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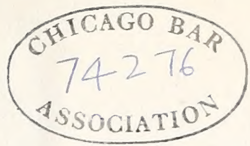
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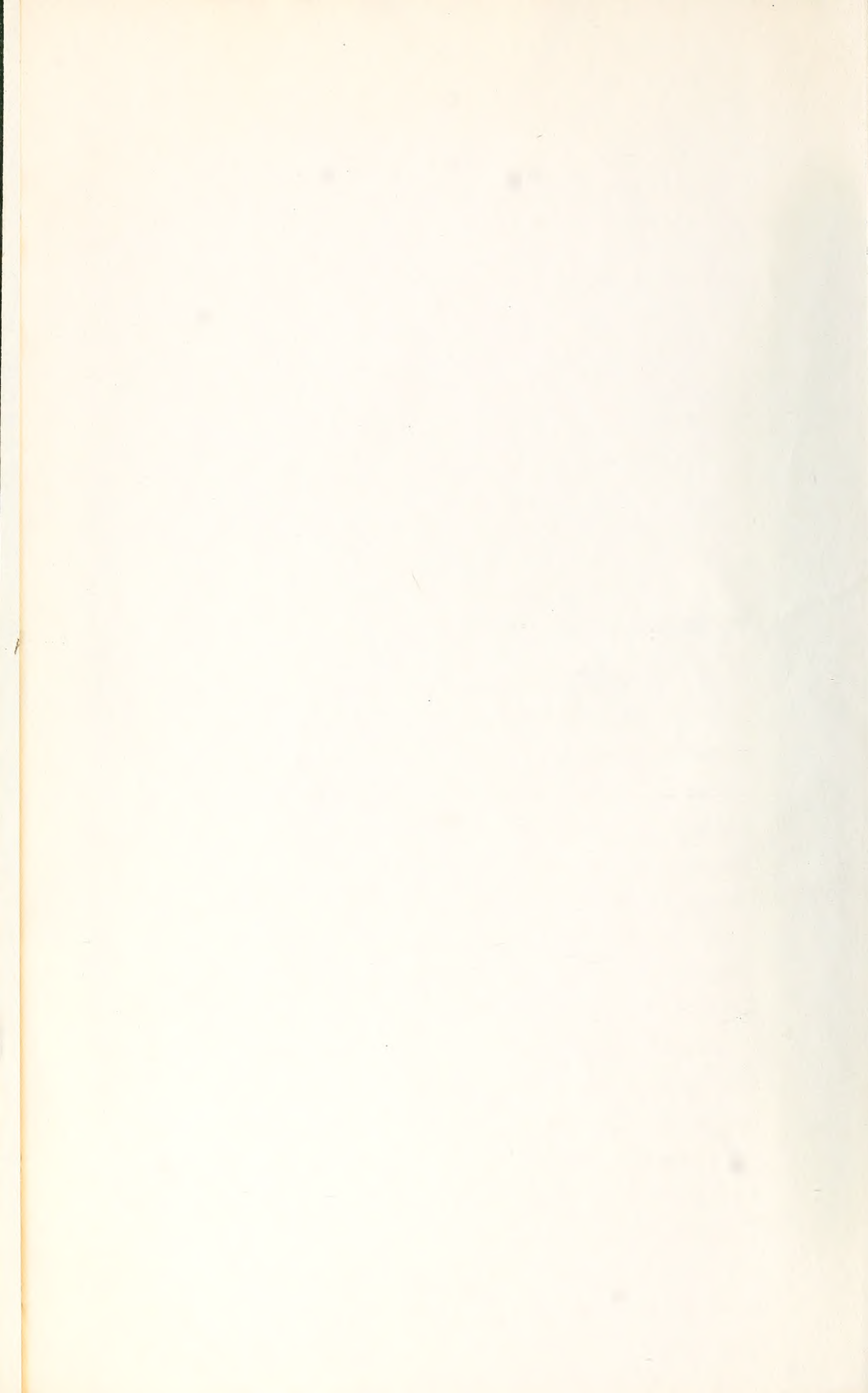

CHICAGO BAR ASSOCIATION 74276

275 - 28110

233 I.A. 621

MICHAEL P. MORRISSEY,
Appellant,

v.

C. FRANK TAYLOR,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

3/59/14

Opinion filed Feb. 20, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a first class case in the Municipal Court of Chicago, the amount claimed by the plaintiff, exclusive of costs, exceeding $1,000. All that we have before us is the common law record and the rules of the Municipal Court. The common law record shows an amended statement of claim by the plaintiff, claiming damages in the sum of $3500, and interest thereon from September 11, 1917. It also shows an affidavit of merits, which admits certain allegations contained in the statement of claim, and denies certain others, and in the end denies any indebtedness to the plaintiff, and alleges that the plaintiff is indebted to the defendant. The record also shows that on May 9, 1922, the parties to the cause being present, and the cause coming up in its regular course for trial, before the Court, without a jury, the trial thereof was entered upon, and on May 11, 1922, the court found the issues against the plaintiff. It further shows that motions for a new trial and in arrest of judgment were made in behalf of the plaintiff and overruled, and that final judg-

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ment was then entered "that the plaintiff take nothing by this suit, and that the defendant have and recover of and from the plaintiff the costs by the defendant herein expended, and that execution issue therefor." This appeal is from that judgment.

The chief contention of the plaintiff is "that the affidavit of merits states no defense to appellant's cause of action, and the motion for a new trial or in arrest of judgment should have been sustained and a new trial granted or the judgment arrested." It is urged in support of that contention, that as a judgment predicated on a statement of claim which is so defective that it does not state a cause of action, cannot stand, then the converse is true, that a judgment for costs for the defendant cannot be predicated on an affidavit of merits that states no defense, and that a motion in arrest of judgment is as valid when based on a defective plea as when based on a defective declaration.

That argument is unsound. The plaintiff brought suit and was asking for relief, and the burden was upon him to make out a case. Having only the common law record before us, we are entitled to assume that the trial judge was of the opinion, after the evidence was put in, that the plaintiff had failed to make out his case. That being the law, it is unnecessary and would be improper to consider the question whether the affidavit of merits would have been good, if challenged by a motion to strike. Keegan, et al v. Kinnare, 123 Ill. 292.

We know of no case in which the particular matter here involved has been considered. Bearing in mind, however,

ment was then entered "that the plaintiff take nothing by this suit, and that the defendant have and recover of and from the plaintiff the costs by the defendant herein expended, and that execution issue therefor." This appeal is from that judgment.

The chief contention of the plaintiff is "that the affidavit of merits states no defense to appellant's cause of action, and the motion for a new trial or in arrest of judgment should have been sustained and a new trial granted or the judgment arrested." It is urged in support of that contention, that as a judgment predicated on a statement of claim which is so defective that it does not state a cause of action, cannot stand, then the converse is true, that a judgment for costs for the defendant cannot be predicated on an affidavit of merits that states no defense, and that a motion in arrest of judgment is as valid when based on a defective plea as when based on a defective declaration.

That argument is unsound. The plaintiff brought suit and was asking for relief, and the burden was upon him to make out a case. Having only the common law record before us, we are entitled to assume that the trial judge was of the opinion, after the evidence was put in, that the plaintiff had failed to make out his case. That being the law, it is unnecessary and would be improper to consider the question whether the affidavit of merits would have been good, if challenged by a motion to strike. Keegan, et al v. Kinnare, 123 Ill. 280.

We know of no case in which the particular matter here involved has been considered. Bearing in mind, however,

the obligations which the law imposes upon the plaintiff, both to state a case and establish it by proof, it is our opinion that where a common law record, such as appears in this case, contains merely the statement of claim, affidavit of merits, and the finding of the issues, and judgment for the defendant, that no error can properly be assigned which is based solely on the claim that the affidavit of merits is defective. The judgment will, therefore, be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

285-28120

LIBERTY COAL COMPANY,
a Corporation,
Appellant,

vs.

ILLINOIS STEEL COMPANY,
a Corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

233 I.A. 621

Opinion filed Feb. 20, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 6, 1920, the Liberty Coal Company, plaintiff, brought suit in the Circuit Court against the Illinois Steel Company for a certain balance claimed to be due for coal sold to the defendant. There was a trial, without a jury, and judgment for the defendant. This appeal is therefrom.

On October 10, 1918, the plaintiff and the defendant entered into a written contract. The contract is signed under the word "Accepted," as follows, "Illinois Steel Company By C. F. Collins, R. S. Deegans Coal Company, Purchasing Agents By I. F. Vass, Pres." The contract provided it should expire on April 1, 1919. It contains four other provisions, which are as follows: first, the plaintiff sells and agrees to ship approximately 18,000 tons of coal (of a certain description) from its mines in Kentucky, in approximately equal monthly installments, upon instructions furnished by the defendant's purchasing agents; second, the defendant agrees to pay,

through its purchasing agent, not later than the 15th of the month, for all coal shipped during the preceding month; third, all coal shipped under this contract shall be at a price not in excess of the mine price allowed by the government at the time shipments are made; fifth, the agreement is made subject to all rulings of the United States Fuel Administration, and it is to be submitted to the Fuel Administration for approval.

In the presence of the court, by counsel, certain facts were agreed upon. It was "agreed that the coal was delivered and received and that the only matter in controversy was the difference in the price of the coal shipped between the dates of February 1st and April 1st, the plaintiff claiming a price of $3.00 a ton, and the defendant claiming a price of $2.55 a ton."

At the time, October 10, 1918, the war was in progress, and there was created by the President, the United States Fuel Administration. By reason of its jurisdiction and authority coal mining companies and purchasers were given a fixed maximum price at which they could sell and buy coal. The maximum price fixed by the Administration when this contract became in force was $3.00 per ton. In January 1919, the Administration cancelled as of February 1, 1919, all of its rules and regulations and prices affecting the kind of coal covered by the contract here in question, so that, it is claimed by the defendant, there remained no words in the contract which fixed the price per ton that the defendant should pay. During February and March considerable coal was

shipped for which the plaintiff claims the defendant should pay $3.00 per ton, and for which the defendant claims it should pay only the market price. The defendant paid $3.00 per ton for all coal it received under the contract up to February 1st and the market price for what it received in February and March, and so insists that nothing remains due the plaintiff. On the other hand, although the plaintiff does not dispute the amount of coal it delivered was paid for at the prices stated by the defendant, it claims that it was entitled to $3.00 per ton for the coal shipped in February and March, whereas, it has only been paid $2.55 per ton, and that the defendant is still liable for 45 cents per ton on all coal shipped between February 1 and the last of March. No question is made about the quality or amount of the coal, nor about the market price for February and March being $2.55 per ton. It was stipulated that in February and March the plaintiff shipped 2,775.15 tons, and that the defendant has paid therefor $7,076.63, being at $2.55 per ton, and that if the plaintiff was entitled to $3.00 per ton, there would still remain due at 45 cents per ton, the sum of $1,248.00. This suit is for the latter sum.

Three contentions are made by counsel for the plaintiff. First, that as there was no express price fixed in the original contract, and as the contract provided that the coal was to be paid for at a price "not in excess of the mine price allowed by the Government at the time shipments were made," that

shipped for which the plaintiff claims the defendant should pay $2.00 per ton, and for which the defendant claims it should pay only the market price. The defendant paid $2.00 per ton for all coal it received under the contract up to February 1st and the market price for that it received in February and March, and so insists that nothing remains due the plaintiff. On the other hand, although the plaintiff does not dispute the amount of coal it delivered was paid for at the various prices by the defendant, it claims that it was entitled to $2.00 per ton for the coal shipped in February and March, whereas, it was only then paid $1.60 per ton, and that the defendant is still liable for 40 cents per ton on all coal shipped between February 1 and the last of March. No question is made about the quality or amount of the coal, nor about the market price for February and March being $1.60 per ton. It was stipulated that in February and March the plaintiff shipped 2,795.16 tons, and that the defendant has paid therefor $4,472.25, being at $1.60 per ton, and that if the plaintiff was entitled to $2.00 per ton, there would still remain due at 40 cents per ton, the sum of $1,118.06. This suit is for the latter sum.

