made by B, or at B's instance it could not be used otherwise than to refresh the memory of the witness. It was not in itself evidence,[13] that is, the physician's book could not be used to prove that a certain condition, not expressed in his note to a creditor, affected his promise to pay.

Proceedings

The claim of the physician may be made in an action of assumpsit against the patient, or his father (if he is a minor) or the husband, if she is a married woman,[14] or, if the patient be dead, his executor or administrator. The claim may be presented also in the proceedings in the orphans' court for the distribution of the estate of the deceased.[15] In the common pleas [16] as well as in the orphans' court the orignal entries may be used. The claim may be used as a set-off.[17]

Affidavit of Defence

The affidavit of defence in an action against a physician may allege a counter-claim by him, e. g. for "professional and dental services, and medical care and treatment tion, an affidavit of defence is necessary.[19] It may deny the sufficiency of the entries as proof of the claim, e. g. it points out that the charge is a lumping one[20] or that it is of the plaintiff.[18] In actions for a physician's compensa-

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[13]Hottle v. Weaver, 206 Pa. 87.

[14]Tiedeman v. Loewengrund, 2 W. N. 272.

[15]Haines' Estate, 10 Dist. 667.

[16]Moffatt's Estate, 1 W. N. 518; German's Estate, 16 Phila. 318; Kelley's Estate, 5 Dist. 263; O'Bold's Estate, 221 Pa. 145; Haas' Estate, 16 Dist. 251; Staggers' Estate, 8 Super. 260.

[17]Cook v. Birkey, 6 W. N. 503.

[18]Cook v. Birkey, 6 W. N. 503.

[19]Birch v. Gregory, 7 W. N. 147; Mathews v. Glenn, 7 W. N. 215; Bingaman v. Lewis, 47 Pitts. L. J. 369; Paist v. Spittall, 56 Super. 408.

[20]Birch v. Gregory, 7 W. N. 147; Thomas v. Askin, 6 W. N. 501.

made up of abbreviations and hieroglyphics, and is unintelligible[21] or that the entry did not debit the defendant.[22] It may deny that the services were worth as much as the entry represents them to be worth.[23]

Chiropodist

Perhaps the book entries of a chiropodist would be as receivable, as evidence, as those of a physician. A judgment for want of an affidavit of defense was opened, however, the entries a copy of which was filed, being lumping; e. g. one charge for the service of each month:

1873, Jan. 1st, to attending his feet one month $15.
Feb. 1st, to attending his feet one month, $15.

Dentist

Probably a dentist may prove his services by a book of original entries. In Cook v. Birkey,[25] the defendant filed an affidavit of defence, in which he set off a claim for professional and dental services and medical care and treatment, but how this set-off was to be established, does not appear.

Literary Labor

Strong, J., mentions that "It has been decided that literary labor is not a fit subject for book entries. It is not within the necessity that opened the door for the admission of a party's own books."[26]

Surgeon

Penrose, J., assimilates the employment of a book of original entries by a surgeon, to the employment of it by an

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[21]Matthews v. Glenn, 7 W. N. 213.

[22]Tiedeman v. Loewengrund, 2 W. N. 272.

[23]Tiedeman v. Loewengrund, 2 W. N. 272; Thomas v. Askin, 6 W. N. 501; Bingaman v. Lewis, 47 Pitts. L. J. 369.

[24]Davidson v. Geddes, 1 W. N. 9.

[25]6 W. N. 503.

[26]Hales' Exec. v. Ard's Exec., 48 Pa. 22. Strong, J. asks, "In what respect does professional advice given by an attorney differ?" from literary work. Cf. Foreman's Estate, 7 Dist. 214.

attorney. "What was said by Judge Strong in Hale v. Ard, 12 Wright (48 Pa.) 24, with reference to proof of professional services of a lawyer, applies with equal force to the services of a surgeon." The surgical act in question was described in the original entry by the words "snared off anterior internal polypoid."[27]

Real Estate Agent Conveyancer

A commission on the sale of a house for its owner, is not the proper subject of a book charge to be proved by the production of the book as one of original entry.[28] Conveyancers' charges are probably not provable by original entries. In a suit by a conveyancer, a copy of book entries was filed.

