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EXEMPLARY DAMAGES

Under what circumstances are they imposed and should they be allowed?

Exemplary, punitive or vindictive damages are said to be damages over and above compensation, assessed for the purpose of punishing the defendant wrong-doer where he is guilty of actual malice, deliberate violence, oppression, wantonness, recklessness, or fraud. A New York case gives as the basis for exemplary damages the moral culpability of the defendant.[1]

As a concise description it is said that exemplary damages are compensation for wrongs done with a bad motive. This is not the case with ordinary compensation for damages even though the wrongful act was done by mistake if the act was done in good faith.

When, however, an act is done with a wanton disregard for the plaintiff's rights or in such a way as to constitute an outrage or insult, many jurisdictions will allow the

[1]Hamilton vs. Third Ave. Ry. Co., 53 N. Y. 25, 63 N. W. 975.

plaintiff to recover what is called exemplary, punitive or vindictive damages, which terms are used interchangeably and are practically synonymous. This principle seems to have been sanctioned in Bible times as set out in Exodus ch. 21, 22, and quoted with approval in a Pennsylvania case.[2]

Mr. Justice Gray of the U. S. Supreme Court recites that an early English court approved of the awarding of exemplary damages as follows: "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detest of the jury to the action itself,"[3] or as is said in a Pa. case, whenever there has been oppression or vindictiveness.[4]

In a Ky. case the court says with apparent reason, "If trespassers were bound to pay in damages no more than the exact value of the property forceably taken and converted by them, there would be no motive created by the operation of law to induce them to desist and abstain from invading the rights of others. To furnish such a motive smart money is allowed."[5] In a N. H. case the court says, "Exemplary damages may in certain cases encourage prosecutions where compensation for private injury would not repay the trouble and expense of the proceedings."[6] "The rule has been held to apply in all actions of tort—in actions for personal injury, in cases of wilful injury to property, in slander, libel, seduction, false imprisonment, malicious prosecution, and in actions of tort founded on negligence amounting to misconduct and recklessness."[7] "A corporation has the same

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[2]Auer vs. Longstreet, 10 Pa. 148.
[3]Wilkes vs. Wood, Lofft 1, 18, 19, 19 How St. Trials 1153-1167.
[4]Nagle vs. Mattison, 34 Pa. 48.
[5]Tyson vs. Ewing, 3 J. J. Marsh 186.
[6]Hopkins vs. Railroad, 36 N. H. 9-72 Am. Dec. 287.
[7]Pittsburgh etc. R. Co. vs. Lyon, 123 Pa. 140.

right to recover exemplary damages as an individual for a malicious and oppressive trespass committed upon its property."[8]

In matters of procedure it is held that "It is no objection to the allowance of such damages that the declaration does not allege that negligence was wilful and wanton[9] or malicious."[10] "An excessive battery is an answer to a plea **of son assault demesne,** and if wantonly or maliciously inflicted, subjects the party making it to the same liability to exemplary damages as if he had been the original wrongdoer."[11]

The cases do not always require the proof of actual malice, and malice may be inferred or there may exist malice in law which "refers to that state of mind which is reckless of law and of the legal rights of the citizen, in a person's conduct towards that citizen."[12]

It is held in suits for libel that "if the publication is libelous **per se** exemplary damages may be awarded without proof of express malice"[13] and "if it is not so libelous the falsity of it is sufficient proof of malice to sustain such damages if the jury award them."

In some jurisdictions if actual damages have been sustained, then there may be an award for mental suffering or offended feelings which holdings would seem to be more sound than those which allow vindictive or punitive damages which are not based on damages in any sense of the word.

The courts of Michigan, very properly, it would seem, do not award exemplary damages by that name nor as a

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[8]International etc. R. C. vs. Tel. & Tel. Co. 69 Tex. 277.
[9]Wilkinson vs. Drew, 75 Me. 360.
[10]Lyddon vs. Dose, 81 Mo. App. 64.
[11]Philadelphia etc. R. Co. vs. Larkin, 47 Md. 28.
[12]Willis vs. Miller, 29 Fed. Rep. 238.
[13]Wood vs. Hilbish, 23 Mo. App. 389.

punishment, but rather as compensation for injured feelings in aggravated cases.[14]

It is said in Vermont, Miss., Ky., Ill., Mo., N. Y., R. I., Tenn., Wis., Ala., Md., N. D., N. C., and Me. that punitory damages cannot be claimed as a matter of right and in such jurisdictions if exemplary damages are ever allowed it is a matter of discretion with the court.

In some jurisdictions the wealth, or rather the **reputation** for wealth and social standing of the defendant may be taken into account by the jury in making up its verdict on the ground that an insult or injury committed by a person of high standing in the community hurts more than an injury from a person of no reputation, and further, on the additional ground that a small verdict against such a person would be very little punishment, while such verdict against a person of very limited means might be a very heavy punishment.[15]

Among the objections urged against the allowance of exemplary damages are the following:—

First. In a criminal proceeding the complaint is issued under the oath of the complainant, but this is not the case in the commencement of a civil action even where exemplary damages may be awarded against the defendant, although such damages are in the nature of a punishment.

Second. Although a person may have been compelled to pay exemplary damages in a civil suit which really amounts to punishment, he may again be tried and punished as the result of a conviction in a criminal action, thus contrary to the Constitutional prohibition be placed twice in jeopardy for the same offence.

Third. As to degree of proof which in all criminal cases must convince the jury beyond a reasonable doubt

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[14]Ford vs. Cheever, 105 Mich, 679.

[15]Brown vs. Evans, 17 Federal Rep. 912. McBride vs. McLaughlin, 5 Watts 375.

while in a civil case where exemplary damages are allowed the proof of the accusation need only be established by a fair preponderance of the evidence.

Fourth. The particular circumstance or feature which would entitle the plaintiff to recover exemplary damage in a civil case does not need to be explicitly set out, while in a criminal proceeding all such matters are set forth in the indictment.

Fifth. In the civil suit the defendant may be compelled to testify against himself, which is not the case in a criminal prosecution.

Sixth. In the civil case depositions may be introduced against the defendant, which is not allowed in a criminal action where adverse witnesses meet face to face.

Seventh. In civil suits the juries are not limited as to the amount they may inflict as punishment, while in a sentence as a result of a conviction for a crime the fine which may be imposed is fixed within certain limits.

Eighth. No official has the power to remit the amount of exemplary damages while there is the pardoning power in criminal sentences or fines.

Ninth. Exemplary damages are in their nature vindictive and are not paid to the plaintiff as compensation or on account of anything that may be due him, and

Tenth. That being the case, the allowance of such damages to be recovered by the plaintiff would have a tendency to multiply actions, which is not desirable.

What may take the place of exemplary damages, or in a measure at least serve the same purpose? Where the injury inflicted is done by the defendant in a vindictive, wanton or revengeful spirit much mental suffering is inflicted upon the plaintiff, his feelings are unnecessarily injured and indignity is imposed upon him, and in a proper case damages which are really compensatory should be awarded to the plaintiff. Thus, actual compensatory damages in such cases may, in a measure, take the place of exemplary damages.