Three contentions are made by counsel for the plaintiff. First, that as there was no maximum price fixed in the original contract, and as the contract provided that the coal was to be paid for at a price "not in excess of the price allowed by the government at the time shipments were made," that

left the price to be fixed by the mutual agreement of the parties at anything from $3.00 per ton down, and as the parties proceeded to put the contract into effect at $3.00 per ton, that fixed the price for the whole of the contract, subject only to Government action. Second, that, as the result of certain correspondence, beginning on November 24, 1918, a new agreement was entered into, which reduced the quantity bought and sold, and established the price at $3.00 per ton; and third, that as the defendant received and used all the coal shipped under the original and the new agreement, and knew at the time that the plaintiff claimed the price was $3.00 per ton, and was paid at that rate up to March 25, 1919, it is now estopped, as a matter of law, to claim that it is only liable for $2.55 per ton for coal shipped after February 1, 1919, the date the Administration removed the coal regulations.

As to the first contention based on the fact that no specific price was fixed in the original contract, the words in the contract are, at a price "not in excess of the mine price allowed by the Government." The Government fixed the maximum price, it is assumed, at $3.00 per ton. The Government regulations, asfar as they were paramount, were cancelled on January 10, 1919, to be effective February 1, 1919. It is claimed by counsel for the defendant, and not denied, that the original contract was signed by the Illinois Steel Company by C. F. Collins, in Chicago, after it had been signed by the plaintiff and the W. E. Deegans Coal Company, Purchasing Agents, and so was a contract made in

Illinois. Section 10 of the Uniform Sales Act of Illinois is as follows:

> "Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor."

There is no doubt, and it is not really disputed, that the $3.00 price, which was the maximum fixed by the Administration, was understood to be the fixed price, at least while the rules of the Government were in force, that is up to February 1, 1919. Counsel for the defendant stated to the Court "that during the functioning of the Fuel Administration, parties were not free to sell coal at any price they pleased, but that the Government * * * undertook to tell the mining companies and the purchasers what price they should pay, that is, the maximum price. In other words, they (meaning the Administration) established fair prices, as it was then called." The question then arises, what was the price under the original contract for coal shipped in February and March 1919, after the Government control of prices ceased, and there was no governmental "mine price" fixed. Evidently, that was a situation the contracting parties had not expressly provided for. In such a case, therefore, it would seem to be necessary to apply the principle that when goods are accepted and price is not mentioned, there is a liability to pay their reasonable worth. And that is the law as stated in Section 10 (supra). Unless, therefore, something was done subsequent to the making of the original contract that modified its terms as to price,

the plaintiff cannot recover.

Second. Does the correspondence between the parties, after making the original contract on October 10, 1918, prove that the defendant agreed to pay $3.00 per ton for the coal delivered in February and March, 1919? Sixty four letters and telegrams constitute the correspondence. On November 21, 1918, Collins, agent for the defendant, wired [illegible]. [illegible]. Deegans Coal Co. (hereinafter called Deegans) the purchasing agent, at Huntington, West Virginia, who signed the original contract as "accepted," along with the Illinois Steel Company, that as the "Administration has instructed the discontinuance of shipments of all coal allocated to us" you will cancel our orders of September 7 and October 29, and make no further shipments to us. "This is in accordance with our orders." The next day Deegans wired Collins, asking if the defendant could handle the coal "in self-clearing hopper cars at least a week longer, giving mines time to place elsewhere," that otherwise it would force them to shut down. On November 23 Collins wired Deegans, extending privilege for one week, and, further, "Please ship as little tonnage as possible over this period and then stop shipments altogether as we are congested at this end." On November 24 Deegans wrote the plaintiff that he had wired it on November 22 that defendant refused to accept shipments save in self-clearing hoppers; that he was sending a man to Chicago to induce defendant to take coal to April 1, according to the contract. In that letter Deegans says, "It is not an easy matter to sell mine run coal at $3.00 when plenty of it is being offered from Logan County at $2.50. On

the plaintiff [illegible] company.

Second. [illegible] the correspondence between the parties, [illegible] the original contract of October 14, 1932, [illegible] that the defendant agreed [illegible] [illegible] in February and March, 1933. [illegible]

[illegible]

November 25 Deegans wrote the plaintiff that defendant had asked that its order be cancelled, "but in fairness to you we have induced them to accept shipments for another week so as to give you time to place your coal elsewhere." And, further, "Although acting as agents for the Illinois Steel Co. in this transaction, we feel that they ought to take this coal during the period of the contract and had our representative call on Mr. Collins at Chicago, a few days ago with this end in view. However, they absolutely decline to accept further shipments after November 29th and it will be necessary for you to suspend shipments on that date."

On November 27, 1918, the plaintiff wrote Deegans that as the contract did not provide for self-clearing hoppers, it would continue to ship under the contract in any cars provided for it. On November 27, Deegans wired the plaintiff, "Suggest that we do not reduce contract price to Illinois Steel Company, but endeavor to sell to some other customer at market price and later collect difference from Steel Company * * * Steel Company should be notified that we are relying on contract with them." This letter from Deegans, who signed the original contract with the defendant, and was their purchasing agent, is significant. It suggests that the price of $3.00 per ton, after the market had gone down, even though the Administration rule was still in effect, was the obstacle that was bothering the defendant.

On November 27, the plaintiff wrote to Deegans that it stood on the original contract. "We will stand on our contract right to receive the maximum price fixed by the U. S. Fuel Administration. * * * We construe our contract to be one that binds all parties, and not one that compels us to ship only so long as it is convenient and profitable for the purchaser to accept it or until the price goes down and enables it to purchase cheaper elsewhere. Under this belief, we will continue to consign our coal to you. While the coal shortage existed and after our contract was made we had several opportunities to make long time contracts at very attractive prices, but, of course, declined to do so on account of our contract obligation to the Steel Company and you."

On November 28, the plaintiff wired the defendant, that Deegans had informed it, the plaintiff, that the defendant declined to accept further shipments of coal, and, continued, "Our contract with you of October 10th, still in effect and its existence has precluded our making other and longer contracts for our output. Shipments will continue to move to you as heretofore under said contract and this is to so advise you." On the same day Deegans wired the defendant that at its request he had notified plaintiff to stop shipping under its contract, but that it had refused and insisted on shipping according to contract to preserve its legal rights.

On November 29, Deegans wrote to the plaintiff, and referred to a contract the defendant had with another

coal company. That letter contained the following, "In the case of the Elkhorn Superior Coal Co., however, no formal contract was executed, but merely a purchase made by us for account of Illinois Steel Co., of 15,000 tons to be shipped to April 1st, in equal monthly installments. We believe you have a better case than the Elkhorn Superior Coal Co., and while as you know, we are acting as agents for the Illinois Steel Co. in this transaction, and not the agent of the mines, we believe you should continue shipments until the coal is refused, although I think it would be best for you to get self-clearing hoppers if you can possibly do so, as this might result in them taking the coal up to April 1st and avoid any litigation. Please return my letters of November 24th and 25th for reasons which I explained to you over the phone yesterday, also return this letter along with the copy inclosed. I am enclosing another letter for your files which you may retain." On December 2, the defendant wired Deegans, "If you will agree not to ship tonnage in excess of what you have done on orders 1173 and 1211, you may continue at that rate to April 1st, 1919. Advise." The next day, December 3, Deegans wired the defendant, "Mines agree not to ship tonnage in excess of previous rate and will continue until April first." On the same day Deegans wrote the plaintiff, informing it of the defendant's proposition and that he had replied to the defendant accepting it. In that letter Deegans suggested that the plaintiff make an effort to obtain self-clearing hoppers. There was then correspondence between Deegans and the defendant to the effect that on

order R. M. 1173, which was the only one plaintiff was interested in, the shipment from December 1, to April 1, 1919, should be one car a day, or about 1,250 tons a month. It was admitted that Collins was authorized to act for the defendant. On December 3 Deegans wrote the defendant, "We will do all we can to get coal loaded only in self-clearing hoppers as per your request." On December 6 Deegans wrote to the plaintiff informing him of his agreement with the defendant for a reduced amount and asking for defendant's views, and referred to the difficulty of selling coal at the Government price, "when there is such a large quantity of good coal being offered for less." In a postscript, he asks, "How about naming a minimum price, and then if we can get more we will do so." On December 9 the plaintiff wrote Deegans that its letter of November 27 stated its views as to the contract, and, further, of course, we do not want to waive any rights thereunder." It contained the following, "We regard our contract with the Steel Company as an asset valuable at this time and are relying upon it. I lost no sleep in reaching a conclusion on the question whether or not the Steel Corporation would release us in case the contract turned out favorable to it and unfavorable to us."

On December 10, Deegans (through one Vass) wrote the plaintiff as follows:

"On receipt of wire from the Illinois Steel Co. that they would accept shipments to April 1st, provided we would not exceed the rate of previous shipments, I had in mind the fact that you had been shipping only about one car per day and assumed that you would prefer continuing at this rate and dispose of any surplus you might have, even at a less price, to litigation, which always entails more or less expense, regardless of the outcome, so I took it upon myself to wire, the Illinois Steel Co., that this would be agreeable. I perhaps, should have taken this up with you before doing so but did not, and believe that it would really be better not to exceed to any great extent the rate of shipments previously made on this contract, although this will not, I know, take care of the full tonnage covered by the contract. Kindly let me have your views in regard to this.

For your information I quote exchange of telegrams between us and the Illinois Steel Co., on this point.

'If you will agree not to ship tonnage in excess of what you have done on orders 1173 and 1311 you may continue at that rate to April 1, 1919. Advise.'

'Your wire mines agree not to ship tonnage in excess of previous rate and will continue to April 1st.'

If you do not agree with me in this matter you might take it up with the Illinois Steel Co., at this time and state that we took it for granted this would be satisfactory and wired but that you will expect to ship the full tonnage called for. As a matter of fact, however, you will not be able to ship the full tonnage of 18,000 tons, and the other mine having a similar contract with this company agrees to their proposition not to exceed previous rate of shipment.

We will try to dispose of any surplus you may have if you will let us know about what you think this will be.

I am sure it will be all right to ship one car per day to the Illinois Steel Co., and an extra car occasionally, will likely be accepted."