Jos. Noel, 618 Chestnut Street to Samuel G. Thorne, Dr.
To commission on $1200 at 2 per cent ____$24.00.
To preparing assignment of mortgage ____ 15.00.
To preparing agreement and declaration of no off-set _____ 10.00
To examination of title _____ 15.00

A judgment entered for want of an affidavit of defence was struck off, and execution thereon stayed; but the deposition of defendant showed that the copy had not been filed within 10 days after the return day, and that no notice had been given the defendant or his attorney.[29]

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[27]Foreman's Estate, 7 Dist. 214.
[28]Fenn v. Earley, 113 Pa. 264.
[29]Thorne v. Noel, 5 W. N. 566.

MOOT COURT

WHITMAN'S ESTATE

Trusts and Trustees—Charitable Trusts—Petition to Terminate—Refusal

STATEMENT OF FACTS

Henry Whitman devised land to George Roland, his heirs and assigns, in trust to rent it, repair it when necessary, keep it insured, and pay over the net rents every six months to the First M. E. Church of Newville, a corporation. Roland died. The Church then asked the Court to appoint another trustee and direct the trustee to convey the property to the Church. This the Court refused to do. The Church is now appealing.

Claster, for the appellant.

Coplan, for the appellee.

OPINION OF THE COURT

COURTNEY, J. This is an appeal from the Lower Court refusing appellants' petition for the termination of a trust in estate of Henry Whitman, deceased.

Henry Whitman devised land to George Roland, his heirs and assigns, in trust..... The fundamental and cardinal rule in the interpretation of wills is that the intention of the testator, if not inconsistent with some established rule of law or with public policy must govern. Woelpper's Appeal, 126 Pa. 572. Here the testator's intention was to have the property held in trust for the M. E. Church. We cannot agree with the appellants in their contention that testator had used the phrase "heirs and assigns" without knowing the significance of the same. The usual custom in making wills is to have as attorney draw the same—and as nothing is stated to the contrary here—we will assume that an attorney drew the testator's will. Therefore the testator must have known what the phrase "heirs and assigns" meant, and his intention must have been that the property should not vest in the cestui que trust, but should be held by the trustee in trust for the cestui que trust. Unruh's Estate, 248 Pa. 185. Where technical words are used they must be taken in their legal and technical sense. Bispham's Equity, page 112.

It was also argued that this was a passive trust and therefore should be executed and the legal title vested in the First M. E. Church. We think that this is a plain case of an active trust. "A passive or dry trust is one which requires the performance of no duty by the

trustee in order to carry out the trust, but by force of which the mere legal title rests in the trustee; while an active or special trust is that in which the trustee has some duty to perform, so that the legal estate must remain in him or be defeated." Bouvier's Dictionary. In Barnett's Appeal, 46 Pa. 392, it was held that, among the active trusts has always been classed that to receive and pay over the profits to another, in which case the land must remain in the trustee to enable him to perform the trust. So also, when the trustee is to dispose of the property, or pay the rents over to the cestui que trust, or to apply them to their maintenance, or to make repairs on the property. In Re Estate of Eshleman, 191 Pa. 68. In the present case testator directed that the trustees should rent the property, repair it when it was necessary, keep it insured, and pay over the rents every six months to the cestui que trust. This shows that the trustee had duties to perform which made the trust active.

The question then is, whether the court can—in violation of the testator's express intention—terminate the actual trust and convey the property to the appellants. We think that the case of Unruh's Estate, 248 Pa. 185, decides this question. In that case the testatrix devised land to Spiegel, his heirs and assigns forever, in trust to invest the securities as he might deem prudent, and to pay the net income over to the Orphans' Asylum. The cestui que trust, upon the death of the first trustee—with whom the succeeding trustee joined —asked the court to terminate the trust. The court refused to do so on the ground that the testatrix used language which clearly showed her intention that the trust was to be administered by her trustee, and not by the institution which was the object of her bounty. "And therefore if we were to terminate the trust and order the transfer of the assets over to the charitable beneficiary we would not only be defeating the intention of the testatrix, but would also deprive the ultimate objects of her bounty of the supervision and control which we have over trustees." We think that the present case should be decided the same way. The testator intended that the property should be managed by only one person, instead of by a number over whom the court would have no control. If we directed the conveyance of the property to the cestui que trust we would thereby terminate the trust and entirely disregard the intention of the testator. We refuse so to do.

It will not make a difference if there is no succeeding trustee living, as the court has the power to appoint a new trustee who will succeed to all the powers of the trustee selected by the testator. A trust shall not fail for want of a trustee, since a court of equity by its general inherent jurisdiction over trusts, has power to appoint one if necessary. 39 Cyc. 277; Ash v. Ash, 1 Phila. 176.

We therefore affirm the learned court below and direct that a trustee be appointed.