ROBERT W. LYMAN.

MOOT COURT

SLOAN VS. MILLER

Landlord and Tenant — Lease — Covenants — Alterations — Breach of Covenants — Right to Pursue Two Remedies, Ejectment and Increase of Rent

STATEMENT OF FACTS

Sloan leased a building to Miller for one year. He agreed not to make any alterations. The lease provided that if this or other provisions were violated, the rent, originally $50 a month, should be increased to $75. It also provided that for such breach Sloan should be able to enter an ejectment and confer a judgment therein. Alterations were made and suit was brought for increased rent, since the alterations were made. An ejectment is also brought six months after the alterations were made and judgment is confessed by the plaintiff under the provisions of the lease. Miller asked the court to strike off the judgment in ejectment, alleging that the double penalty for the alterations was not allowable.

Clarke, for Plaintiff.

Bobick, for Defendant.

OPINION OF THE COURT

Dilley, J. From the facts of this case it appears that the lease from Sloan to Miller provided for a penalty of an increase in rent if Miller should make alterations. It also provided for the entry of an ejectment and confessed judgment. The defendant contends that Miller made alterations, sued for the increased rent, and also brought ejectment and confessed judgment. The Defendant contends that the double penalty was not allowable. We think that, under the facts of the case it was. The latest case on this subject, Stevenson vs. Dersam, 275 Pa. 412, is on all fours with this case. In it the court, in referring to a lease which provided for the right to demand additional rent in case of breach, and also authorized the entry of judgment in case of violations of a covenant or agreement says, "The remedies which are reserved are cumulative and both may be resorted to."

The defendant in his argument relies on the decisions to the effect that if the lessor does an act which recognizes the subsistence of the relation of landlord and tenant, such as the acceptance of rent, the right to declare a forfeiture of the lease is waived, Swartz vs. Bixler, 261 Pa. 282; Newman vs. Rutter, 8 Watts 51. These cases are distinguishable. In the case at bar the plaintiff did not accept the rent from the defendant, but was forced to sue for it under the clause providing for an increase in rent in case of a breach; finally bringing ejectment. If the defendant had tendered rent to the plaintiff and he had accepted it the decision of the case would rest on other grounds.

We hold that under the terms of the lease the plaintiff was authorized to resort to both the remedy of additional rent and that of ejectment. We must therefore dismiss the defendant's motion to open the judgment in ejectment.

OPINION OF SUPREME COURT

The parties have agreed that, if any alteration in the premises should be made by the defendant, the rent should be seventy-five dollars a month, instead of fifty dollars. Such an agreement is enforceable, and seventy-five dollars a month, after the alteration, would be reasonable, so long as the tenant is permitted to remain in possession. Another provision is that for breach of the agreement, an ejectment can be brought, and judgment therein confessed by lessor. There can be a recovery of seventy-five dollars per month, until the ejection of the tenant. After that the agreement for rent is superseded.

It is supposed by the tenant that because of the increase of rent, resort to the ejectment is not permissible. This is not the view of the Supreme Court in Stevenson vs. Dersam, 275 Pa. 412, where it is said that "the remedies are cumulative, and both may be resorted to." This does not mean that, after ejectment by one process, there can be a recovery of any rent for the time following.

The judgment of the learned court below is affirmed.

JONES VS. DIMMICK

Equity — Building Restrictions Creating an Easement — Remedy for Violation of Restriction—Injunction—Agreement to Forfeit a Certain Sum in Case of Violation No Bar to Obtaining Injunction

STATEMENT OF FACTS

Jones and Dimmick owned contiguous lots in a borough. In consideration of $300 paid by Jones, Dimmick agreed under seal

never to erect any structure on his lot within eight feet of the division line, and to allow Jones and his heirs to use this strip as an alley. Jones erected a house and continued to use the alley, for six years. The agreement contained the stipulation that for the faithful observance of it, Dimmick binds himself on the penalty of $400. At the end of six years Dimmick is erecting a house so close to the boundary as to leave an open space of only three feet. This is a bill to enjoin against the violation of the agreement. Defendant contends that plainitff's only redress is the enforcement of the penalty.

McInroy, for Plaintiff.

Curtze, for Defendant.

OPINION OF THE COURT

Miss Ainey, J. The written agreement of Dimmick not to build within eight feet of Jones' line and to allow Jones and his heirs to use the strip reserved as an alley, creates an easement in favor of Jones. The proper remedy for obstruction of an easement is injunction, the reason being the inadequacy of the remedy at law, 19 C. J. 255. "From the nature of easements their disturbance, if other than temporary, is necessarily destructive, and because the easement is always connected with the use of real property, it is generally per se possessed with the peculiar quality which is not adequately to be paid for in damages, Pomeroy, Equity Jurisprudence (2nd ed.) v.5, sec. 544. No amount of money can scarcely replace the loss to this plaintiff of ingress and egress to his own property.

It is alleged, however, that the plaintiff has signed away his equitable remedy by stipulating in the contract an amount of damages which would compensate such loss. For the faithful observance of the contract, Dimmick binds himself in the penalty of $400. The distinction between penalties and liquidated damages often is not easy of determination and the rule is that the intention of the parties must prevail, "yet great reluctance is shown in construing as liquidated damages, a sum expressly called a penalty by the parties," Sedgwick, 1 Damages sec. 411, (8th ed.). The distinction is clear in the cases cited, Mellon vs. Oliver, 256 Pa. 209, and Heckman's Estate, 236 Pa. 1939. In the former in which the parties bind themselves in the penal sum of $200 to be paid by the party delinquent to the party performant, it was held that the penalty fixed was intended as security for performance, not as a substitute for it, and did not deprive the plaintiff of a remedy in equity." In the latter the agreement not only recites the sum as liquidated damages, but expressly provides that in case of breach, "all the rights under the agreement shall be at an end." The terms specifically relinquish other remedy.

The wording of the contract in our case is as unequivocal as that of Mellon vs. Oliver, supra, and since the hardship upon the plaintiff is of a nature not to be compensated in damages, this court will enjoin the interference with his right.

The mutuality doctrine is inapplicable in these circumstances. It is true that a court will not grant specific performance to a plaintiff and at the same time leave the defendant to the legal remedy of damages for possible future breach of the contract on the plaintiff's part, 36 Cyc. 622. No such possibility can arise in this case. The plaintiff has fully performed. As for obligation, mutuality sufficient in law is sufficient in a suit to secure specific performance.

Bill for injunction sustained.

OPINION OF SUPREME COURT

The plaintiff has bought for $300, and has secured a grant of an easement over the defendant's land. That the latter may be compelled by injunction, to refrain from interfering with this easement requires no citations of authorities. Nor does the fact that Dimmick. the defendant has bound himself to observe his agreement by a penalty of $400, lead to the conclusion that the parties intended that for a breach or a total renunciation of Dimmick's obligation, it was understood that $400 should be the price. Such a stipulation is virtually nothing. The payment of the $400 could not be coerced, and at the same time other remedies pursued. Nor can we regard what is termed a "penalty of $400" a liquidation of damages and infer a waiver of all other remedies, Mellon vs. Oliver's Estate, 256 Pa. 209.