On December 12, the defendant wrote Deegans confirming the latter's letter of December 5, saying, "It will be agreeable to us, if you will ship not to exceed one car per day." On December 14, Deegans wrote the plaintiff saying that the defendant in requesting shipments not to exceed

the previous rate, did not limit plaintiff to any specified equipment, and presumed it would take the coal in any kind of cars, but Deegans suggested that the plaintiff make a special effort to get self-clearing hoppers for defendant's order. And, further, "I wrote you a few days ago, expressing my views in regard to previous shipments and I am still of the opinion it will be better not to exceed one car per day. Of course, if you happen to skip a day and load two cars the following day, we will report one on one day and one on the next, so as to keep up the average. There are but very few mines anywhere now that have sufficient orders or contracts to permit them running full time and if you should find it necessary to curtail the production slightly you certainly would not be in worse shape than other people." No other correspondence, save an immaterial letter of December 19, is shown between the parties, until January 28, 1919. Was there an agreement made by the correspondence beginning November 24 and ending on December 14? The only writings that accept the defendant's proposition to reduce the quantity of coal under the contract are by Deegans and the defendant. At no time did the plaintiff, when quantity was being actually considered, agree to accept a reduction. The plaintiff, in its letter of December 8, after Deegans had agreed with the defendant, referred Deegans to its letter of November 27, and then said that it was relying on its contract with the defendant. The terms of the qualifying agreement, if it was made, reduced the 18,000 tons, as to the time

between December 1, 1918 and April 1, 1919, to about 5,000 tons, a cancellation of about 5,800. Considering the market price to have been through that period 45 cents per ton less than the maximum Government price of $3.00, it meant a saving of $2,610.00 to the defendant. There were, therefore, obvious pecuniary reasons why the defendant was solicitous of reducing the contract quantity. As to the insistence that the plaintiff should ship only in self-clearing hoppers, there is no evidence that the defendant had any right to make that demand. The contract being silent on that subject, it would seem as though the defendant interjected it without reason, perhaps as a subterfuge, as the price after the Armistice had gone down. Certainly there was no justification for the announcement on November 24 that it would refuse to accept shipments in anything but self-clearing hoppers. But subterfuge and effort at evasion do not necessarily make an agreement. It is true, however, that later, on April 15, 1919, the plaintiff wrote to Deegans, that as the demand for coal decreased after the Armistice, the defendant sought to breach its contract and buy its coal for less, and notified the plaintiff that it would not take any more coal, and that a new arrangement was made whereby the defendant agreed to take plaintiff's coal until April 1, 1919, in consideration of the contract quantity being reduced by the plaintiff. In that letter he also stated that the plaintiff understood by the new arrangement that what doubt there was as to price was cleared away and that the defendant agreed to take coal at the reduced quantity until April 1 at $3.00 per ton.

between December 1, 1913 and April 1, 1915,
or about 3,000 tons, a deterioration of about 4,000,
[illegible] the market price to have been through that
period 40 cents per ton less than the maximum Government
price of $2.20, it would amount in all to $1,200.00 in the
aggregate. There were, therefore, evidently [illegible]
[illegible] for the defendant the [illegible] of [illegible]
the contract security. As to the insistence that the
plaintiff should ship coal in [illegible] manner,
there is no evidence that the defendant had any right to
make that demand. The contract being silent on that
subject, it would seem as though the defendant interjected
it without reason, perhaps as a subterfuge, as the price
after the [illegible] had gone down. Certainly there was
no justification for the requirement in [illegible] to
that it would refuse to accept shipments in anything
but [illegible] baskets. The submission and effect of
evidence do not necessarily make an agreement. It is
true, however, that later, on April 15, 1918, the plaintiff
wrote to [illegible], that at the demand for coal [illegible]
after the [illegible], the defendant sought to breach its
contract and buy its coal for less, and notified the
plaintiff that it would not take any more coal, and that
a new arrangement was made whereby the defendant agreed to
take plaintiff's coal until April 1, 1919, in consideration
of the contract security being released by the plaintiff.
In that letter he also stated that the plaintiff understood
by the new arrangement that when [illegible] there was an [illegible]
price was [illegible] and that the defendant agreed to
take coal at the reduced quantity until April 1 at
$2.00 per ton.

Although coal was shipped in a reduced quantity and, apparently, pursuant to a new and qualifying agreement, there is nowhere shown a single word written or wired by the defendant, or its agent, that proves that the defendant actually promised or agreed that, regardless of the words as to price in the original contract, it would pay $3.00 per ton for the reduced tonnage up to April 1.

Third. On January 28, 1919, Deegans wrote to the defendant that the plaintiff had suggested that it would be willing to reduce the price, provided an increased tonnage was contracted for on a long time contract. This was 18 days after the Administration had announced a cancellation of its rules to take effect February 1. On January 30, the defendant wrote to Deegans that it would not be interested in such a proposition, and on February 1 Deegans sent the defendant's letter of January 30 to the plaintiff. Some two weeks later, on February 15, the defendant wrote to Deegans that as it had been offered similar coal at a lower price, "the price which we paid you prior to February 1st is not justified after that date. We now request that an understanding be reached with regard to price effective after February 1st." On February 17, Deegans wrote the plaintiff what the defendant had stated in its letter of February 15. This was the beginning of a new controversy and, apparently, was precipitated as the result of the cancellation of the Administration rules. On February 24, the plaintiff wrote to Deegans, asking if an agreement could be made with the defendant to take the plaintiff's output for a period beyond April 1, stating

also, "and I think we can agree on a reduction in price," that plaintiff preferred to work amicably, "and if the Illinois Steel Company will take two cars per day of our coal from now until June 1, 1919, we will make the price $2.50 per ton." On February 27, the defendant wrote Deegans that it had made terms with all other shippers on a $2.55 basis "and would expect you to so invoice shipments to us. Otherwise, make us no further shipments after March 1st." On March 7, Deegans wrote the plaintiff quoting a telegram of March 6, from the defendant, that if the plaintiff was not willing to sell at $2.55 per ton, the defendant "will accept no coal shipped after February 28." On March 21, Deegans wired the plaintiff a copy of a telegram of the same date from the defendant, as follows: "Six cars shipped in March now being held here subject to your order. We will not accept this coal unless price of $2.55 is made covering their shipments since February first." On March 22 the plaintiff wired Deegans, "You, as agent of Steel Company may make whatever disposition of this coal you see fit. We will continue to ship until April first and bill same at three dollars per ton as per contract." A copy of that, Deegans sent the same day to the defendant. And on the same day the defendant wired Deegans, "We will not pay more than $2.55 for any coal shipped" by plaintiff "after February 1st. Will hold this coal subject to your disposition unless you authorize payment on basis mentioned." On the same day the plaintiff wrote Deegans, that he was the agent of the defendant, and it, the plaintiff, would continue to ship until April 1st at $3.00 per ton, according to the contract. A number of other

telegrams and letters passed between the parties, but they do not bear on the question in controversy. On March 25, Deegans wired plaintiff, "Illinois Steel Co. wires they will refuse shipment since February first, excepting price of $2.55 net you and further this is final." In the letter of April 15, 1919, by the plaintiff to Deegans, quoted in part above, occurs the following:

> "On February 1, 1919, the government removed all restrictions with regard to coal prices so far as we were concerned. The Steel Company immediately began another crusade upon our little contract and asserted that we must reduce the price or they would take no more coal. We refused again, as we had uniformly been doing before to make any reduction (believing that if they could, by an ex parte order set a price on our coal in disregard of all prior trades and agreements, that they could take it for nothing) and we continued to ship in a reduced quantity, and invoice it at $3.00 'as heretofore.' The agents continued to receive the coal at the point of reconsignment and move it to the Steel Company until March 25th - about six days before the end of the contract period. We were then notified by the agents that they would not reconsign any more of our coal to their principal. If the W. R. Deegans Coal Company was ever the agent of the Illinois Steel Company for the purpose of handling our coal (and we are assuming that an agency can be created by contract), then the agency still existed when the coal was accepted by the Deegans Company and reconsigned at Russel Yards to the Steel Company."

On April 30, 1919, the defendant answered that letter as follows:

> "We are unable to agree with you in your interpretation of this contract, and can only adhere to the position which we have at all times taken, namely, that we would pay you for this coal at the rate of $2.55 per ton, which price was at the time shipments of coal in question were made, a reasonable price therefor, and the going market price for coal of a similar character in the same field. This is all that we have paid other dealers in your territory and we will not be able to pay you more. We trust that you will see your way clear to arrange for an adjustment of the matter on this basis."

It will be seen from the foregoing that the second controversy began on February 15, when the defendant requested

"that an understanding be reached with regard to price effective after February 1st." There is no doubt but that the plaintiff at all times claimed the price was fixed at $3.00 by the contract itself and never was changed, even after the cancellation of the Administration rules on February 1. As we have already held that the market price must prevail after February 1, unless there is evidence of some varying agreement, the question arises whether the correspondence shows that the defendant accepted any coal after February 1 for which it bound itself to pay $3.00 per ton. There seem to be two letters by the defendant which show an intention to be bound to pay $3.00 per ton on coal received up to March 1, 1919. The letter of February 27 begins, "Referring to our letter of the 15th relative to price arrangement," and then states that it expects plaintiff's coal to be invoiced at $2.55 per ton, "Otherwise," that is, if the plaintiff still insists on $3.00 a ton, "make us no further shipments after March 1st." And, again, on March 6, 1919, the defendant wired Deegans, and the latter sent it the next day to the plaintiff, "If not willing (that is the plaintiff) to bill at $2.55 per ton, f. o. b. cars mines, as per our letter February 27th will accept no coal shipped after February 28th." As the plaintiff was insisting all the time on $3.00 per ton, and was regularly shipping coal which was being accepted by the defendant, when the defendant in view of the controversy says either lower the price or "will accept no coal shipped after February 28th," and further, you agree to $2.55 a ton,

"otherwise, make us no further shipments after March 1st," it follows that there is an admitted liability to pay $3.00 per ton for what it received up to the first of March. What it received after February 28 has been paid for at the market price, and that, we hold, is full payment for that period.

The judgment will be reversed and the cause remanded in order that proof may be made of the amount due, at 45 cents per ton for the amount of coal shipped and delivered in February 1919; and that judgment be entered therefor.

REVERSED AND REMANDED

O'CONNOR, J. CONCURS.

THOMSON J. DISSENTING:

I do not concur in the foregoing decision of this case. As I view it, the parties to the contract involved, modified its terms, with regard to the quantity of coal to be delivered under it, in December 1918. It may not be said from the record that the question of price, in any way entered into the modification of the contract, as to quantity. It does not appear that anything whatever was said about prices in connection with this modification. It was doubtless the understanding of the parties that the provisions of the contract, as to price, still held good and were to continue.

The provisions of the contract with regard to the price to be paid for the coal contracted for were, not that the price agreed upon between the parties at the beginning

deliveries, only as to further shipments after March 1st," it follows that there is an admitted liability to pay $3.00 per ton for what it received up to the first of March. That it received after February 28 has been paid for at the market price, and that, we hold, is full payment for that period.

The judgment will be reversed and the cause remanded in order that proof may be made of the amount due, at 40 cents per ton for the amount of coal shipped and delivered in February 1919; and that judgment be entered therefor.

REVERSED AND REMANDED

Thompson, J. concurs.

Dunbar, J. dissenting:

I do not concur in the foregoing decision of this case. As I view it, the parties to the contract involved, modified its terms, with regard to the quantity of coal to be delivered under it, in December 1918. It may not be said from the record that the question of price, in any way entered into the modification of the contract, as to quantity. It does not appear that anything whatever was said about prices in connection with this modification. It was doubtless the understanding of the parties that the provisions of the contract, as to price, still held good and were in force.

The provisions of the contract with regard to the price to be paid for the coal contracted for were, not that the price agreed upon between the parties at the beginning

of the contract period were to obtain throughout the period, as the plaintiff contends. The contract provisions were that all coal shipped under it "shall be at a price not in excess of the mine price allowed by the Government at the time shipments are made." Nothing could be plainer than that the price was subject to change.