OPINION OF SUPERIOR COURT

It is unnecessary to add anything to the opinion of the learned court below, which sufficiently vindicates its decree.

Appeal dismissed.

HUNTER v. TROLLEY CO.

Street Railways—Automobiles—Contributory Negligence—Last Clear Chance

STATEMENT OF FACTS

Hunter was driving a wagon on Main street and was near the tracks of the defendant, which cross the street, when the conductor of the trolley car saw him. Hunter's manner showed that he was not heeding the approaching car and was about to cross the track. The car could have been stopped or slowed and thus a collision could have been avoided, but the motorman, assuming that Hunter would desist from attempting to cross, if he noticed the approach of the car, continued the existing speed of the car. A collision ensued. Hunter claims that the motorman should have averted the accident. The defendant argues the contributory negligence of the plaintiff.

OPINION OF THE COURT

Hibbard, J. There was no evidence that the car at the time of the accident was being operated at a high rate of speed, or that it was beyond the control of the motorman; nor was there any question as to the failure of the motorman to give a signal of the approach of the car. But there were facts indicating that Hunter was not heeding the approach of the car. This we take to mean that he was driving down the street in a careless manner, totally oblivious of his surroundings, and thus he was approaching the lines of the defendant company. It is obvious that he was not exercising that care and prudence exacted of vehicles and pedestrians about to cross street railway tracks. Ordinary prudence is all that is required; and if that be shown, the plaintiff should not be non-suited, but is entitled to have the question of his contributory negligence submitted to the jury to decide upon the evidence.

Do the facts in the case establish contributory negligence in Hunter, the driver? "There is always the duty to look for an approaching car, and if the street is obstructed, to listen, and in some situations to come to a full stop. If he looks and sees an approaching car

so near as to make the attempt dangerous, it is his duty to stop; or if when he looks at the edge of the tracks his view is so obstructed that he cannot see in, it becomes his duty to listen, and under some circumstances it may be his duty to stop, if, when he looks and listens he still is in doubt as to the location and movement of the car. If in any of these situations he fails in the performance of the duty required by many decisions he is guilty of contributory negligence and cannot recover." Spahr v. York Ry. Co., 50 Sup. 602, "The street company has a right to the use of its tracks, subject to the right of crossing by the public at the street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour. But it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen and so avoided the collision—and this appears from his own evidence—he may be properly non-suited." Carson v. Federal St. and Ry. Co., 147 Pa. 219. Hunter neither looked nor listened for the approaching car. He drove in front of a moving car so near to him as to make a collision inevitable. If he had looked, he could have seen the car and stopped, and the accident would have been averted. It nowhere appears that his view was obstructed in any way. "There is always the duty to look for an approaching car, and if the street is obstructed to listen, and in some situations to stop. Omslaer v. Traction Co., 168 Pa. 519. "While street railways have not an exclusive right to the use of their tracks, their rights are superior to those of the traveling public; their cars have the right of way thereon over private vehicles and pedestrians, and the latter must yield to this superior right." Smith v. Phila. Traction Co., 3 Sup. 129; Davidson v. Traction Co., 4 Sup. 86.

We are unable to discover any evidence that tends to relieve plaintiff from the charge of negligence on his part or that would justify a finding that he exercised that care which the law requires of one about to cross a railway when in full view of an approaching car and, especially when, if he had looked immediately before driving upon the track he could easily have avoided the accident. There was no evidence of circumstances or conditions that prevented plaintiff from exercising ordinary prudence or that would tend to divert his attention. It is clear, we think, that under the undisputed facts in the case the plaintiff was guilty of negligence which caused his injuries and that judgment should therefore be given to defendant.

Judgment for the defendant.

OPINION OF SUPERIOR COURT

The plaintiff was driving along a street which crossed that on which the defendant's track was. He had a right to cross that street, and the track; as much right to cross the track as the defendant had to impel its cars longitudinally upon it. He was not bound to give precedence to the defendant's car. Arriving first at the crossing, he had reason to expect the defendant to wait, if necessary, until the transit was accomplished. It probably was carelessness on the part of the plaintiff not to heed the approaching car, but had he heeded it, it would not follow that it would have been his duty to pause so as to allow the car to pass. The car was so situated, the light and the conditions were such, that the car could have been slowed and a collision avoided, and that being so, it would not necessarily have been a negligent act in the plaintiff to have gone across the track, though his attention had adverted to the approach of the car. "A person about to cross a street at a regular crossing, is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross, if it is run at the usual speed, it cannot be said as matter of law, that he is negligent in going on." Callahan v. Phila. Traction Co., 184 Pa. 428; Hamilton v. Traction Co., 201 Pa. 351 If the person crossing may without negligence, assume that the car will be run at the usual speed, so he may assume that the motorman will exercise the usual care, and, seeing a vehicle crossing a track, will sufficiently retard the car, when that is practicable, to avoid collision.