We approve of this issue of the injunction by the learned court below. Appeal dismissed.

KARRFORD VS. FIRE INS. CO.

Fire Insurance — Husband and Wife — Nature of Estate Required by 'Unconditional and Sole Ownership' Clause in Policy

STATEMENT OF FACTS

Insurance for $5000 on a house. It was totally destroyed by fire. The policy provided that it should be void if the interest of the insured was not "the unconditional and sole ownership." The house had been bought by the husband of the plaintiff and paid for with his money. He declared however that he had bought the home for her. The deed named him as grantee. The trial court has held the

policy void. After the conveyance the husband repeatedly declared that the house was his wife's. No contradictory statement had ever been made by him. Appeal.

Kernan, or Plaintiff.

Beckley, for Defendant.

OPINION OF THE COURT

Pottash, J. The contract provided that the policy was to be void unless the interest of the insured was to be sole and unconditional ownership, and as the plaintiff was not the owner of the property, this claim is relied on by counsel for defendant to defeat recovery.

The clause in question is a common one in fire insurance policies and the reports of this state are replete with decisions construing it. It was uniformly held to be a representation and not a warranty, and that the defendant could not avoid the policy therefore unless he was injured by the misrepresentation, Imperial Fire Insurance Co. vs. Dienham, 117 Pa. 460.

But this line of decisions is apparently overthrown by the decision of the Superior Court in Lehman vs. Lancaster Fire Ins. Co. in 45 Sup. 375.

The facts of the case are in confusion and stated conversely in syllabus and in the opinion of the court. Nevertheless, the court holds that the plaintiff cannot recover where the "sole and unconditional ownership" clause is violated, and it follows therefore the decision in this case must be for the defendants.

Plaintiff relies on the fact that the husband declared the property was to be hers, as making her the sole and unconditional owner. But we cannot accede to this view. A mere declaration by the real owner is not enough to pass any direct interest. It is a mere promise and plaintiff has a bare expectancy that the promise will be fulfilled.

It is remarked, in Lehman vs. Lancaster Fire Ins. Co., supra, that the wife has an insurable interest in the husband's property, but of course this will not fulfill the ownership clause. Were it not for the decision above, we would think that the wife has not such an interest which if destroyed would result in direct and inevitable loss to her. Her interest in her husband's property is contingent on her survival of him, 26 C. J. page 25. However we must adhere to the doctrine laid down by the above case. Appeal dismissed.

OPINION OF SUPREME COURT

The house was bought by Mr. Karrford. He paid the price. He was named in the deed as grantee. Mrs. Karrford has obtained a policy, in which she declares that she is the unconditional and sole

owner. The declaration of the husband that he had bought the house for her, would not transfer the legal title to her, or create an equitable estate in the land. We think the conclusion sound that the condition on which the defendant assumed liability has not been fulfilled, and the judgment of the learned court below is affirmed.

HOLMES VS. JONES

Foreign Attachment — Conveyance by Brother to Sister — Proper Method by Which to Proceed on a Foreign Attachment Against Property Alleged to Have Been Fraudulently Conveyed

STATEMENT OF FACTS

Jones, a resident of New Jersey, had owned land in Pennsylvania. He contracted a debt of $5000 towards Holmes, also a resident of New Jersey. Holmes sued him in New Jersey. obtaining a judgment, but finding no property in that state adequate to pay the debt, began a foreign attachment of the land in Pennsylvania. The right to maintain this attachment is denied on the ground that six (6) months before its issue, Jones had conveyed the land to his sister in payment of a debt due her. The court refused to quash the attachment, holding that the former ownership of the land by Jones would sustain an atttachment, the purpose being to contest the validity of the conveyance, as against Jones' creditors.

Whitten, for Plaintiff.

Sheely, for Defendant.

OPINION OF THE COURT

Haynes, J. The case at bar involves the conveyance of property from brother to sister; said conveyance being claimed by appellants to be in fraud of creditors.

This case is governed by Act of May 21, 1921, P. L. 1045. Said Act provides in Sec. 9 that "where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured may, as against any person except a purchaser for fair consideration without notice of the fraud at the time of purchase, disregard conveyance and attach or levy upon property conveyed. Sec. 3 also provided that an antecedent debt is fair consideration.

The latest case in Pennsylvania pertaining to this subject is that of American Trust Co. vs. Kaufman, 276 Pa. 35 (1923). Said case holds a conveyance by husband to wife which defeats rights of cred-

itors is presumptively fraud, and the burden of proof rests upon the defendants to show nominal consideration and absolute fairness in their dealings, towards the creditors of the grantor.

The case at bar is identical in point of fact with the aforesaid case; except our case concerns the conveyance of land from brother to sister in place of husband to wife. This Court is of the opinion that this fact alone creates a very material difference from the one at bar, and as for taking it as a precedent can give it no weight, whatever, since the relationship of brother and sister can in no wise be reconciled with that of husband and wife.

This Court is further of the opinion, that there is nothing unusual about this transaction between said brother and sister or any other near relatives; except where otherwise proved by a sufficient amount of evidence. Cannot relatives, the same as other individuals incur debts towards each other, however unwise it might be? If such were the law, that all transactions between brother and sister and near relatives were to be looked upon with a suspicious eye by the court, it would be a most unequitable state of circumstances, and would tend to bring about a multiplicity of suits, as one can readily see.

If this were the case, a sister could not accept payment by means of a conveyance of land from a brother without fear of being brought into Court and being the recipient of great hardship and inconvenience, merely to show there was no conspiracy between them for the purpose of defrauding the creditors of the grantor. As the learned counsel for the defence stated, business dealings between parents, children, and other near relatives are not per se fraudulent, but can only be made so by a preponderence of evidence, and therefore must be treated as any other transactions between ordinary debtors and creditors, Reehling vs. Byers, 94 Pa. 316 (1880).

The plaintiff failed to show by any degree of proof, whatever, that the defendant was acting in a manner to defraud his creditors. Therefore, the attachment will be quashed and the decision of the lower court reversed.

OPINION OF SUPREME COURT

A judgment has been obtained in N. J. by Holmes against Jones. Intending to reach land in Pennsylvania owned by Jones, Holmes has sued on the judgment in this state, in the form of foreign attachment, he not being able to serve process otherwise than by attachment on the debtor who remains out of Pennsylvania.

It is said that the land attached is not Jones' and hence that the attachment will not lie. We do not conceive that when a dispute exists, whether a conveyance by the debtor, was bona fide or not, the

court must investigate under a motion to quash. Such a question should be determined by a jury, and in a contest between the party who has acquired, by sheriff's sale, the title of the debtor, and the party who claims by conveyance from the debtor. A jury will not sit in judgment in the motion to quash the attachment. The attachment must proceed in the ordinary way, and if it results in judgment for the attaching creditor, and if, under the attachment, a sale of the land takes place, the respective rights of the creditor and of the debtor's grantee will be determined in ejectment.

The order quashing the attachment must be reversed, and the attachment must proceed in the usual way. Hence the order is reversed and set aside, and precedendo awarded.