Apparently, the parties treated the price provisions of this contract as meaning that while the seller could not charge a price "in excess of the mine price allowed by the Government at the time shipments were made," it could charge as much as that, and, accordingly, the price fixed by the Fuel Administration of the Government, which was $3.00 per ton, was treated by the parties as the contract price, as long as that continued to be the price fixed by the Government. Although the World War Armistice took place in November 1918, there was no change in the Fuel Administration's regulation, as to price, until some time after the parties had made their supplemental agreement, as to quantity. By saying that the parties made a supplemental agreement, it is not meant that they did so formally. The Steel Company submitted its proposition in writing, through i

its agent, and the Coal Company acquiesced in it, by shipping at the reduced rate of a carload a day from that time on. When all restrictions as to rate and price were removed by the Government, as of February 1, by the announcement or publication issued by the Government early in January, this contract became one for the sale and delivery, from the plaintiff to the defendant, of approximately one

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Apparently, the parties treated the price provisions of this contract as meaning that while the seller could not charge a price "in excess of the mine price allowed by the Government at the time shipments were made," it could charge as much as that, and, accordingly, the price fixed by the Fuel Administration of the Government, which was $3.60 per ton, was treated by the parties as the contract price, so long as that continued to be the price fixed by the Government. Although the World War Armistice took place in November 1918, there was no change in the Fuel Administration's regulations, as to price, until some time after the parties had made their supplemental agreement, so to modify. By saying that the parties made a supplemental agreement, it is not meant that they did so formally. The Steel Company submitted its proposition in writing, through its agent, and the Coal Company acquiesced in it, by shipping at the reduced rate of 4 carloads a day from that time on. When all restrictions as to rate and price were removed by the Government, as of February 1, by the announcement of cancellation issued by the Government early in January, this contract became one for the sale and delivery, from the plaintiff to the defendant, of approximately one

car a day, after February 1 and up to April 1, 1919, at such price as the parties might agree upon, or, in the absence of such agreement, at the market price, for the contract they had entered into in no way covered the situation which was present after February 1.

The plaintiff contends that the defendant paid for the coal received up to March 26, at the rate of $3.00 per ton, and then held back remittances so as to make the aggregate paid after February 1, such as to make the price paid on all coal received $2.25 per ton, which, it is agreed, was the reasonable price on the market throughout that period. That is impossible, in the first place, because the amount thus retained on shipments between March 26 and April 1, could not equal the difference between $3.00 and $2.55, on the coal shipped during February and March. In the next place, there is not a word of evidence in the record (but a few self-serving statements contained in letters of the plaintiff, received by the court subject to defendant's objection) proving or tending to prove that any coal shipped after February 1, was paid for at the rate of $3.00 per ton.

The defendant further contends that by accepting the coal, after February 1, with knowledge of the fact that the plaintiff was claiming the price of $3.00, fixed by the parties at the beginning of the contract period, was to hold on throughout the period, the defendant became liable to pay that price for all coal so received. In my opinion, that position is not sound in view of all the circumstances involved. When the Government restriction and regulations

and a day, after February 1 and up to April 1, 1920, at such price as the parties might agree upon, or, in the absence of such agreement, at the market price, for the contract they had entered into in no way affected the situation which was present after February 1.

The plaintiff contends that the defendant paid for the coal received up to March 29, at the rate of $2.00 per ton, and then held back remittances so as to make the aggregate paid after February 1, such as to make the price paid on all coal received $1.95 per ton, which, it is agreed, was the reasonable price on the market throughout that period. This is impossible, in the first place, because the amount then withheld on shipments between March 29 and April 1, could not equal the difference between $2.00 and $1.95, on the coal shipped during February and March. In the next place, there is not a word of evidence in the record (but a few self-serving statements contained in letters of the plaintiff, received by the court subject to defendant's objection) proving or tending to prove that any coal shipped after February 1, was paid for at the rate of $2.00 per ton.

The defendant further contends that by accepting the coal, after February 1, with knowledge of the fact that the plaintiff was claiming the price of $2.00, fixed by the parties at the beginning of the contract period, was to hold in throughout the period, the defendant became liable to pay that price for all coal so received. In my opinion, that position is not sound in view of all the circumstances involved. When the Government restriction and regulations

were removed, on February 1, the question of price on future shipments on this contract, became an open one, subject to the agreement of the parties. Apparently, after the announcement of the removal of the Government regulations was made, in January, the defendant took up with the plaintiff the question of readjustment of the price on shipments after February 1. Under date of January 28, the defendant's agent advised it that the plaintiff had suggested that they might be willing to reduce the price, provided an arrangement could be made covering an increased tonnage, on a contract running beyond April 1, when the contract here in question was to expire. Under date of January 30, the defendant replied that they would not be interested in contracting for any heavier tonnage than was called for by the existing contract. So far as the record shows, no further negotiations or communications passed between the parties until the middle of February, when the defendant, through its agent, advised the plaintiff that it did not consider the prices which had been paid the plaintiff, prior to February 1, as justified on shipments after that date. Continuing in that communication the defendant said: "When the United States Fuel Administration's regulations were called off, we believed this also cancelled our order with you. Having in mind, however, the contract period, and believing it was your intention to make us shipment over that period, we allowed the matter to go this way, expecting to hear from you from time to time, with reference to prices. We now request that an understanding be reached, with regard to prices effective after February 1." The plaintiff con-

were entered, on February 1, the question of prices on future shipments on this contract, became an open one, subject to the agreement of the parties. Apparently, after the announcement of the removal of the Government regulations was made, in January, the defendant took up with the plaintiff the question of readjustment of the price on shipments after February 1. Under date of January 22, the defendant's agent advised it that the plaintiff had suggested that they might be willing to reduce the price, provided an arrangement could be made covering an increased tonnage, on a contract running beyond April 1, when the contract here in question ran to expire. Under date of January 30, the defendant replied that they would not be interested in contracting for any heavier tonnage than was called for by the existing contract. So far as the record shows, no further negotiations or communications passed between the parties until the middle of February, when the defendant, through its agent, advised the plaintiff that it did not consider the prices which had been paid the plaintiff, prior to February 1, as justified on shipments after that date. Continuing in that communication the defendant said: "When the United States Fuel Administration's regulations were called off, we believed this also cancelled our order with you. Owing to which, however, the contract period, and believing it was your intention to make a shipment over that period, we allowed the matter to go this way, expecting to hear from you from time to time, with reference to prices. We now request that an understanding be reached, with regard to prices effective after February 1." The plaintiff sub-

tinued to take the position that under its contract it was entitled to $3.00 per ton, for all coal shipped up to April 1, and the defendant continued to take the position that it could not be charged more than $2.55 a ton, which was the price of coal, of the kind involved, on the open market. The parties never did come to an agreement on the price to be paid for coal shipped after February 1. In my opinion, the fact that the defendant continued to take the coal, with knowledge of the fact that the plaintiff was going to demand $3.00 a ton for it, does not, under the circumstances make it liable for that amount any more than the fact that the plaintiff continued to deliver it, with knowledge of the fact that the defendant was going to resist any payment above $2.55 a ton, would, of itself, establish that as the basis of liability. Nor, in my opinion, is the question of the defendant's liability affected in any way by the fact that late in February the defendant wrote a letter stating that if the plaintiff could not see its way clear to accept $2.55, they could discontinue shipping it altogether. I am unable to comprehend how that can be held to constitute an admission, on the part of the defendant, that up to that time it had taken the coal at $3.00 per ton.

The coal which was shipped by the plaintiff and taken by the defendant, after February 1, was sold and delivered under a contract, which, to all intents and purposes, was silent as to price. The price to be paid, therefore, was open to the agreement of the parties. It was the subject of correspondence between them throughout those two months and they never came to any agreement over it. The defendant

sisted to take the position that under its contract it was entitled to $2.50 per ton, for all coal shipped up to April 1, and the defendant continued to take the position that it would not be charged more than $2.25 a ton, which was the price of coal, of the kind involved, in the open market. The parties never did come to an agreement on the price to be paid for coal shipped after February 1. In my opinion, the fact that the defendant continued to take the coal, with knowledge of the fact that the plaintiff was going to demand $2.50 a ton for it, does not, under the circumstances make it liable for that rate any more than the fact that the plaintiff continued to deliver it, with knowledge of the fact that the defendant was going to resist any payment above $2.25 a ton, would, of itself, establish that as the basis of liability. Nor, in my opinion, is the question of the defendant's liability affected in any way by the fact that late in February the defendant wrote a letter stating that if the plaintiff could not see its way clear to accept $2.25, they would discontinue shipping it altogether. I am unable to comprehend how that can be held to constitute an admission, on the part of the defendant, that up to that time it had taken the coal at $2.50 per ton.

The coal which was shipped by the plaintiff and taken by the defendant, after February 1, was sold and delivered not under a contract, which, to all intents and purposes, was silent as to price. The price to be paid, therefore, was open to the agreement of the parties. It was the subject of correspondence between them throughout these two months and they never came to any agreement over it. The defendant

was, therefore, liable to pay the plaintiff, for the coal shipped during those two months, the then prevailing market price. The tonnage shipped during those two months is admitted in the record. The remittances to the plaintiff from the defendant during that period are also admitted. When those remittances are applied to the quantity delivered it is found that they were based on a price per ton which, it is further admitted, was the market price. Therefore, I am of the opinion that the trial court properly found the issues for the defendant, and that there was no error in the judgment appealed from.

ant, therefore, liable to pay the plaintiff, for the coal shipped during those two months, at the then prevailing market price. The tonnage shipped during those two months is admitted in the record. The remittances to the plaintiff from the defendant during that period are also admitted. When these remittances are applied to the quantity delivered it is found that they were based on a price per ton which, it is further admitted, was the market price. Therefore, I am of the opinion that the trial court properly found the issues for the defendant, and that there was no error in the judgment appealed from.

317 - 28152

A. C. PETRI,
Appellee,

vs.

HENRY D. DAVIS LUMBER COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Feb. 20, 1924.

233 I.A. 621

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the Court.

On November 7, 1919, A. C. Petri, the plaintiff brought suit in the Municipal Court against Henry D. Davis Lumber Company, the defendant, to recover $786.50 for commissions on certain sales of lumber. A writ of attachment in aid was issued against Harris Brothers Company, as garnishee. On December 29, 1919, the defendant filed its appearance, and gave bond, and the attachment was dissolved and the garnishee discharged. On April 18 and 19, 1922, there was a trial, without a jury, and a judgment for the plaintiff in the sum of $786.50. This appeal is therefrom.

It is alleged in the statement of claim that in the year 1915 (afterwards amended to read, 1917), the plaintiff entered into a contract with the defendant to take orders and sell lumber for the defendant at a commission of 50 cents per thousand feet, and 50 per cent of any amount received over and above the basic price quoted by the defendant; that, pursuant to that agreement, he procured contracts as follows: On December 11, 1918, with D. A. Goodwillie Co. of Chicago, Illinois, a

contract for 500,000 feet of spruce dunnage 4/4 in. to be dry at price of $29.75 per 1,000 feet, set basic price on same having been $38.75 per 1,000 feet; and on January 8, 1919, a contract with Maxwell Bros. of Chicago, Illinois, for 500,000 feet of spruce box lumber 4 in. and wider to be dry at price of $34.50 per 1,000 feet, set basic price on same having been $31.59 per 1,000 feet; that there is still due and owing the plaintiff in accordance with the terms of his contract with the defendant; First, on the contract obtained with the D. M. Goodwillie Co., the sum of $297.62, and second, on the contract with Maxwell Bros. of Chicago, Illinois, the sum of $386.46, which sums or any part thereof, the defendant has refused and still refuses to pay and for which combined amounts being $684.08 together with interest from April 15, 1919, the plaintiff is indebted to him.

On September 22, 1920, the defendant filed an affidavit of merits. That was stricken, and an amended affidavit was filed. The latter admits that an agreement was made with the plaintiff, but that "any and all commissions or compensations of the plaintiff under and by virtue of the said agreement, were to be paid to him by the defendant only on shipments actually made and in no event on orders cancelled." It alleges that the price quoted by the defendant to the plaintiff on the contract of December 11, 1918, with D. M. Goodwillie was $29.75 per 1,000 feet, and not $28.75; that only a part of the Goodwillie, and the Maxwell Brothers orders was shipped, the unshipped part of each having been cancelled; and that the defendant has paid all the commissions on the orders as far as they were carried out. It recites further that, on April 15, 1919, the defendant tendered to the plaintiff, and the latter accepted, a check in full settlement of his claim.