But, let us concede that it was negligence in the plaintiff to cross the tracks under the circumstances. Hunter's manner showed that he was not heeding the approaching car, and was about to cross the track. The car could have been stopped or retarded, so that a collision with Hunter's wagon could have been avoided. The motorman assuming that Hunter would see the car and would desist from attempting to cross, continued the speed of the car without abatement. Had he a right to speculate upon Hunter's seeing the car, when the latter indicated by his demeanor that he was paying no attention to it? Was it not his duty to do what was practicable, to prevent a collision? The jury might properly have found that it was.

We have found no case in Pennsylvania which distinctly recognizes the doctrine so unhappily named that of the "last clear chance." We deem it a sensible doctrine. It is thus stated in Shearman and Redfield, Negligence, 5th edition, Sec. 99: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's omission after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is longer

disputed." Cf. Grand Trunk R. Co. v. Ives, 144 U. S. 408; Pilmer v. Boise Traction Co., 94 Pac. 434; 15 L. R. A. N. S. 254. The doctrine is applied in Lyons v. Metropolitan St. Railway Co., 253 Mo. 143; 36 Am. & Eng. Ann. Cases, p. 508, to a case whose facts are not dissimilar to those of the case before us.

The jury should have been allowed to say whether, had the motorman not carelessly neglected to diminish the speed of the car, the accident would have been prevented.

Reversed with v. f. d. n.

MANUFACTURING CO. v. ADAMS ET AL.

Corporation—Directors—Dividends Declared Negligently

STATEMENT OF FACTS

Plaintiff is a corporation. Adams et al., the defendants are its directors. By gross negligence they declared dividends, when no profits had been made, and these dividends have been paid, and the capital correspondingly diminished. The corporation files its bill to compel the directors to replace the stock thus diminished. The stockholders now in the corporation were all the stockholders who received dividends. The corporation is not insolvent and the replacement of the capital stock will not be necessary in order to pay any existing creditors.

OPINION OF THE COURT

CLARK, J. If directors of a corporation by gross negligence or wilful conduct declare a dividend when there are no profits, and thereby the capital stock is diminished, they are liable personally to the corporation. Neall v. Hill, 16 Cal. 145.

Directors of a bank who receive no compensation are liable only for gross negligence (in absence of fraud) in management of the corporation at least as against stockholders seeking in behalf of the corporation to hold them personally liable for mismanagement. Jones v. Johnson, 86 Ky. 530. The directors of a corporation who wilfully abuse their trust or misapply the funds of the company by which a loss is sustained are personally liable as trustees to make good that loss, and they are liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. Robinson v. Smith, 3 Paige (N. Y.) 222; Spearing's Appeal, 71 Pa. 11.

In Devlin v. Moore, 19 Pac. 35, the court says, "If directors know or by exercise of ordinary care should have known any facts which would awaken suspicion and put a prudent man on his guard,

then a degree of care commensurate with the evil to be avoided is required and a want of that care makes them responsible. Directors cannot in justice to those who deal with banks shut their eyes to what is going on around them. They are bound to use reasonable care, and when they are grossly negligent they do not use that amount of care." In looking over the opinions of different states we find that the general rule applied is that the directors must use reasonable and ordinary care, skill, and diligence in conducting the business of a corporation. It was held in Loan Society of Philadelphia v. Eavenson, 248 Pa. 407, that this was the standard rule in Pennsylvania and the failure to observe it imposes liability on a defaulting director. And in no case can we find that the directors were not held liable to the corporation when they were guilty of gross negligence.

The stockholders cannot be compelled to return the dividends they have received if they acted in good faith, believing the same to be paid out of the profits, and when the corporation at the time the dividend was declared and paid, was solvent, even if the dividends were paid not out of the profits but entirely out of the capital. McDonald v. Williams, 174 U. S. 397. Since the stockholdtrs cannot be made to return the dividends we must attach the liability to persons who are responsible for the loss. Sir George Jessel said in Flitcroft's case, L. R. 21 Ch. Div. 519, "It follows then that if directors who are quasi trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them. We are of the opinion that the company in its corporate capacity can compel them to do so, even if there were no winding up." In the same case it was said, "In my opinion the corporation at any time before the winding up could have compelled the directors to replace the money thus improperly expended, and the liquidator now can do so. Even if shareholders had all sanctioned what was done and had remained the same throughout, still the company could sue the directors for a breach of trust. They are trustees for the company, not for the individual shareholders."