COMMONWEALTH VS. JENKS

Criminal Law — Evidence — Husband and Wife — Competency of a Witness Who Secured His Evidence Through Aid of Wife

STATEMENT OF FACTS

Indictment for larceny of goods belonging to X. X suspected Jenks and went to his house to accuse him. He was not present but Jenks' wife displayed some of the stolen goods, identified as some of the articles belonging to X. X, as a witness was permitted to testify to the finding of the goods, notwithstanding that to do so was virtually allowing the wife to testify against Jenks. Verdict of guilty. Motion for a new trial.

Reamer, for Commonwealth.

Stickler, for Defendant.

OPINION OF THE COURT

Mundy, J. The testimony rendered by X at the trial of the accused — such testimony having been revealed by the accused's wife— was virtually the testimony of the wife.

Apparently the presentment of this testimony was violative of the Act of May 11, 1911, sec. 1, P. L. 269 providing — "Nor shall husband or wife be competent to testify against each other, except in proceedings for maintenance and desertion, and in criminal proceedings against either for bodily injury or violence attempted, done or threatened upon the other, and except also that either shall be competent merely to prove the fact of marriage in support of a criminal charge of adultery alleged to have been committed by or with the other." The present statement of facts is not embraced within any of the enumerated exceptions.

However, counsel for the Commonwealth cites Welker vs. New York Central Railroad Co., 275 Pa. 82, where the wife actuated by malicious vindication, volunteered incriminating information, which was relayed in court by a third person, resulting in the husband's conviction. Such testimony was declared competent.

Obviously such procedure is a flagrant evasion of the statute as it provides the anomalous situation of validating incompetent evidence by the method of offering such testimony by proxy and ignoring the source. The logical justification of such a machination is beyond our comprehension.

By the adoption of 275 Pa. 82 (and not by desire) we are constrained to deny the motion for a new trial.

OPINION OF SUPREME COURT

X was an important witness against Jenks. He went to Jenks' house and there saw some of the goods that had been stolen. He would not have seen them, had Jenks' wife not displayed them. The presence of these goods was important evidence of their having been taken, by Jenks. It is supposed by the defendant, that allowing the proof of the presence of the goods was virtually allowing the wife to testify against her husband. With this view disagrees Commonwealth vs. Johnson, 213 Pa. 432, where it is said that the facts learned by a competent witness, are not to be excluded because he may have been put on the track of them by information coming from the wife. Mr. Justice Frazer, in Welker vs. N. Y. Central R. R. Co., 275 Pa. 82., remarks, "there is no rule of law which prevents a third person from instituting criminal proceedings based on facts learned through information given by the wife of the accused. The admission of such facts in evidence is not permitting the wife to testify against her husband." It clearly is not. The weight of the testimony does not repose on the wife's assertion. The witness recognizes the articles, sees them at the house of the defendant: so testifies. His creditability, not the wife's, is the force which gives value to the testimony.

Judgment is affirmed.

ESTATE OF JOHNSON

Trusts Created by Will — Charitable Use — Failure of Testamentary Trustees to Appoint Beneficiaries — Appointment by Person Selected by Orphans' Court — Thompson's Estate, 282 Pa. 30 Cited With Approval

STATEMENT OF FACTS

Johnson bequeathed one-half of his property to specified persons. His will directed that his executors should divide the other half in as many parts, equal or unequal, as they chose and all of such parts be given to churches, hospitals, public libraries, as it seemed proper to them to select. Both executors died not having made the decision or selection. The will suggested that one of the beneficiaries should be the X Library Association. The administrators d. b. n., having filed an account, this association petitions the court to appoint someone to make the designations of beneficiaries. The next of kin resist claiming that, as to the one-half of the estate Johnson had died intestate.

Mark, for Plaintiff.

Mundy, for Defendant.

OPINION OF THE COURT

Lescure, J. This case presents two questions. The first question is whether the trust created by the decedent in his will for charitable purposes, was rendered ineffective because of uncertainty in describing the objects intended to be promoted and the persons or institutions who were to share in the fund created.

The fact that no fixed charity is described, the power of selection and power of discretion having been granted by the decedent to the executors, does not render the trust ineffective, for that which is capable of being rendered certain must be treated as being sufficiently definite, Dulles' Estate, 218 Pa. 162; Murphy's Estate, 194 Pa. 310.

Nor does the failure of the decedent to set forth particular plans for the carrying out of his intentions as to the charitable bequests, render such bequests void.

The second question presented is whether a trustee could be appointed to carry out the desires of the testator, those designated to make the selection of beneficiaries having died without exercising the powers conferred upon them by the will.

A trust whether religious, literary, or scientific does not fail for want of a new trustee, if the general intent to dispose of the estate is evident and there remains only the necessity of having some one to

carry out the purposes, Thompson's Estate, 282 Pa. 30; Steven's Estate, 200 Pa. 318.

Under the enactments now in force, the survivor of trustees may exercise the discretion granted by the will, and if all those named by the testator to choose the beneficiary die, the court may appoint others to carry out the purposes contemplated.

In Thompson's Estate, 282 Pa. 30, which is a case similar to the case at bar, Justice Sadler held that the Court has jurisdiction to appoint a new trustee; that such trustee shall have the power to carry out all the intentions of the decedent as designated in the will; and that the next of kin have no claim whatever to that portion of the estate in trust for charitable benefits.

In view of the above stated reasons and decisions cited, we decide in favor of the petitioner.

OPINION OF SUPREME COURT

If A. should by what he terms a will ,direct a priest X., to appoint his estate, according to his discretion as respects portions and beneficiaries, there might be doubt of the validity of the instrument as a will. It would seem to be a devolution on X. of the function of disposing of A's property.

There is a special interest on the part of the courts in the preservation of charitable gifts. It is apparently conceded that a gift by A., in what he denominates his will, to B. of the power of selecting recipients of portions of his estate, and of determining the quantities of the estate so bestowed, is valid, if the gifts are to be charitable. This may be because the need of charity is so great, and the supply of it so meager. In Thompson Estate, 282 Pa. 30, the will, after making gifts to certain persons, gave to the executors power to convert the remainder of the property, and "full and unlimited power" to divide the proceeds as they chose, and to allot the portions to "such religious and charitable purposes * * * as in their descretion," and "as in their judgment are in accord with my (testator's) wishes." He added that he included among the institutions to which distribution may be made, the Memorial Free Library of Alexandria.

The executors did not make the allotment. One renounced, the other died, having made no disposition of the charitable part of the estate. The court, in a careful and elaborate opinion by Mr. Justice Sadler, approved of a selection by the Orphans' Court, of a certain member of the bar, for the purpose of making allocations, and the decree of the Orphans' Court adopting these allocations, was affirmed.

The X Library Association, having been suggested in the will as one of the institutions to be elected to share in the fund, petitions the court to appoint one to make the selections of beneficiaries and to determine the amounts to be given to each. Despite the objection of the next of kin that the deceased has, as respects this portion of his estate, died intestate, and that it must therefore be divided among them according to the intestate law, the learned court below has decided it will appoint a person to make the allotments contemplated by the testator. The authority for this act is incontestable, and the appeal is dismissed.