The chief contention of the defendant is that the judgment is clearly against the weight of the evidence; to be more explicit, that the evidence pertaining to the question, whether the plaintiff was entitled to commissions on unshipped or cancelled orders, clearly did not preponderate in favor of the plaintiff's claim.

The plaintiff had been a lumber salesman for over thirty years. He had sold lumber for the defendant, an Oregon corporation, a dealer in wholesale lumber, for a number of years prior to 1917, and at first received fifty cents a thousand feet. Having written to the defendant from Chicago that he would call upon them at Portland, Oregon, he called there at their office on February 1, 1917, and met one Linder, the general manager of the defendant. The plaintiff says Linder was the only other person present besides himself, save that Linder's stenographer was "way back in the room." Parts of a first and second deposition by Linder, and of a first and second deposition by one Lanning, vice-president of the defendant, were put in evidence. In their first depositions they say nothing about the contract in question, as it pertained to cancellations, or whether any one was present save the plaintiff and Linder, but Lanning in his second deposition says he was present at the conversation. The plaintiff testified that he talked with Linder on February 1 and 2, 1917, and that it was agreed that he, the plaintiff, should get fifty cents a thousand feet, and fifty per cent of the difference between a fixed basic price and the price at which the lumber was actually sold. At the meetings on February 1 and 2, 1917, the plaintiff gave the defendant various orders, which included the Goodwillie Company and Maxwell Brothers. The plaintiff continued from that time until January 8, 1918, to

The chief contention of the defendant is that the judgment is clearly against the weight of the evidence; to be more explicit, that the evidence pertaining to the question, whether the plaintiff was entitled to commissions as salesman or financial broker, clearly did not preponderate in favor of the plaintiff's claim.

The plaintiff had been a lumber salesman for over thirty years. He had sold lumber for the defendant, an Oregon corporation, a dealer in wholesale lumber, for a number of years prior to 1917, and at first received fifty cents a thousand feet. Having written to the defendant from Chicago that he would call upon them at Portland, Oregon, he called there at their offices on February 1, 1917, and met one Linton, the general manager of the defendant. The plaintiff says Linton was the only other person present besides himself, and, that Linton's conversation was [illegible]. Parts of a first and second deposition by Linton, and of a first and second deposition by one Leupold, vice-president of the defendant, were put in evidence. In their first depositions they say nothing about the contract in question, as it pertained to commissions, or whether any one was present with the plaintiff and Linton, but Leupold in his second deposition says he was present at the conversation. The plaintiff testified that he talked with Linton on February 1 and 2, 1917, and that it was agreed that he, the plaintiff, should get fifty cents a thousand feet, and fifty per cent of the difference between a fixed price which was the price at which the lumber was actually sold. At the interview on February 1 and 2, 1917, the plaintiff gave the defendant certain orders, which increased the defendant's business [illegible]. The plaintiff continued from that time until January 16, 1919, to

turn in orders to the defendant. In his second deposition, Linder stated that in the conversation with the plaintiff in February, 1917, the latter said he was not satisfied with the arrangement covering commissions, and thought he was entitled to something more; that he, Linder, then told him that the defendant, as to future business, would quote him prices, and in addition to the regular commission of fifty cents per thousand, it would pay him one-half of what he got in excess of the quoted prices, all commissions to be paid after the first of each month following the date of shipment, and only on shipments actually made, and in no event on orders cancelled; that the plaintiff said that would be satisfactory, to work on that basis; that the plaintiff continued working for the defendant until April 15, 1919; that the defendant has paid the plaintiff his commissions on all shipments that were made.

Lanning, in his second deposition, corroborates Linder, and states that he, Lanning, was present at the conversation in February, 1917, and that Linder told the plaintiff, the defendant would pay him only on shipments actually made and in no event would pay any commission on orders cancelled, and that the plaintiff said that was satisfactory to him.

Three witnesses testified that they knew Lanning in 1918, and that he was then very hard of hearing. One Stafford says Lanning used a hearing trumpet or telephone arrangement, or would put his hand over his ear, or, if one spoke loudly, he could hear. One Lambert testified that on account of Lanning's defective hearing, he talked to him through an interpreter; that Lanning used some kind of telephone instrument. One Jones testified that he met Lanning in 1918, and that the latter was very, very hard of hearing.

The plaintiff offered in evidence a copy of a complaint filed by the defendant in a suit by it against the plaintiff in the latter part of 1921, in the Circuit Court, Multnomah County, Oregon, in which, under the oath of Lanning, President of the defendant, it is stated that the defendant agreed "to pay the defendant (meaning Petri) a commission of 50 cents per thousand board feet for all orders secured and lumber sold by said defendant (Petri) for the plaintiff; "that it would divide any profits secured over and above the quoted price by the plaintiff to the defendant, it being understood that the defendant was to secure the best price possible for such lumber and receive one-half of the amount secured over and above the quoted price to the defendant by plaintiff."

The evidence shows that the plaintiff obtained for the defendant in 1919 an order from Maxwell Bros. of Chicago for 500,000 feet of lumber, for which Maxwell Bros. agreed to pay $34.50 a thousand feet; the basic price of which was $31.50 a thousand feet; and that there was shipped 306,768 feet, leaving unshipped 193,232 feet. It, also, shows that in 1919, the plaintiff obtained an order from D. M. Goodwillie Co. for 500,000 feet of lumber, of which 202,381 feet were shipped, leaving unshipped 297,619 feet, for which D. M. Goodwillie Co. agreed to pay $29.75 a thousand feet; the basic price of which was $28.75 a thousand feet. The plaintiff's claim is for 50 cents a thousand feet as straight commissions, and 50 cents a thousand feet as so-called average on the unshipped 297,619 feet of the Goodwillie Co. order, which makes $297.61; and 50 cents a thousand feet as commission, and $1.50 a thousand feet as average on the unshipped 193,232 feet of the Maxwell Bros. order, which makes $386.46; being a

total of $684.07, exclusive of interest.

Evidence was introduced tending to show why the whole of the orders obtained by the plaintiff from Maxwell Bros. and the Goodwillie Co. were not filled. The plaintiff testified that after he received a telegram dated January 25, 1919, from the defendant, notifying him that the latter had been wired by Maxwell Bros. that certain lumber that had been shipped was refused because it was green and heavy, and requesting him to investigate, he went with Gus Maxwell, the President of Maxwell Bros., to inspect the cars, and found them full of icicles and the lumber green and soggy, and wet and frozen; that Maxwell Bros. took no more after that; that he also examined lumber shipped to the Goodwillie Co., and found it in a similar condition, and that Goodwillie Co. cancelled the order after that shipment. A letter dated March 7, 1919, sent by the Goodwillie Co., was introduced, which requested the defendant to cancel the balance of its order "as the stock is such we cannot use it." The plaintiff testified that the defendant wired him of the cancellation of both orders and asked him to smooth it over to the best of his ability. The defendant introduced a letter dated April 17, 1919, from Maxwell Bros. which requested a cancellation of their order on the ground that the meat packers for whom Maxwell Bros. manufacture export cases "have changed their specifications to conform with those formerly used before the war." The plaintiff testified that he made a dozen calls on Maxwell Bros. after receiving the telegram from the defendant on January 25, 1919; that he examined seven cars; that Gus Maxwell said he could not stop "the d - bums;" that he had to use the Government to stop them shipping, so he used a subterfuge and wrote them that the Government would not accept that kind of lumber. The only evidence favoring the defendant is a letter dated February 25, 1919,

in which the Goodwillie Co. request the defendant to hold all future shipments of No. 3 and No. 2 Dry Spruce Dunnage; that the company is "very slack at the present time and have more lumber on hand than we can conveniently handle;" that as soon as it is in a position to handle more it will notify the defendant, which time, it trusts, will be shortly. Three witnesses, familiar with the lumber business, testified for the plaintiff concerning the uses and customs in that business in regard to compensation earned by brokers in answer to an hypothetical question, containing substantially what the evidence tended to show. Petri had done in pursuance of his agreement with the defendant, and each gave it as his opinion that, where orders were obtained and there was a failure of fulfillment owing to the lumber not being up to quality, and there was no fault on the part of the agent, or broker, the custom is to pay the broker a commission on the total order. Some evidence was offered by the defendant in regard to the plaintiff having received a check in full of all due him, but no point is made of that in defendant's brief.

From the foregoing analysis of the evidence, it is quite obvious that the judgment is not clearly against the weight of the evidence.

The defendant does not deny that a contract was made as claimed by the plaintiff, but it undertakes to maintain that there was a qualification to the effect that no commissions or compensation was to be paid on the unshipped or cancelled portions of all orders obtained by the plaintiff. The evidence of the defendant as to the qualification is quite dubious. Neither Linder nor Lanning in their first depositions say anything about such a qualification,

but in their second depositions both state that commissions were to be payable only on shipments actually made. Then, too, the plaintiff testified that only he and Linder were present when the agreement was made, and yet Lanning - who three witnesses testified was very deaf and so could with difficulty have heard had he been present - says he was present and heard the agreement made. Further, in the complaint in the Oregon Court, sworn to by Lanning, in which he purports to set up the very agreement the plaintiff is here suing upon, no mention whatever is made of any limitation on plaintiff's commissions. The trial judge may have been favorably impressed with the credibility of the plaintiff, and have concluded that there were such suspicious circumstances in and about the evidence for the defendant, he was only justified in finding for the plaintiff.

It is contended that the trial judge erred in admitting the testimony of experts in the lumber business as to the usage and custom concerning commissions on unshipped orders. But, as the agreement testified to by the plaintiff was silent on that subject, it was his right under the law, to prove the custom, and so show that it was to be considered as part of the contract. El Reno Grocery Co. v. Stocking 293, Ill. 503. The Court in the latter case said,

> "This Court has held that contracts made in the ordinary course of business without any particular stipulation, express or implied, are presumed to be made with reference to any existing usage or custom relating to such trade, and that it is always competent to resort to such usage to ascertain and fix the terms of the contract. This being so, there can be no question by the weight of authority, that the evidence as to the customs and usages of the trade with reference to such contract were properly held admissible."

It is contended that the trial judge erred in refusing to permit defendant's counsel to question the plaintiff in regard to his relations with the defendant prior to 1917. The plaintiff on cross-examination testified that he started to work for the

defendant in 1916 - that he had given them one carload before - and received fifty cents a thousand feet, and was then asked how long that relationship existed. To that question counsel for the plaintiff objected, on the ground of immateriality, and the objection was sustained. We do not think that constituted substantial error. The plaintiff's claim, here, is upon a special agreement made in February 1917, and the terms he had been working on before were unimportant. At most, it was not an error that would justify a reversal of the judgment.

It is contended that the trial judge erred in allowing interest. The statute, Ch. 74, Sec. 2 (Cahill's Rev. Stat's 1923) provides that "creditors shall be allowed to receive at the rate of five (5) per centum per annum * * * on money withheld by an unreasonable and vexatious delay of payment." What constitutes an unreasonable and vexatious delay of payment is a matter of fact, and here the trial judge held that there was such delay. The question before us, therefore, is whether that finding was clearly against the weight of the evidence. In <u>Mandel Brothers</u> v. <u>Ringstrom</u>, 189 Ill. App. 554, where plaintiff sued for a balance due for professional services as patent attorneys, the court allowed interest, on the ground that it appeared that the good faith of the defendant in refusing and resisting payment, was discredited by the evidence. There is no fixed standard by which unreasonable and vexatious delay may be determined. Delay of payment alone is not vexatious. <u>Sammis</u> v. <u>Clark</u>, 13 Ill. 544. The delay must be both unreasonable and vexatious - <u>Devine</u> v. <u>Edwards</u> 101 Ill. 138 - and must have arisen as the result of the dereliction of the debtor. <u>Mueller</u> v. <u>Northwestern University</u>, 195 Ill. 236.