It is a well settled principle that dividends may be declared and paid only out of the surplus and profits from the business. Smith v. Dana, 77 Conn. 543; Martin v. Zellerbuch, 38 Cal. 300. The directors are liable to the corporation for the dividends they have declared through gross negligence.

Judgment for the plaintiff.

OPINION OF THE SUPREME COURT

Loan Society v. Eavenson, 248 Pa. 407 is authority to justify the affirmance of the learned court below, even though (1) the corporation is solvent, and (2) the stockholders now in the corpora-

tion are the stockholders who receive the dividends. To the same effect is Appleton v. Am. Malting Co., 65 N. J. Eq. 375.

Affirmed.

WATSON v. RAILROAD CO.

Negligence—Trespassing Cattle—Duty of Engineer

STATEMENT OF FACTS

A mule belonging to Watson was on a highway near to the crossing of the tracks of the defendant when it was seen by the engineer.

The whistle was not blown, nor the speed of the train lessened. The mule advanced on the track and was struck by the locomotive and killed. Plaintiff claims its value, $150.

OPINION OF THE COURT

O'HARE, J. If the killing had taken place at a crossing there would be greater liability on the part of the defendant as an engineer would be required to lessen the speed of his engine and blow his whistle when approaching a crossing, and failure to do so would be negligence per se. In the present case the accident did not take place at a crossing, but near to one, and therefore failure to blow the whistle and slacken the speed of the locomotive would only be slight negligence and would not warrant a jury in finding for the plaintiff.

But the fact that the animal was seen by the engineer should have had some bearing on the matter, and induced him to blow his whistle at any rate, even if he did not slacken speed.

It would not be wanton and malicious negligence as claimed by the counsel for the plaintiff and there might be many reasons why the speed should not be slackened. A train is supposed to fulfil its engagements with the post office and passengers, and it could not do this if the train would have to stop at intervals to put wandering cattle off the tracks.

As argued by counsel for defendant, a railroad should be allowed to fulfil its engagements at the sacrifice of secondary interests put in its way or else it could not fulfil them at all.

Killing of cattle on defendant's tracks would be a secondary interest. A human life would be a primary interest and a train should be stopped if possible in such a case.

The Western States seem to hold that the railroad is liable in damages for injury to stock through its negligence where plaintiff had contributed to the injury by allowing stock to run at large.

But Pennsylvania courts seem to hold the opposite, and say that plaintiff cannot recover unless defendant is wholly at fault, and if defendants are not wholly at fault, plaintiff cannot recover. Therefore, in deciding for the plaintiff in this case, we agree with the Pennsylvania view and say that if it is not wholly defendant's fault, he will not be liable. In this case he was not wholly at fault as is seen by the facts.

A railroad is private property and anyone who uses the railroad as a highway holds himself liable for the consequences which result. Towanda R. R. v. Munger, 5 Denio 255, upholds this doctrine.

While we all recognize the leaning of the Pennsylvania courts to obtain verdicts for railroads, still we think in a case like this a court would be justified in deciding for a railroad as if it would decide otherwise the tracks could be infested and used as highways to the great inconvenience of passengers and the mail and express departments.

Summing up the case, defendant was negligent in not blowing the whistle when it saw the mule, but was not compelled to slacken the speed of the train as it was not at a crossing, and plaintiff was negligent in allowing his mule to roam on defendant's tracks. As we feel that plaintiff's negligence overbalances the negligence of defendant, we render judgment for the railroad company.

OPINION OF SUPERIOR COURT

The mule was seen near the crossing, and advancing towards it, by the engineer. It was in charge of nobody. Why it was there, does not appear. In the absence of evidence, we cannot assume that its owner, the plaintiff, had been negligent in allowing it to be there. Did its presence, known to the engineer impose any duty upon the Railroad Company? We think it did. Whatever could reasonably have been done, to escape collision with the mule should have been done. Not only the safety of the mule but that of the passengers, dictated the adoption of proper means.