PACE VS. RODGERS

Negligence — Master and Servant — Infant Injured While Riding on Master's Wagon, Driven by Servant — Trespass for Injuries — Liability of Master

STATEMENT OF FACTS

Rodgers, a merchant, delivered goods to Pace by means of a horse drawn wagon, driven by X, an employee. While the wagon was at Pace's home, his boy, four years old, clambered into it. When X was leaving the Pace home, he discovered the boy in the wagon, but intending to give him a ride of a few rods, allowed him to remain. Rodgers had forbidden allowing anyone on the wagon. Forgetting the boy for a few minutes, he then recalled him, and looking behind, discovered that he was missing. He had climbed from the wagon and had been injured in falling to the ground. This is a suit for damages by the boy and his father. Verdict for the plaintiffs.

Angle, for Plaintiff.

Lescure, for Defendant.

OPINION OF THE COURT

Bobick, J. In order to arrive at a definite and conclusive decision in the present case this court will have to assume that the lower court found that the driver, X, was guilty of negligence. If there was no negligence, there could, of course, be no liability either against the defendant or against the driver. The fact that the child was only four years old, is important only in so far as it shows conclusively that he was not guilty of contributory negligence.

But the negligence of the servant and nothing more is insufficient to affix liability on the master. The plaintiff must show not

only that the servant has committed a tort, but also that the tort was committed while he was acting within the scope of his employment and in his master's business.

In the case at bar, the master had expressly forbidden the servant to allow anyone on the wagon. But even in spite of this express prohibition, if X was acting within the scope of his employment and in his master's business he will be liable for the torts of X.

Judge Grier, in writing for the Supreme Court of the United States in Phila. Railway Co. vs. Derby, 14 Howard 468, says: "We find no case which asserts the doctrine that the master is not liable for the acts of his servant in his employment, when the particular act causing the injury was done in disregard of general orders or special command of the master." But when the servant quits sight of the object for which he is employed and without having in view, his master's orders, pursues that which his own whim suggests, he no longer acts in pursuance of the authority given to him and in the scope of the employment intrusted to him and the master will not be liable for such an act.

Whether the tortious conduct of the servant is within the scope of his employment and in his business is ordinarily a question of fact and where the evidence is conflicting and fairly warrants more than one inference, the question is submitted to and is decided by a jury under proper instructions, but where the question is so clear as to admit but one answer it must be disposed of by the court.

The servant in this case was engaged as a teamster. He was authorized to all acts which were consistent with his employment. A review of the facts as disclosed by the record shows clearly that the driver of the wagon had no implied authority to carry the plaintiff's child. In fact he had been expressly forbidden to do so. He was not engaged in the furtherance of his master's business, and even if negligent could impose no liability on the defendant. He was undoubtedly engaged in work of the employer but he was acting beyond the scope of his employment. In Perrin vs. Glassport Lumber Co., 276 Pa. 8, a case similar in all respects to the case at bar, the court gave a directed verdict for the defendant and the Supreme Court of Pennsylvania sustained the verdict. On this case as in that case, the facts are so clear as to admit of but one inference, and under these circumstances it is the duty of the court and not the jury to draw that inference, and so we hold that the defendant's servant was not acting within the scope of his employment when he committed the tort and as a result the defendant cannot be held liable.

Counsel for the plaintiff contends that if we hold that the defendant is not liable in this case it will destroy all the protection that is due to infants from the traveling public. But is the court to take

into consideration only the fact that the plaintiff was an infant and upon proof of this fact impose an absolute liability upon the defendant? Certainly not. The defendant may, in some cases, be under a duty to exercise a high degree of care in respects to infants but his liability is by no means absolute.

Again, if the servant commits a tort which is not within the scope of his employment the defendant is not left without a remedy in such case even though the master is not liable but he must bring his action directly against the servant and not the master. The law will not permit a tort feaser to hide behind the command of his master. This question, however, has not been raised in the present case and its determination is unnecessary.

OPINION OF SUPREME COURT

For what should the defendant be liable? Not because he owned the wagon. Not because a child had climbed into it, and in attempting to leave it had fallen. The child was not cajoled or inveigled into the wagon. The driver of the wagon, perceiving him in, did not instantly compel his departure. How could that tolerance be attributed to the employer, nor even if so attributed, was it the cause of the injury. The impulses of the child, not awakened by any enticement or encouragement of the driver, led to the act which caused his injury. We cannot find that the failure of the driver to induce the boy to leave by force or persuasion, earlier, was negligent; nor that having tolerated the presence of the boy for a brief time, he should have kept him under constant oversight. Nor could we, even though failure to do this was negligent, say that it occurred in the performance of the work for which he was employed. The case cited by the learned court below justifies the result declared by it. Affirmed.

RALSTON VS RAILWAY CO.

Negligence — Collision Between Street Car and Motor Truck — Injury to Guest on Truck — Contributory Negligence

STATEMENT OF FACTS

Ralston was invited to ride in a truck by its driver, but against the instructions of the owner of the truck, of which he had no knowledge. The driver approaching the crossing of the street on which he was traveling with another and on which the defendant's tracks were, negligently continued his course until his truck collided with the car

of the defendant. The result was the death of Ralston, a boy of about fifteen years of age. Ralston's father sues for damages. Defence is that the truck driver's negligence caused the collision and that the boy was himself negligent in not objecting to the driver's continuing to drive towards the car. The purpose of the driver to attempt to cross the track was not revealed until he was within six or eight feet of the track. Verdict for $4,000.

Mirkin, for Plaintiff.

Cherry, for Defendant.

OPINION OF THE COURT

Miss Cohn, J. Although a guest is not required to exercise the same degree of care and watchfulness as the driver, and the carelessness of the latter is not imputed to the former, yet a passenger must bear the consequences of his own negligence; when he joins in testing a danger but the extent to which one, in the position of a guest should appreciate an impending peril, and act in relation thereto, depends upon the facts peculiar to each case. Unless these are manifest and the inference to be drawn therefore clear beyond peradventure, the issue must be submitted to the jury for determination, 267 Pa. 204.

The contention that the truck driver's negligence caused the collision is of importance to us only in determining whether the boy was himself negligent in not objecting to the driver's continuing to drive towards the car.

In 276 Pa. 178, the plaintiff's son was injured in a right angled collision between a street car and a motor truck on which he was riding as a guest. The truck driver was running his car at five to eight miles an hour. He gave warning of his approach to the crossing by sounding his horn. His speed was such as to convey to the mind of the guest the car was under perfect control which in fact it was. When the truck passed the house-line the street car was fifteen or twenty feet away; notwithstanding the imminent danger, the driver continued to the track and collided with the street car which was approaching the street intersection at a high rate of speed without warning. The truck driver was held guilty of negligence in not stopping. The learned court said: "The driver negligently drove to the tracks, but we cannot declare as a matter of law, under the facts as here presented that any act on the part of the guest was necessary, especially when the car at all times was traveling under control. These facts bring the case within the class that must be submitted to the jury." The judgment was affirmed.