[illegible]

[illegible] 1923, [illegible] the plaintiff [illegible]

It is [illegible]

[illegible]

if the evidence shows that the defense - though unsuccessful - was maintained as one made in good faith, the statute does not apply, as it was not intended to penalize a litigant for interposing what he believed to be an honest defense to an unjust claim. Schmallbacher v. McLaughlin Plum Co. 108 Ill. App. 486.

The judgment here in favor of the plaintiff means, by implication, that the trial court found that the claim of the defendant not only was not proven, but that it was known to its officers that the defense set up was false, or that it was interposed without good faith and merely to accomplish a delay in payment of plaintiff's claim. We are not in a position to say that the finding of the trial court was against the manifest weight of the evidence, and, therefore, we are obliged to hold that the plaintiff was entitled to interest from the time the principal became due. Chicago v. Tebbetts, 104 U. S. 120.

The judgment, therefore, is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

-74-

If the evidence shows [illegible] [illegible] [illegible] [illegible] [illegible] - was
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible], the [illegible] [illegible] and [illegible]
as it was not intended [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
be believed [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]. [illegible] [illegible]
v. [illegible] [illegible], [illegible] [illegible], [illegible].

The judgment [illegible] [illegible] [illegible] [illegible] the plaintiff [illegible] [illegible]
[illegible], [illegible] the trial court [illegible] [illegible] [illegible] [illegible] of the
defendant [illegible] [illegible] [illegible] [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] the
[illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible], [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] of plaintiff's [illegible]. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] of the trial court [illegible] [illegible] the [illegible]
weight of the evidence, [illegible], [illegible], [illegible] [illegible] [illegible] [illegible]
that the plaintiff [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]. [illegible] v. [illegible], [illegible] [illegible] [illegible]. [illegible].

The judgment, therefore, is affirmed.

AFFIRMED.

[illegible], P. J. and [illegible], J. [illegible].

333 - 28168

LEWIS DEGEN, Appellee, v. KERNES MFG. CO., a corp., Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 622

Opinion filed Feb. 20, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Lewis Degen, acting as an insurance solicitor, got the defendant to take out certain insurance through Wiley, Magill & Johnson, insurance brokers. In June, 1921, a dispute having arisen between the plaintiff and Wiley, Magill & Johnson, the insurance brokers on the one hand, and the defendant on the other, as to the debits and credits of the account between the insurance brokers and the defendant, the plaintiff, together with one Mugolet, the rate clerk for the insurance brokers, went to the place of business of the defendant, and there, together with Kernes, of the defendant company, and the company's bookkeeper, went over the account. As the result of that meeting, a statement of debits and credits was made out, which was dated June 13, 1921, which showed debits of $556.11, and credits to the defendant of $70.15, leaving a balance due from the defendant to Wiley, Magill & Johnson of $485.96. What purports to be a typewritten copy of that statement was made out by the insurance brokers, and, after a small correction, shows a debit

by the defendant of $548.91, and a credit of $77.35, leaving a balance due from the defendant of $471.56.

Up to October 1920, the defendant's place of business was at 455 West Huron Street, Chicago. It was then moved to 814 Rees Street. After the removal of the business to Rees street, apparently, some questions arose as to a change in the rate of the defendant's insurance.

Subsequent to the meeting on June 13, 1921, the defendant made the following payments: On July 13, 1921, $171.56; August 13, $100.00; September 28, $100.00; and October 12, $100.00, these four payments aggregating $471.56, being the amount which the defendant claims was agreed upon as the total amount due, at the meeting of June 13, 1921. Sometime in October, however, it was discovered according to Degen's testimony, that, instead of the balance of the account being $471.56 - which the defendant paid - it should have been $147 more. This suit is for the latter sum.

At the trial before the court, without a jury, judgment was given for the plaintiff in the sum of $147.57. This appeal is therefrom.

If the evidence shows that, with knowledge of all the circumstances and items of account, the parties, _bona fide,_ agreed on June 13, 1921 upon a statement of the account, it would follow that the plaintiff was not entitled to recover in this suit. But, it is contended on his behalf that what was done on June 13, 1921, was based on mutual ignorance of the rates that were properly chargeable for the insurance which had been given the defendant. The plaintiff testified

that when the defendant moved from 451 Huron street to 812 Rees street, he received all the plaintiff's policies, so that the addresses might be changed and a correction made in the rates; that he, the plaintiff, had the policies in his possession for three or four months until they were changed, after which he delivered them to Kernes, President of the defendant company, and that there then appeared upon eachone of those policies the correct amount of debit and credit. He further testified that when Kernes moved from Huron to Rees street, the Board of Underwriters made a mistake in the rate, "put the decimal point in the wrong place;" that subsequently, when the Board of Underwriters found out their mistake, it was corrected; that Kernes had claimed that the Board of Underwriters had charged his company, the defendant, too much. Plaintiff further testified that Kernes went with the plaintiff's rate clerk to the Board of Underwriters and had the revision made in the rate; that he talked with Kernes when he moved in October 1920, and during the month of January or February, 1921. He further testified that the policies were delivered to the defendant prior to the time that the statement for $471.56 was made up.

The plaintiff testified that after the meeting of June 13, 1921, Hugolet had a summarized statement which he made, that showed a balance of $471; that later "we found out that there was a mistake in this statement. The clerk, who is not our bookkeeper, had just gone over the different bills and added them up as credits and debits, and made one from there, and he showed a $471. balance, and on that Mr. Kernes paid, but when he made out our statement, this statement, we found

that time the defendant moved from 431 Eaton Street to [illegible] Street, he received all the plaintiff's policies, so that the witness might be charged with a corresponding note in the amount that he, the plaintiff, had the policies in his possession for three or four months until they were changed, after which he delivered them to [illegible], President of the defendant company, and that there were [illegible] upon each of these policies the current amount of debit and credit. He further testified that when [illegible] moved from [illegible] to [illegible] street, the board of underwriters made a mistake in the rate, "put the decimal point in the wrong place;" that subsequently, when the board of underwriters found out their mistake, it was necessary that [illegible] the board of underwriters had changed the [illegible], the defendant [illegible]. Plaintiff further testified that [illegible] went with the plaintiff's rate clerk to the board of underwriters and had the revision made in the rate; that he [illegible] about the [illegible], and during the month of January or February, [illegible]. He further testified that the policies were delivered to the defendant prior to the time that the statement for [illegible] was made up.

The plaintiff testified that after the meeting of June 15, [illegible], [illegible] had a memorandum statement which he made, that showed a balance of [illegible]; that later he found out that there was a mistake in this statement. The clerk, who is not our bookkeeper, had just gone over the different bills and added them up as credits and debits, and made out from them, and it showed a [illegible] balance, and on that Mr. [illegible] said, [illegible]

that Mr. Kernes had owed us more than the $471;" that is $147.00 more; that he talked with Kernes in October 1931, and the latter told him to see his, Kernes' bookkeeper; that he did, and that the bookkeeper put him off; that it was always the same thing, he was too busy and he could not go over the books; that he, the plaintiff, told defendant's bookkeeper "if he took his policies out, he would find his debits and credits on the policies and he could check up the statement we sent him; that he, the plaintiff, offered to check it up any time with the bookkeeper; that as to the $471.56, there was no dispute.

Kernes, the president of the defendant company, testified that after June 13, 1931, he took out on August 5, 1931, another policy for $1,000, the premium of which was $31.70, which the defendant paid on December 15, 1931, and that the dispute between the defendant and the plaintiff as to $471.56 not being the total indebtedness of the defendant for insurance, began sometime after August 5, 1931. Kernes further testified that, after October 13, 1931, at which time the last payment on the $471.56 was made, the insurance brokers sent the defendant a "wrong statement without the dates, and they couldn't locate the year. We didn't know what was paying twice * * * and we asked them kindly to point out to us which bill we owed it. They couldn't show us which bill we owed. They simply said, this is on a transaction of business for a period of several years, and we can't tell exactly in which year it was, they said the balance showed that much. We asked them to account what policies it was - what bills were unpaid, what balances they were. They said they couldn't tell us anything except the final amount -

that Mr. Kernan had owed us more than the $471;" that it $647.50 more; that he talked with Kernan in October 1921, and the latter told him to see Mr. Kernan's bookkeeper; that he did, and that the bookkeeper put him off; that it was always the same thing, he was too busy and he could not go over the books; that he, the plaintiff, told defendant's bookkeeper 'if he took his pencil out, he would find his debits and credits on the policies and he could check up the statement we sent him; that he, the plaintiff, offered to check it up any time with the bookkeeper; that as to the $471.98, there was no dispute.

Kernan, the president of the defendant company, testified that after June 15, 1921, he took out on August 8, 1921, another policy for $1,000, the premium of which was $21.75, which the defendant paid on December 16, 1921, and that the dispute between the defendant and the plaintiff as to $471.98 not being the total indebtedness of the defendant for insurance, began sometime after August 8, 1921. Kernan further testified that, after October 20, 1921, at which time the last payment on the $471.98 was made, the insurance company sent the defendant a "wrong statement without the dates, and they couldn't locate the years. We didn't know what was paying for * * * and we asked them kindly to point out to us which bill we owed it. They couldn't show us which bill we owed. They simply said, this is on a transaction of business for a period of several years, and we can't tell exactly in which year it was, etc., said the balance showed this much. We asked them to segment what policies it was -- what bills were unpaid, what balance they were. They said they couldn't tell us anything except the final amount --

that was $137." He further testified, however, that after the $471.56 was paid in full, his attention was called by Degen to the policies enumerated in the statement of claim; that he asked Degen to explain which policies were unpaid and which were paid, but that Degen could not tell him. He further testified, "I told Mr. Degen any time he asked me where I owed him money I would pay it"; and that Degen told him a mistake had been made by the bookkeeper, or someone in charge of the books, and that was what made the difference of $147.56. That was after the bill, evidently referring to the statement attached to the plaintiff's statement of claim, was rendered in November 1921.

From the foregoing, it will be seen that, according to the evidence on the part of Degen, the alleged agreement of June 13, 1921, was merely as to the amount admittedly due at that time, but that the agreement did not purport to be a final settlement of account between the parties, with knowledge at that time by each as to all the policies and rates charged. We are of the opinion, under the circumstances, considering particularly that Degen testified that on June 13, 1921, no agreement was made that the $471.56 represented all that the defendant owed, that it would not be reasonable for us, on the face of the record as it appears here to override the judgment of the trial judge.

The evidence shows that the plaintiff Degen, on March 17, 1922, paid the sum of $147.56 to Wiley, Magill & Johnson, and the record shows that this suit was originally begun in the name of Lewis Degen, but that subsequently an order was entered as follows: "It is ordered by the court

that leave be and hereby is granted the plaintiff to amend statement of claim on the face to read, 'Wiley, Magill & Johnson, for use of Lewis Degen.'"

Considering that the plaintiff was an insurance solicitor and got the defendant company to take out policies of insurance through the insurance brokers Wiley, Magill & Johnson, and was necessarily interested in the payment of premiums by the defendant to the insurance brokers, there is no doubt but that payment of the balance of $147.50 by the plaintiff to the insurance brokers gave him such an interest as justified bringing suit in their name for his use. It is contended further, that, inasmuch as the statement of claim was not physically altered on its face so as to read, "Wiley, Magill & Johnson, for use of Lewis Degen" no such amendment can be considered as having been made. The order of June 14, 1922, giving leave to amend the statement of claim on its face, contains, also, the finding of the court of the issues against the defendant and assessing the plaintiff's damage in the sum of $147.50.

In Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, the court sanctioned the following language:

> "Where there is an order granting leave to amend and the subsequent proceedings in the cause are based upon the assumption that the amendment has been made, the course is to consider the order as standing for the amendment itself. Where a motion to amend has been granted but no amended pleading appears in the judgment roll, it may be treated, on appeal, as if actually made."

Also in that case the court said:

"To consider this amendment on this record as actually made in no manner affects the merits of this cause, neither is it against 'right and justice.'"

Under the circumstances, we are of the opinion that the judgment was properly entered in favor of Wiley, Magill & Johnson, for use of Lewis Degen.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

351 - 28186

AGNES KADLEC, Appellee,

v.

JOHN WRZESIEN, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 622

Opinion filed Feb. 20, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On July 28, 1922, Agnes Kadlec, the plaintiff, filed a complaint in forcible detainer in the Municipal Court against John Wrzesien, the defendant, stating that she, the plaintiff, was entitled to the possession of a "store and rooms in rear and part of basement located at 5605 W. Grand Ave.," Chicago, and that the defendant unlawfully withheld possession. On August 25, 1922, the court, upon a trial without a jury, found that the defendant was guilty of unlawfully withholding, and that the plaintiff had the right to possession. Judgment was entered, accordingly, and this appeal taken.

The evidence shows substantially the following: On April 15, 1920, one Stermer leased, in writing, the premises in question to one Archacki from April 15, 1920 until April 15, 1925, for $2100.00, payable $35.00 a month. On the back of the lease a blank "Assignment and Acceptance" is partly filled out, evidently intended to be an assignment by the lessee, Archacki, but it is not signed by him. And directly below, what purports to be an "Acceptance," dated June 7, 1920, is signed by Stermer, the lessor, and one Kraskiewicz. Below

the acceptance there is a "Consent to Assignment," to Kraskiewicz, also dated June 7, 1920, signed by Stermer. Then follows a "Lessor's Assignment," dated June 7, 1920, which recites that the lessor, Stermer, for a consideration, transfers, assigns and sets over to Kraskiewicz all Stermer's interest in the lease and the rent secured thereby. That is signed by Stermer. On a printed blank form, attached to theoriginal lease, there is what purports to be an "Assignment and Acceptance," dated April 13, 1921, and signed by Kraskiewicz and Wrzesien, the defendant. That recites that for value received the signers "assign all my right, title and interest in and to the within lease unto John Wrzesien, his heirs and assigns," and, further, an assumption of and agreement to pay the rent under the lease. Below that, on the same printed blank, appears a "Consent to Assignment," signed by Stermer, which undertakes to consent to an assignment of the lease to Wrzesien, on condition that Kraskiewicz remains liable for the prompt payment of the rent. Each signature, on the lease and on the assignment, is followed by a seal. It was not recorded. A certified copy of a Quit-claim deed dated May 20, 1920, from Stermer to Czeslawa Dombrowski of the premises in question, acknowledged on May 20, 1920, and recorded on October 29, 1920, was offered and received in evidence. A contract to purchase, dated April 3, 1922, concerning the same property, between Czeslawa and Bernard Dombrowski, parties of the first part, and Agnes Kadlec (the plaintiff), party of the second part, which constituted an agreement to convey by warranty deed, $2,000.00 being paid down, and a balance of $3,000.00 to be paid in monthly installments of $65.00, was offered in evidence. It recited that Agnes Kadlec was given immediate possession with all the

[illegible]

[illegible] "Lessee's Assignment," [illegible] [illegible] April [illegible] [illegible]

rights of ownership. On the back of it are endorsed four payments, for May, June, July and August, 1922, aggregating $260.00 of principal and $58.02 of interest.

On May 15, 1923, on behalf of the plaintiff, a written notice to terminate the defendant's tenancy was served on him. It notified him that it would "terminate on the 15th day of July, A. D. 1923" and that he would be "required to surrender possession of said premises" to the plaintiff on that day. The defendant was in possession when the notice was served on him, and was in possession at the time of the trial. One Myka, former attorney for the plaintiff, stated that he had been collecting rent for the premises for over a year, and that the rent falls due and is paid by the defendant on the fifteenth of the month; "That is the first day of the succeeding month's rent." The plaintiff stated that when she bought the premises she did not know that there was a lease of them to the defendant, but that she did know he was in possession and paying rent; that the rent was paid on the fifteenth; that as far as she knew it started on the fifteenth.

Kraskiewicz testified that he occupied the premises at one time; that he bought the place, which was a soft drink parlor, from Archacki; that he asked Stermer to assign the lease to him; that, after he bought the place, he paid rent to Stermer, then Gollas, and then Dombrowski, $35.00 a month; that he did not remember when he sold the place to the defendant. His attention being called apparently to the signatures, to the blank assignment and acceptance of June 7, 1920, he testified that one was his and the other that of Stermer. He further testified that he went to Stermer

vided that it could only be assigned in writing, by the written consent of the lessor, the trial judge found that at the time Stermer assented he had parted with his interest in the property, and so would then give no rights to the defendant.

On April 5, 1922, when the plaintiff by the written contract purchased the premises in question, she admits that she knew that the defendant was in possession and paying rent therefor. Prior to that time he had been paying rent to the Dombrowskis. In taking the premises as she did, and knowing at the time that the defendant was in possession, and thereafter accepting rent from him, she is not now entitled to challenge his rights as a lessee under the lease in question. Kraskiewicz, who testified that he bought the place from Archacki, had been rightly in possession and had paid rent to Stermer, the then owner, and also, subsequently, to Dombrowski. Then when Kraskiewicz sold his interest to the defendant, the defendant went into possession and paid rent to Dombrowski, and then subsequently to the present plaintiff. Obviously, the defendant obtained all the rights in the premises that Kraskiewicz and Archacki had under the original lease. It is true that the plaintiff may never have assented in writing to a transfer of the lease to the defendant, but inasmuch as at the time she bought the property from the Dombrowskis she knew the defendant was in possession - and thereafter accepted rent from him - she was put on her guard and had notice that the defendant was in possession and claiming to be there under the terms of the original lease. And although the original lease provided that it could only be assigned in writing by written consent of the lessor; yet, as that clause is for the benefit of the lessor only, and

within that it might only be assigned in writing, by the written consent of the lessor, the trial judge found that if the [illegible] consented to [illegible] [illegible] [illegible] in the property, and so would then give no rights to the defendant.

On April 6, 1956, when the [illegible] by the plaintiff [illegible] the premises in question, [illegible] that the defendant was in possession and paying rent therefor. Prior to that time he had been paying rent to the Commonwealth. In [illegible] the [illegible] of the lot, and [illegible] at the time that the defendant was in possession, and the [illegible] [illegible] that [illegible], he [illegible] [illegible] his rights as a lessee under the lease in question. [illegible], who testified that he bought the [illegible] from [illegible], [illegible] [illegible] to [illegible], the then owner, and [illegible], subsequently, to [illegible]. [illegible] when [illegible] sold his interest to the defendant, the defendant went into possession and paid rent to [illegible], and then subsequently to the present plaintiff. Obviously, the defendant obtained all the rights in the premises that [illegible] and [illegible] had under the original lease. It is true that the plaintiff may never have consented in writing to a transfer of the lease to the defendant, but [illegible] as it was [illegible] who bought the property from the Commonwealth when the defendant was in possession — and thereafter accepted rent from him — she was put on her guard and had notice that the defendant was in possession and claiming to be there under the terms of the original lease. And although the original lease provided that it could only be assigned in writing by written consent of the lessor, yet, as that clause is for the benefit of the lessor only, the

and as she saw fit to recognize his possession by accepting rent from him, she must be considered as having waived an assignment in writing. Webster, et al v. Nichols, et al, 104 Ill. 160.

It is claimed that the fact that the defendant paid $50.00 a month rent is evidence that he was not in the premises as a tenant under the original lease. But the evidence shows that after the plaintiff had testified that she knew the defendant was in possession of the premises, she was asked, "How much rent were they paying," and answered, "$35.00," and that it was paid on the fifteenth of the month. Why the defendant paid $50.00 a month, as shown by certain receipts for four months in the latter part of 1931, is not explained, but that fact alone does not prove that the defendant's rights under the original lease were given up and a new lease of some other kind made.

From the foregoing, it follows that as the plaintiff failed by a preponderance of the evidence to prove that the defendant was in the possession of the premises without right, the judgment must be reversed.

REVERSED.

O'CONNOR, J. CONCURS;
THOMSON, J. SPECIALLY CONCURRING:

Referring to the contention that the fact that latterly the defendant was paying a rent of $50 a month and not $35, as called for in the lease, shows he was not holding the premises in question under the lease, I wish to add that a reading of the defendant's testimony shows that he

went into possession of these premises under the written lease in evidence and that whatever right to possession he now claims is under that lease. That he went into possession under that lease and continued in possession under it, is, in my opinion, established by the evidence in the record. For a time, at least, he paid the rent stipulated in the lease. The bare fact that his rent was raised does not establish that his lease was terminated.

The plaintiff admits she knew of his possession. That she, herself, received rent from him is clear. She said she did not know there was a lease. But she testified that one Nyka was her lawyer, at the time she acquired the property, and represented her in that transaction. The defendant testified that Nyka sometimes collected the rent. Apparently he had also represented the previous owner, Mrs. Dombrowski. On one occasion, the defendant testified, when Nyka came to collect the rent, (at a time when he was paying $35 per month) he made a claim for an allowance for some minor repairs he had taken care of and Nyka asked if he had a lease and he said he had and he exhibited it to him and Nyka, in view of the lease, made a deduction in the rent then due. Nyka testified in this case that he had been collecting the rent on these premises for over a year. That he knew there was a lease and that defendant claimed possession under it, he did not deny. That plaintiff must be charged with knowledge of the lease, seems clear.

366 - 28201

MARY W. WALLACE,
Appellee,

v.

BENJAMIN F. J. ODELL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 622

Opinion filed Feb. 20, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On November 29, 1920, the plaintiff, Mary W. Wallace, brought suit in the Municipal Court against the defendant, Benjamin F. J. Odell, who was her former attorney, claiming that there was due from him the sum of $2,298.09, being the difference between $7,309.59, which had come into his hands for her, and $5,011.50, which it was admitted he had properly disbursed for her.

The defendant filed an affidavit of merits in which he admitted the receipt of $7,309.59, and stated that $2,298.09 for which the plaintiff sued, less certain small amounts, was applied by him on account of his attorney's fees.

There was a trial by the court, with a jury, and a verdict and a judgment for the plaintiff in the sum of $2,000. This appeal is therefrom.

The plaintiff, Mary W. Wallace, was at the time of the trial 73 years of age, and had been a resident of Chicago for more than forty years. She was a widow of one

Whittaker. By her marriage with Whittaker she had six children, one of whom, Herbert Whittaker, died in August, 1918, leaving a widow, Myrtle Whittaker, who herself had no children. Herbert Whittaker left as his heirs and next of kin five brothers and sisters, his mother and his widow. In June, 1918, the plaintiff intermarried with one Edward S. Wallace.

The son, Herbert Whittaker was in his lifetime a contractor and builder. From time to time prior to his death he borrowed various amounts of money from his mother, amounting in all to about $14,000. About a year prior to his death, the plaintiff received from him, as security for the money which she had loaned to him, two notes, each for $5,000, secured by second lien trust deeds on fourteen two-flat buildings, located on South Leavitt Street, in Chicago. Each of the trust deeds covered seven lots. Each of the fourteen lots, with flat buildings thereon, were subject to a first trust deed incumbrance, securing the principal sum of $4,000. The first trust deed incumbrances were owned or represented by the Southwest Trust & Savings Bank, of Chicago. Outstanding against those properties there was also a mechanic's lien for about $2,000 in favor of one Kirk.