That the blowing of a locomotive whistle alarms animals, is well known. Negligence has been found in the killing of turkeys, (Lewis v. R. R. Co., 163 N. Car. 33) cows, horses, etc., by reason of failure to sound the whistle. It cannot, however, be foreseen whether the result of the alarm of the animal would be its retreat from, or its advance towards the danger. The circumstances ascertained, would not have warranted a finding by the jury that if the whistle had blown or the speed slackened as much as practicable, the killing of the mule would have been averted. For this reason we affirm the judgment of the learned court below.

Some merriment was excited in the mind of the writer of the per curiam opinion, in Fisher v. Penna. R. R., 126 Pa. 293, where a mule was killed by a train. "If it was the duty" ways the writer, "of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule to 'stop, look, and listen.' To apply rules to dumb animals which were intended only for reasonable beings is dangerously near to the realm of absurdity." But, is requiring an engineer to adopt reasonable means to prevent the killing of a mule, and if blowing the whistle is such reasonable means, is requiring him to blow the whistle the same thing as requiring a mule to stop, look, and listen? The former is the duty of a "reasonable being," to prevent, if he can, destruction of live stock; the other would be a duty put upon the dumb animal itself. The facetiousness of the justice was a trifle inappropriate.

Since it does not appear that the collision could have been avoided, had the omitted acts, viz: the whistling and the slowing been done, the

Judgment is affirmed.

REX v. THE A. B. C. CO.

Practice C. P.—Service of Summons—Statute of Limitations—Amendments

Certain persons obtained a charter from Pennsylvania under the name "A. B. C. Co." The same persons obtained a charter under the same name from Maryland. The two corporations carried on distinct businesses, the construction of buildings, and each operated to the same extent in the state other than that of its incorporation. The Maryland corporation was erecting a building in Pennsylvania and Rex was an employee. He knew that the men who employed him and were erecting the building were a corporation but had never known that there were two corporations, one of which was of Maryland. The president of the Pennsylvania corporation was Harper, on whom as president summons was served in this action for injuries. The president of the Maryland corporation was Robinson. At the trial, plaintiff discovered his error. The trial was postponed. An alias summons issued and was served on Robinson. But more than six years since the cause of this action had then elapsed. The statute of limitations was pleaded. The original action was in time.

OPINION OF THE COURT

HESKETT, J. A review of the cases wherein amendments have been allowed or disallowed results in great confusion as to

what the law in this respect actually is. In the early history of the adjective law, an error of any kind appearing in the pleadings, was fatal to the action, but the injustice perpetrated by so harsh a rule later gave rise to more leniency in regard to barring meritorious actions on mere technicalities, and thus the old rule had so far been abrogated that the court says in Barnett v. School Directors, 6 W. & S. 46, that amendments in furtherance of justice are always favored by the courts. The liberal note there sounded continues throughout a succession of cases including Porter v. Hildebrand, 14 Pa. 129; Stewart v. Kelly, 16 Pa. 160; Wood v. Philadelphia, 27 Pa. 502; Nelson v. Bank, 45 Pa. 488; Pa. R. R. v. Kellar, 67 Pa. 300; Miller v. Pollock, 99 Pa. 302.

In Wright v. Eureka Tempered Copper Co., 206 Pa. 274, the court has not departed from the policy of liberality in this respect, but holds, "Statutes of Amendments are liberally construed to give effect to their clearly defined intent to prevent a defeat of justice through a mere mistake as to the parties or the form of action."

It should however be noted that in all those cases where amendments have been allowed, the courts have been careful to look to the amendment to determine whether it was a mere defect in the pleadings or service that was to be remedied, in which case the amendment is generally permitted, or whether it was such as to go to the cause of action, or the parties thereto, in which case it has not been allowed. Greer v. Assurance Co., 183 Pa. 334; Riley v. Insurance Co., 12 Super. 561. Nor can amendment be permitted in any case so as to deprive the opposite party of any right. Kaul v. Lawrence, 73 Pa. 410; Trego v. Lewis, 58 Pa. 463; Furst v. B. & L. Assn., 128 Pa. 183. There is however a qualification to the rule that no new parties shall be brought in, in a certain class of cases where substitution of parties acting as legal successors is permitted. Jamieson v. Capron, 95 Pa. 15; Clifford v. Ins. Co., 161 Pa. 257; Power v. Grogan, 232 Pa. 387.