It is true as the learned counsel for the defendant contends that in the case at bar there is no evidence to show that the driver slowed down, or blew his horn as in the case cited, or had the car under perfect control. And we might further add—no evidence that the trolley car was approaching at a high rate of speed without warning; nevertheless we cannot infer from the absence of these facts that the driver therefore failed to observe these regulations or that the street car was operated in a careful manner.

The question of the negligence of the guest in not objecting to the driver's continuing to drive towards the car was submitted to the jury. In order to arrive at a verdict, it was necessary to determine to what extent the driver was negligent, as the duty of the boy to warn the driver was entirely dependent therein. The verdict of the jury clearly showed that they believed the evidence preponderated in establishing the fact that the boy was not guilty of negligence in failing to warn the driver and therefore of necessity, that the driver exercised the proper amount of care prior to the negligence in crossing.

As the evidence before us merely shows that the purpose of the driver to attempt to cross the track was not revealed to his guest until he was within six or eight feet of the track and that the driver was negligent in continuing his course; but fails to show the manner in which the driver drove prior to his negligence or the manner in which the street car was operated, we must, in the absence of evidence clearly preponderating to the contrary, hold the judgment of the lower court to be correct.

OPINION OF SUPREME COURT

A collision between a truck and the defendant's street railway car has occurred. An action against the defendant has been brought. The mere fact of collision does not put a liability on it. Was it negligent? If not, there is no duty on it to make compensation. The evidence is entirely silent concerning the negligence of the defendant. Hence there is no liability.

Had there been liability, the question of contributory negligence would have demanded an answer. Nothing shows negligence on the part of the plaintiff's son in not controlling or attempting to control the truck-driver. The boy was under no duty to imagine that the driver would drive on and risk a contact with the street car. It would be impossible, then, to charge the boy with negligently contributing to the fatal injury. But, the innocence of the boy would impose no liability on the defendant unless its negligence caused the damage. That it did is non-apparent. 'Quod non apparet, non est.' We are obliged therefore to disagree with the result attained by the learned court below. Judgment reversed.

COMMONWEALTH VS. GLENN

Criminal Law — Trial for Murder — Reference to a Former Conviction of Crime by Prosecuting Officer — Withdrawal of Juror — Wife's Statements Merely Hearsay Evidence

STATEMENT OF FACTS

Trial for killing his wife. Plea, insanity. Examining witness X, who has related the incident, the prosecuting officer asks, "Was that after he had been convicted as assault on X?"

The court refused to allow the defence to prove that on several occasions the wife had said that Glenn had done several things indicative of insanity. The court told the jury not to pay heed to the question about the assault on X but refused to arrest the trial by withdrawing a juror. Conviction of murder. Appeal.

Berger, for Plaintiff.

Bickel, for Defendant.

OPINION OF THE COURT

Bobkowski, J. Counsel for the accused petitions this court asserting two allegations as justification for the rendition of a new trial.

In consideration of the first assignment, the following question was asked a witness: "Was that after he (the accused) had been convicted for an assault on X?" Counsel for the defence objected, contending that the question was prejudicial to the interest of the defendant, and that the commission or conviction of a former crime or crimes could not be introduced, at a subsequent trial. The lower court erroneously overruled the objection. Such an incompetent question would tend to bias the jury. A juror should have been withdrawn, in compliance with the defendant's request, necessitating a continuation of the case.

In Commonwealth vs. Gibson, 275 Pa. 338, presenting facts synonomous with those under consideration, such testimony was declared incompetent with the further qualification "that a juror should be withdrawn and the case continued."

This elaborate opinion was quoted and confirmed in Com. vs. Mozzorilla, 279 Pa. 465, reiterating the established precedent that any evidence introducing the commission of another distinct and independent crime is incompetent.

In reference to the disqualification of the defendant's wife, testimony concerning his peculiarities indicative of his insanity, the lower

court was correct, for it was also enunciated in Commonwealth vs. Gibson, 275 Pa. 338, that such testimony was mere hearsay and not being part of the res gestae was inadmissible.

In view of the first irregularity averred the judgment is reversed and a venire facias de novo is granted.

OPINION OF SUPREME COURT

The reference of the prosecuting officer to a conviction of assault of the defendant, was improper. It suggested that another crime had been committed by the defendant, and thus violated the principle that when one is on trial for crime X, it is not proper to bring to the attention of the jury the fact that he has been guilty of crime Y.

Doubtless the wife could have been examined as to the mental state of the defendant, but she was not thus examined. She had made statements out of court and it was the making of these statements, that was offered to be proved. They were mere hearsay. The decision of the learned court below is affirmed.

ROLAND VS. SAMUELS

Damages — Breach of Agreement to Exchange Stocks — Correct Measure of Damages to be Awarded to Plaintiff

STATEMENT OF FACTS

Roland agreed with Samuels to exchange shares of stock in corporations; he to deliver five (5) shares in the X corporation, for Samuel's four (4) shares in the Y corporation. The exchange was to be made in three (3) days, but on the second day, Samuels notified Roland that he would not carry out the arrangement. No evidence of difference of values in the stocks since the making of the contract was shown. The Court gave intimation that the measure of damages was the difference of the value of the Y corporation shares, and that of the X corporation shares.

Morris, for Plaintiff.

Neil, for Defendant.

OPINION OF THE COURT

Perrella, J. The question presented in the case at bar is one of damages. Is the plaintiff entitled to merely nominal damages, or may he recover the difference of the value of the Y corporation

shares and the X corporation shares? The lower court has intimated that the latter is the correct measure of damages.

In the case at bar Samuels repudiated his agreement with Roland to exchange stock, thereby giving Roland an immediate right of action for damages, according to the Pennsylvania cases, Zuch vs. McClure, 98 Pa. 541; Aetna Explosives Co. vs. Diamond Alkali Co., 277 Pa. 399.

Had the contract here been for the sale of goods, the defendant's contention that the measure of damages is the difference between the contract and the market value, and if there is no difference, then merely nominal damages would be tenable, for the reason that the vendee could use his money to buy the same goods in open market.

However, the contract here is for the exchange of stock and the plaintiff can recover whatever damages he might sustain by reason of failing to receive benefits which might have accrued to him by the performance of the agreement.

In our opinion, Alexander vs. Soulas, 269 Pa. 423, is strictly analagous to the case at bar. There the court held that the plaintiff was entitled to recover the difference between the value of the securities the defendant agreed to give him less those the plaintiff agreed to give to the defendant, each being the value at the time of breach by the defendant.

In view of the foregoing authorities, we therefore, affirm judgment for the plaintiff.

OPINION OF SUPREME COURT

Had the exchange of shares of stock been accomplished, in conformity with the agreement Roland would be the owner of the shares in the Y corporation, but in becoming such he would have lost the ownership of the shares in the X corporation. It is sensible then, to apply the rule announced in Alexander vs. Soulas, 269 Pa. 423, "The true measure of (Roland's) damages, was the value of the securities the defendant agreed to deliver to the plaintiff, less the value of the securities plaintiff engaged to deliver to defendant, each being valued as of the date of the breach of the contract by defendant."