In the light of the foregoing authorities we are led to the conclusion that care must be exercised in the use of amendments to differentiate between those cases where the right party is sued in a wrong name and those wherein the wrong party has been sued in his right name. In the latter case the action is defeated and we think the case at bar falls within its scope. We are not apprised by the facts as to whether the Maryland or the Pennsylvania corporation has been sued but in view of the fact that the plaintiff, Rex, never knew of the existence of the two corporations, we think it is a fair inference that summons having been served on the president of the Pennsylvania Company, the plaintiff intended that company to be the original party defendant. Cor-

porations are legal entities and the fact that two corporations are of the same name and owned by the same parties does not affect the rights of either as such entities.

One of the objects of serving summons is that the defendant may be apprised that he has been sued, and in case of corporations service on the president or other officers as prescribed by law, is regarded as service on the corporation. But where no such service has been had upon the proper party defendant within the time required by the Statute of Limitations, the plaintiff cannot then begin his action and show error in having brought an original action against an entirely wrong party as a bar to the statute. In O'Neill's Estate, 29 Super. 415, it is held, "Where an original writ is issued, but not served, and an alias writ is not issued, until seven years after issuance of the original writ the claim is barred by the Statute of Limitations." We can see no difference in no service at all and service on a wrong party.

The Statute of Limitations is an affirmative defense and confers upon the party defendant a right to be relieved of liability for old causes of action, which by virtue of lapse of time, subject such defendants to unusual difficulty in preparing adequate defense. The case may therefore also be said to come within the rule in Kaul v. Lawrence, Trego v. Lewis, Furst v. B. & L. Association, supra.

Judgment is therefore given for the defendant.

OPINION OF THE SUPREME COURT

By the statement of facts we are informed that "at the trial plaintiff discovered his error." What was the error which the plaintiff discovered that he had made? Did he discover that he had sued the wrong corporation? Or did he discover that having sued the right corporation he had served the summons on the wrong president? The answer to these questions depends upon the answer to another. Which corporation did the plaintiff intend to sue?

He intended to sue and did sue the A. B. C. Co. The learned court below has determined that he intended to sue and did sue the Pennsylvania corporation. What is there in the facts to justify this inference? Simply the fact that the summons was served upon Harper the president of the Pennsylvania corporation.

We think, however, that the inference that he intended to sue and did sue the Maryland corporation is equally strong. He intended to sue the men for whom he was working. He knew that they were incorporated. The name of the corporation for which he was working was the A. B. C. Co. He sued the A. B. C. Co. He did not know "that there were two corporations." If he intended to sue the corporation for which he was working and the name of that corpora-

tion was the A. B. C. Co., and he sued the "A. B. C. Co." and he did not know that there were two corporations, the inference to which these facts give rise is that he intended to sue the A. B. C. Co. of Maryland, and this inference is not, in our opinion, overcome by the fact that process was served upon the president of the Pennsylvania corporation.

Taking this view of the case we are compelled to reverse the judgment of the learned court below. In Pennsylvania an action begins with the issue of the summons. Its commencement is not postponed to the time when the service of the writ is effected. Nor is it necessary that the writ whose issuance is the beginning of the action should be served at all. When the writ is not served the action may be continued by the issue of an alias writ within six years of the issue of the original writ. The service of the writ in this case was not a service as to the A. B. C. Co., of Maryland, and the case falls within these principles. Judgment reversed.

BREWERY CO. v. RAILROAD CO.

Evidence — Positive and Negative Testimony—Relative Weight—Instructions to the Jury

STATEMENT OF FACTS

In a collision between a brewery wagon and a train on the defendant's track, the wagon was damaged. The plaintiff alleged that had the whistle blown, the bell been rung, the collision would not have occurred.

He produced four witnesses who said they were listening for the whistle and bell, and would have heard them had they sounded and that they did not hear them. Four employees of the train testified that the whistle did sound, and that they heard it. The trial court told the jury that the testimony for the plaintiff on this point was negative, and therefore inferior to that of the defendant which was positive. The verdict was rendered for the defendant. Motion for a new trial.

Achterman, for the plaintiff.

Alexaetis, for the defendant.

OPINION OF THE COURT

The motion for a new trial is made upon the following points: (1) That the trial court erred when it called the testimony offered by the plaintiff, negative testimony, without informing the jury of the different forms of negative testimony; (2) That the trial court erred when it charged the jury, "that the testimony for the plaintiff on this

point was negative and therefore inferior to that of the defendant which was positive."

The learned counsel for the defendant takes it for granted that the testimony for the plaintiff was negative, and from this inference contends that this testimony is inferior to that for the defendant, it being positive.

It is a rule of evidence that, ordinarily, a witness who testifies to the affirmative is entitled to credit in preference to one who testifies to the negative, because the latter may have forgotten what actually occurred, while it is impossible to remember what never existed. This is held in Stitt v. Huidekopers, 17 Wall. 384.

The real question to be decided upon in this case, a question which must be decided from the facts given, is to what class of testimony, that given by the plaintiff belongs.

There are four forms of testimony under one of which the testimony here must fall, namely: positive, negative, positive testimony though of a negative form, and negative testimony which is not of a purely negative character.

In 17 Cyc. 800, we find the following definitions for the several forms of testimony which are supported by numerous cases, some of which will be cited below.

Positive testimony is testimony by which a witness testifies that he saw or heard a fact. Where a witness testifies that he was present, and did not see or hear, or that the fact did not occur, this is strictly negative testimony, if nothing more appears or if it appears that he was paying no particular attention at the time.

Having had opportunity more or less adequate for correct observation, if he testifies that he was attentive, but did not hear or see, his testimony is commonly termed negative testimony, but not of a purely negative character. This is supported in Quigley v. Canal Co., 142 Pa. 388, and Haverstick v. R. R. Co., 171 Pa. 101.

Under the same circumstances, however, if he testifies not merely that he did not see or hear, but that the fact did not occur, it is clearly positive testimony, though of a negative character.

The first point of the plaintiff is unfounded for the testimony of the witnesses, that they did not hear the whistle or bell, cannot be construed to mean that it did not blow. It must next be seen whether this testimony of the plaintiff's witness was negative testimony or whether it was negative testimony not purely of a negative character. This testimony will fall within this class, because the plaintiff's witnesses testified that they were listening to hear the whistle and they did not hear it.

After carefully considering the facts of the case and the law as held in other cases, it is our opinion that the trial court erred in his charge to the jury.

Therefore, since it is held in Quigley v. Canal Co., 142 Pa. 388, and in many other Pennsylvania cases that testimony of this class is held of equal value with that in the positive class, and this seems to be the law of this State on this point, the decision of the trial court must be reversed and a venire facias de vono must be granted.

OPINION OF SUPERIOR COURT

In a sense, testimony that a bell or whistle did not sound, is negative. It denies the occurrence of the act. But, some witnesses are ready to say that an event did not occur, simply because they did not see or hear it. They fail to consider that events which are visible or audible often take place, without attracting the notice of persons within the radius of perception. From the absence of the perception, the non-happening of the phenomenon is improperly inferred.

When a man is watching or listening for an object or sound, which. to one so watching or listening would, if it occurred, be visible or audible, the fact that it is not seen or heard will warrant the inference that it did not occur. The testimony of such a person that the thing did not happen, would be as worthy of dependence, as that of one who said it did happen.

The four witnesses said that they were listening for the whistle and bell, and would have heard them, had they been sounded, and that they did not hear. This is as reliable as the testimony of the four other witnesses that declared that the whistle did sound. The court below improperly instructed the jury that it was negative and therefore inferior to that of the four employees.

A man can be as certain that W. H. Taft is not in the lecture room, on a certain morning, as that the writer is in the room, and his evidence would be as worthy of credence. He is sure that, if W. H. Taft had been present, he would have seen the ex-president, and he is sure that he did not see the ex-president. On the subject, may be consulted Cox v. Schuylkill Valley Co., 214 Pa. 223; Hugo v. B. & O. R. R., 238 Pa. 594; compare Folson v. Phila. R. T. Co., 248 Pa. 227.

Affirmed.

BOOK REVIEW

Problems in the Law of Contracts, by Henry Winthrop Ballantine, Professor of Law in the University of Wisconsin, Rochester, New York. The Lawyers Co-operative Publishing Company, 1915, pp. 359.

This book is a collection of concrete problems, arranged for study, review, and class-room discussion, in connection with case books, text books or lectures. The subject matter is arranged in the same order as that of the leading text books. Modern examination questions are concrete hypothetical cases and the purpose of this book is to give students practice in answering questions of that kind. The questions are followed by citations to enable the student to solve such problems as his text and case books do not meet. Many of the questions have been taken from the examination papers of leading law schools and many of the citations are to the cases reported in the leading collections of cases in contracts. The questions aim to call attention to the mooted questions in this branch of the law. The book will serve as a useful aid in a practice course in brief making or as furnishing suggestive cases for moot court work. The use of the book will impress students with the fact that it is one thing to learn the apparently plain principles of the law as stated in a text book and a very different thing to apply them to varied sets of facts.

There is appended a list of twenty-one rules for brief making.