The learned court below has adopted this measure of damages. Its judgment is therefore affirmed.

DONNELLY'S ESTATE

Parent and Child — Adoption — Rights of Adopted Children — Not to Take Under Gift by Will to Children of Adopting Parent—Act of June 7, 1917, P. L. 403

STATEMENT OF FACTS

This is an appeal by the next of kin of John Donnelly from a decision of the Orphans' Court concerning the payment of the income from the estate of John Donnelly, deceased, wherein the Court directed part of the income received by the trustee to be paid to the appellee.

The evidence submitted by the appellee in the court below and upon which the decision was based, is as follows:

John Donnelly's will appointed X trustee of land, to pay the income to his three children equally during their lives, and on the death of any of them, to pay the income he had received to such persons of kin to such child, as he should appoint by will; in default of such appointment, to pay to the children of such deceased child. One of Donnelly's children was Charles. Charles has died. His will directed the income from his father's estate to be paid to his adopted son. He had no children. The adopted son claims the income which Charles Donnelly had been receiving prior to his death.

Sheaffer, for Appellants.

Speakman, for Appellees.

OPINION OF THE COURT

I. S. Rahn, J. The question that presents itself in this case is:— Can an adopted child take under the will of a third person when he is not so designated by name? According to the will of John Donnelly each child had the power of appointment by will to name such persons of kin to him who were to receive his income at his death. Charles, one of Donnelly's children, appointed his adopted son to receive his income when he died. But, however, his appointment failed according to Roger's Estate, 218 Pa. 431. It has been held consistently in Pennsylvania Courts that the word "kin" applies only to issue of the body and not to adopted children. According to the Intestate Act of June 7, 1917, Sec. 16 (b) and the Wills Act of June 7, 1917, P. L. 403 the adopted son of Charles could take under John Donnelly's will. But in Yates's Estate, 281 Pa. 178 the court said: "that although as between an adopted child and the adopting parent, the child will be given, under our statutes, the same rights in the parents' estate as he would take had he been born of the latter, this does not make him

an actual child of the adopting parent, and ordinarily will not be entitled to take under the will of a third party who died before December 31, 1917, the date when the Wills Act of June 7, 1917, P. L. 403 went into effect."

The counsel for the appellee has in no manner offered evidence to show that John Donnelly, the testator, died subsequent to December 31, 1917, at which time the Wills Act went into effect allowing an adopted child to take under the will of a third party, or that the child was adopted by Charles before John Donnelly made his will. It is stated in Weider vs. Miller, 52 Super. 198; and Rice vs. Commonwealth, 102 Pa. 408 that when evidence is not submitted which is within the power of the party to submit, it will be presumed that the same was against his interest. It is therefore to be presumed that since no evidence has been offered to the contrary, that John Donnelly died prior to the taking effect of the Wills Act December 31, 1917. Since under this Act an adopted child cannot take under the will of a third party who has died before December 31, 1917, Charles Donnelly's adopted son cannot take under the will of John Donnelly.

I am, therefore, of the opinion that judgment should be granted in favor of the appellant.

OPINION OF SUPREME COURT

Donnelly by will gives one third of the proceeds of the investment of his property, to son Charles during his life. On Charles' death these proceeds from the third were to be paid to the kin of Charles that he might appoint by will. If no appointment was made, the proceeds were to be paid to the children of Charles.

Charles died, leaving no issue to survive him. The original testator has said that the proceeds are to be paid to such of Charles' kin, as he might appoint. Charles has appointed, but the appointee is not of kin, unless we understand the word "kin" to embrace, beside blood relatives, persons adopted by Charles with the intention to bestow on them the status, for the purpose of acquiring property by devise, of blood relatives.

If the will was written before the Wills Act of 1917, the doctrine applies that Charles' act cannot change for John Donnelly, the meaning of the term, "kin." If the will had been written since that act, the intention of the testator would be inferred to be that, as Charles treated the person adopted as a son, so should the testator be understood to treat him. But, it does not appear that the will was written since the act of 1917 went into operation. That will must receive the interpretation it would have received, had the act of 1917 not been enacted, Yates's Estate, 281 Pa. 178.

The well written opinion of the learned court below well dispenses of the questions involved. Appeal dismissed.

AMOS VS. X RAILWAY CO.

Negligence — Street Railways — Evidence — Declaration of Motorman as a Part of Res Gestae — Evidence — Inferences

STATEMENT OF FACTS

The defendant's line ran through Amos's farm at one point. There was a crossing from one to the other side of the track. On a dark day, the sight being obscured by bushes along the track, Amos's son while crossing the track, was run into and killed. This is an action for his death. No negligence is alleged save the omission to blow the whistle. A son, Charles, testified that he was called to by the motorman just after the accident and told that thinking it was Charles he had seen near the track and whom he knew to be careful, he had not blown the whistle. This was the only evidence that the whistle was not blown. The court gave instructions for the defendant.

Shay, for Plaintiff.

Slotkin, for Defendant.

OPINION OF THE COURT

Smith, J. The main questions in this case which come up for decision are; (1) whether or not the motorman was negligent, and (2) whether contributory negligence may be imputed to the deceased.

There is no doubt about the deceased having a right to use the crossing in question, so we arrive at the point which is raised by the learned counsel for the defence as imputing contributory negligence to the deceased. It is contended by the defence that there is a duty on every person attempting to traverse a railroad crossing to "stop, look and listen" in support of which they cite Serfas vs. N. Eng. R. R. Co., 270 Pa. 306. This rule we concede is true, but since death has sealed the lips of the victim, and no one knows what he did as he attempted to cross, and what the situation was from his point of view, the law presumes that he did his duty. as all presumptions are in his favor, Kelly vs. Director General of R. R., 274 Pa. 470. And to rebut this presumption, positive evidence to the contrary must be shown, and since no such evidence appears from the facts, the presumption prevails, Hugo vs. Baltimore & O. R. R. Co., 238 Pa. 594. The case re-

lied on by the defence, Kemmler vs. Penn'a Co., 265 Pa. 212 to show that the deceased was negligent in having walked directly in front of their trolley, differs from that cited. In that case the deceased had ample view to observe the slowly approaching train, whereas, in the case at bar, the view was obstructed and the day dark. Hence no negligence is proven on the part of the deceased.

But there is a binding duty upon all engineers and motormen to give a warning by blowing their whistle as they approach crossings, and it was held in Wingert vs. Phila. & Reading Ry. Co., 262 Pa. 212 that a warning at a distance of 100 yards from the crossing was inadequate under particular circumstances. In the case at bar there is testimony that the motorman himself admitted at the time of the accident that he did not blow his whistle **at all,** and if this fact is established it would amount to negligence on his part and the defendants would be liable, according to the rule laid down in Giberson vs. Patterson Mills Co., 174 Pa. 369, which holds "that there is a well established rule, that declarations of an agent or employee, made at the time of the particular transaction which is the subject of inquiry and while acting within the scope of his authority, may be given in evidence **against his principal,** as part of the res gestae.

The question, whether or not the motorman blew his whistle, is a question of fact for the jury to decide, Thomas vs. Penn'a R. R. Co., 275 Pa. 579. The declaration of the motorman immediately after the accident, that he failed to blow the whistle, together with his reason is part of the res gestae and admissible as evidence against defendants, Thomas vs. Pa. R. R. Co., 275 Pa. 579. The cases of Brown vs. Kittanning Clay P. Co. in 259 Pa. 267, and Giberson vs. Patterson Mills Co. in 174 Pa. 369, which the defence cites as authority for their contention that "declarations made by an agent after an accident are inadmissible against their employers," differs somewhat from the case at bar. In those cases, several days had elapsed between the time of the accident and the time of their making of the statements, whereas, here, they were made spontaneously, and as such, admissible.

The defendants also maintain that the witness for the plaintiff had been inattentive at the time of the accident and could not have heard a whistle blown. That fact is immaterial, because the witness does not testify from his personal knowledge in this case. What the witness did testify to was the declarations of the motorman to him at the time of the accident, that he did not blow his whistle, and since such declarations were admissible as part of the res gestae, they are entitled to great weight by the jury, as against his testimony at the trial, that he did blow.

It was error for the trial court to give instructions for the defendant, since the declarations of the motorman were admissible in evidence, and the question of blowing submitted to the jury, justifies instructions to the jury for the plaintiff because a court is only justified in giving binding instructions for the defendant, when, admitting all evidence submitted by the plaintiff to be true, the plaintiff is not entitled to recover.

In view of the foregoing facts and authorities, we render judgment for the Plaintiff.

OPINION OF SUPREME COURT

For the death of the plaintiff's son, the defendant is liable only if it was caused by negligence, without contributory negligence of the son.

Negligence of the son does not appear. It is to be assumed that he exercised the normal amount of care, until evidence that he did not, is offered. That he did not see the approaching car is accounted for by the darkness of the day and the bushes along the track. Vision of the car being prevented, dependence was necessarily put on the instructions of the ear, in deciding whether a car was coming. The blowing of the whistle, a usual notification of the oncoming of a train or car was of vital importance. Was it blown? We should assume that it was in absence of evidence. The only evidence is the fact that, just after the accident, the motorman stated that he had not blown the whistle, giving a reason for his omission to blow it.

This evidence is admissible, not because the person making the statement was the motorman. As such, he could not by his declaration, affect his employer. It was made immediately after the accident while the motorman was under the influence of the ghastly occurrence, before he had time or opportunity to consider the legal effects of the fact that he was stating, upon anybody. It was a "part of res gestae of the accident," Meyer vs. Pittsburgh, M. & B. Railway, 273 Pa. 363 and as such admissible.

The judgment of the learned court below is affirmed.

BANK VS. SCROPE

Promissory Notes — Negotiable Instruments — Accommodation Note — Necessity of Notice to Indorser of Dishonor and Exceptions — Evidence — Act of May 16, 1901, Section 115 P. L. 194

STATEMENT OF FACTS

A note for $1000 made payable to Scrope, by Scrimmons was made for Scrope's accommodation. The bank discounted it. The

note was not paid at maturity. This is an action on the indorsement against Scrope. He defends, denying that the note was made for his accommodation; and proving that he received, as an indorser, no notice of the dishonor of the note. The court said that no notice of dishonor was necessary, if the note was made for Scrope's accommodation.

Dimona, for Plaintiff.
Dougherty, for Defendant.

OPINION OF THE COURT

Cassone, J. The single question to be considered in this appeal is this: need notice of the dishonor of a promissory note because of the maker's non-payment at maturity be given by the holder to an indorser where the instrument was made for indorser's accommodation?

It has for a long time been the law that an indorser of a note, unless qualified, becomes liable to pay the amount demanded by the instrument upon failure of the maker of the note, upon due notice of such failure, to the holder or any subsequent indorsee who legally claims through the particular indorser. It has been the common commercial rule that such indorsers of notes or other negotiable paper are bound and may be sued after maturity upon demand and notice of the non-payment or other default of the maker.

Section 89, Negotiable Instrument Act of 1901, P. L. 194, takes cognizance of this rule and provides for the discharge from liability of those who are not so notified.

However, several exceptions exist to this rule; the case at bar falling directly within one of them. Where it appears that the maker of the note has lent his name for the mere use and accommodation of the indorser, such notice need not be given to the indorser.

Accommodation paper is promissory notes or bills of exchange made, accepted or indorsed without any consideration therefor. A common illustration would be a note made to get from a vendor a credit which might otherwise have been refused and the goods are sold to the indorser on the joint credit of the maker and indorser.

In such cases the equitable relation subsisting between maker and indorser is that of surety and principal, and the indorser, in an action against him on the indorsement, has no right to complain that his surety has not been pursued first before he was called upon for payment and therefore requires no notice, 25 Pa. 61. The indorser having received the full benefit of the note is not injured.

This exception to the general rule of notice of dishonor is incorporated into the Negotiable Instrument Act, supra, section 115.

While there are no cases since the taking effect of this act directly in point on this question, a dicta by Frazer, J., in 276 Pa. 199, a case in which facts similar to these were at issue, holds that when a note is made for the indorser's accommodation, notice to him of dishonor was not required under section 115 of the Act. This case decided in 1922 renders an affirmation of the judgment below imperative, in view of the long established law and recent legislation in favor of the plaintiff.

The counsel for the defendant has sought to create as an issue the question of whether or not the note was made for Scrope's accommodation. The appellant contends that according to sec. 24 of the Negotiable Instrument Act, supra, every person whose signature appears on a note is prima facie presumed to have become a party thereto for value. The section holds that every negotiable instrument is deemed to have been issued for a valuable consideration.

But here the facts placed before us in the appellee's brief state that the note was made for Scrope's accommodation, by Scrimmons, and that it was discounted by the bank, and not paid at maturity whereupon the bank sued Scrope.

The counsel for the appellant further contends that his denial in the court below raised a question of fact for the jury. It seems to us that the question was properly placed before the jury. The court charged that no notice of dishonor was necessary, if the note was made for Scrope's accommodation.

We find no error and affirm the judgment of the lower court.

OPINION OF SUPREME COURT

Where a man is liable to pay a note only on the default of another person, the failure of that person to make the payment must be early communicated to him. This is a reasonable provision of the law.

On the other hand, when the primary duty is on him, to make the payment, he has no right to assume that some one other than himself, is making the payment, and he knows, without notification, whether he has paid or not. It would be idle to require that a notice be given him of that which he already knows, in order to complete his liability to make payment. Sect. 115 of the Negt. Inst. Acts of 1901, p. 209 provides that notice of dishonor is not required to be given to an indorser "where the instrument was made or accepted for his accommodation." Cf. Park Bank vs. Naffah, 276 Pa. 199.

The note was made payable to Scrope for his accommodation. He could not collect the money named in the note from the maker. The bank has become purchaser of it, but was not obliged to perfect Scrope's liability, by telling him a fact which he already knew that, being under an absolute duty to pay the note, he has failed to pay it. The judgment of the trial court is affirmed.