On August 1918, the plaintiff and her husband called at the defendant's office and the plaintiff told him of the death of her son, and something about her financial relations with him. The defendant requested that she bring in her papers. A few days later she brought in some papers which he then examined. She told the defendant that her son had told her not to worry about the money he had

borrowed from her, that she was protected by her papers; that she further said her son had been estranged from his wife many months prior to his death, and kept his belongings at her, his mother's, house; that he had owned fourteen two-flat buildings on South Leavitt street, which were heavily mortgaged; that he had recently died in the hospital, and that her other children were offended that she had loaned her deceased son so much of her money.

The defendant, whom she had retained as her attorney, testified that they found among her papers two $5,000 second mortgage notes signed by Herbert Whittaker and Myrtle Whittaker, his wife, together with six complete interest coupons attached to each note, purporting to be secured by trust deeds, but that the trust deeds were not among the papers; that he, thereafter, from the street numbers in the map department of the city procured the legal description of the property, and made a search of the records in the Recorder's Office, and then advised the plaintiff of the condition of things and her rights; that he investigated the matters in the Probate Court in regard to the administration of her son's estate; had conferences and correspondence with her concerning these matters and other pieces of property and claims due to her, and claims due to her son, and against her son; that further legal papers were brought to his office by the plaintiff, as well as the trust deeds above referred to, and he gave them attention; that the first conference with her was two and a half hours, and he spent three hours in the map department in the Recorder's office; that when she brought the trust deeds there was a conference of an hour; that she stated that she had no

abstract; that he therefore made his own "abstract search" of the records, as they were in the Recorder's office; that he made an examination sufficient to be able to tell her the condition of the title and whether any lien claims had been acted on whereby the title was forfeited; that he asked her if she had any evidence of her son's indebtedness to her; that she then produced some trust deeds; that he then told her that if they could prove the amount of the indebtedness owed by her son to her, he would advise a foreclosure; that she asked what the charges would be, and he told her that they would be reasonable; that he had a further conference with her, and then drafted a bill to foreclose, which he filed. He further testified that there was considerable diffiiculty at the outset in determining how to prove the amount of the indebtesness to her from her son; that he discussed the matter with her and found that her relations with her son's widow had been in a strained condition for some time; that her son had not lived with his wife for sometime before his death.

After beginning foreclosure proceedings, he served notice on the widow of the plaintiff's son, and the next morning one Roderick, an attorney, called him up and told him that he represented her. The next morning he met Roderick before going to court, and Roderick claimed that he had accurate knowledge that the trust deeds and notes had been signed by the widow in order to get a collateral loan at the bank, and for no other purpose. At the trial, when the defendant undertook to state what was said, quite a colloquy occurred between the trial judge and counsel for the defendant,

and the court ruled that such testimony was incompetent. The defendant then testified that he made an agreement with Roderick on that morning that if he would consent to the appointment of a receiver he would try to sell the property; that that was done, and another extension was made of that agreement later; that he had two or three conferences with Roderick after that in regard to certain probate matters and in reference to the bank's attitude on their notes and the position the bank was going to take and the defense it was going to assert; that Roderick said that there was interest past due on nearly all of the bank's first mortgages. To that testimony, counsel for the plaintiff objected, on the ground that the witness was reciting a conversation, and the objection was sustained. That, of course, was error, as it was entirely proper for defendant, in view of his services, to show actually what took place. Legal services are made up of what the attorney says and writes, and all that he does properly pertaining to the matter involved. As Evans, in his notes to Pothier, quoted by Wigmore on Evidence, says, page 2263, "Speech is a mode of action." It will be observed that the words here were not used testimonially, but to show the defendant's conduct, his service.

He further testified that he then arranged with Roderick to go out with him to the bank. He further testified that on September 9 he had an hour's conference with Mr. and Mrs. Wallace; also on September 10, and on the latter date also had a conference with Roderick and did some work in the Recorder's Office; that he conferred with the Wallaces on the 10th as to whether or not there was a will

left by their son.

In giving his testimony, the defendant used certain memoranda which he himself had made in a book at the time of the transactions therein recited. The defendant then undertook to testify concerning a number of items as they appeared in his memorandum book.

Attached to the plaintiff's statement of claim was an itemized bill, or statement of services, which had been sent by the defendant to the plaintiff. A copy of that statement was offered in evidence by the plaintiff, entitled, "Mary W. Wallace, to Benj. F. J. Odell, Dr." The first item under date of August 20, 1918, was entitled, "Conference concerning rights under notes and mortgages, $15.00." The last item was dated October, 1919, entitled, "Legal services rendered in various matters, $828.00." The total indebtedness shown by the plaintiff to the defendant was $3,361.60.

The defendant further testified that he had a conference with the Wallaces on September 13, and also on October 16, and with Roderick on October 18, in regard to the same matters, but not pertaining to the foreclosure suit; that the conference on October 18 with Roderick pertained to some contention between the plaintiff and the widow of her son; that two days later he had a conference with Roderick concerning the threat of the bank to foreclose the first lien trust deeds. The defendant then relates in his further testimony a great many meetings and conferences in regard to the properties, and the bank's trust deeds thereon, and the possibility of a sale of the premises, and about getting the money to satisfy the bank's liens, so it would not foreclose.

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In giving his testimony, the defendant used certain memoranda which he himself put down in a book at the time of the transactions therein recited. The defendant then undertook to testify concerning a number of items as they appeared in his memorandum book.

Attached to the plaintiff's statement of claim was an itemized bill, or statements of services, which had been made by the defendant to the plaintiff. A copy of this statement was offered in evidence by the plaintiff, entitled, "Mary A. Williams, in acc. with A. B. Smith, Dr." The first item under date of August 10, 1912, was entitled, "Services rendered pending eight years since old settlement, [illegible]." The last item was dated [illegible], 1913, entitled, "Legal services rendered in various matters, [illegible]." The total indebtedness shown by the plaintiff to the defendant was [illegible].

The defendant further testified that he had a conference with the Wallaces on September 17, and also on February 18, and with [illegible] on October 18, in regard to the same matters, but not pertaining to the foreclosure suit; that the conference on December 12 with [illegible] pertained to some negotiation between the plaintiff and the widow of her son; that two days later he had a conference with [illegible] concerning the [illegible] of the bank to foreclose the first lien trust deeds. The defendant then related in his further testimony a great many meetings and conferences in regard to the properties, and the bank's stand thereon, and the possibility of a sale of the properties, and about getting the money to satisfy the bank's liens, as it would not foreclose.

The defendant further testified that the bank which had the first lien on the properties made several propositions, the first being that each lien should be reduced from $4,000 to $3,000, and the premises put in good condition; that subsequently another proposition was made that $500 should be paid on each lien and the interest paid up to date; that later another proposition was made, and finally an agreement was made for a straight three-year loan at 7%, and accordingly, extension papers were drawn up, inspected by him, and signed by the plaintiff and her husband; that at that time the property was under contract for sale, $350 having been paid down by one Sinkus on August 14, 1919; that the plaintiff and her husband had been anxious to have this property sold and had urged him to try to sell the property; that Mr. Wallace asked him if the receiver of the property would not be a good man to sell it, and requested him to offer the receiver a commission to sell it; that, accordingly, he told the receiver, and within three or four weeks the receiver sent Sinkus in; that he had six conferences with Sinkus about the contract which finally was consummated on August 14, 1913. He further testified that from week to week he had conferences with the plaintiff and her husband concerning the necessity of raising money to pay past due demands, and to bring about an extension with the bank; that the property was sold to prevent the foreclosure; that he told the plaintiff that it would be necessary to have sufficient money to pay off the mechanic's lien, nearly $1,000, before they could buy the property at the sale; that at the plaintiff's recommendation, he tried to borrow the money from a Mrs. Abau; that the money was not raised; that he went over to see the attor-

-8-

The defendant further testified that the bank which had the first lien on the property made several propositions, the first being that such lien should be reduced from $9,500 to $7,500, and the plaintiff put in good condition; that subsequently another proposition was made that $500 should be paid on such lien and the interest paid up to date; that later another proposition was made, and finally an agreement was made for a straight three-year loan at 7%, and accordingly, extension papers were drawn up, presented by him, and signed by the plaintiff and her husband; that at that time the property was under contract for sale, [illegible] having been paid down to the bank on August 12, 1929; that the plaintiff and her husband had been anxious to have this property sold and had urged him to try to sell the property; that Mr. Wallace asked him if the purchase of the property would not be a good one to sell it, and requested him to offer the property [illegible] to sell [illegible]; accordingly, he told the receiver, and within three or four weeks the receiver sent Sisson in, that he had six conferences with Sisson about the contract which finally was consummated on August 16, 1929. He further testified that four weeks in each of his conferences with the plaintiff and her husband concerning the necessity of raising money to pay past due interest, and to bring about an extension with the bank, that the property was sold to prevent the foreclosure; that he told the plaintiff that it would be necessary to have sufficient money to pay off the mechanic's lien, nearly $1,000, before they could buy the property at the sale; that at the plaintiff's recommendation, he tried to borrow the money from a Mrs. [illegible]; that the money was not raised; that he even went to see the attorn-

ney representing the lien claimant concerning an extension of the same, and that they urged an agreement for protecting the plaintiff's interests; that he saw the Master in Chancery concerning a continuance of the sale; that that was not brought about; that as the plaintiff was unable to raise money to pay the lien, the property was sold at a judicial sale; that he still endeavored to raise money for the plaintiff, and went to one or two banks, and talked to several of his clients, and also sent the plaintiff to one or two places; that the mechanic's lien claimant bought in the property; that on the day of the sale, Sinkus was in his, the defendant's, office three-fourths of the time; that Sinkus finally agreed to pay $72,550 for the property, and made a deposit on the agreement; that it was provided that separate trust deeds and notes were to be executed on the various buildings; that the total number of notes drawn aggregated 800; that shortly afterwards Sinkus took one Roskey in with him; that as the property was sold on the installment plan to Sinkus, it was necessary to raise some more money, and that was why Roskey was taken in by Sinkus and given a half interest in the purchase.

The witness then stated, "I prepared in accordance with the requirements an opinion of title, showing the condition of the property, and I went over to the Recorder's Office and the Chicago Title & Trust Company and prepared from the records an opinion of title." Upon objection, the court struck that out. That was, obviously, error. He was asked, "What was the purpose of your preparing an opinion of title?" to which he answered, "The purpose was to get Roskey to advance sufficient money to take care of the extension and the

any representing the lien claimant consisting of witnesses
of the case, and that they acted as agents of the represent-
ing the plaintiff's interests; that he saw the matter in
[illegible] consisting a resolution of the sale that they
was not brought [illegible] that as the plaintiff was unable to
raise money to pay the lien, the property was sold at a
[illegible] sale; that he would endeavor to raise money and
the plaintiff, and went to see the lender, and talked to
several of his clients, and also sent the plaintiff to him
at the closing that the defendant's lien claimant bought in
the property sold at the day of the sale, things was in this,
the defendant's, [illegible] three-fourths of the lien; that
[illegible] finally agreed to pay $25,000 for the property, was
made a deposit on the agreement; that it was provided that
[illegible] trust deeds and notes were to be executed on the
various buildings; that the total amount of trust deeds aggre-
gated $20,000; that shortly afterwards, [illegible] took the deeds in
[illegible]; that as the property was sold at the foreclosure
sale to [illegible], it was necessary to raise some more money,
and that was why [illegible] had taken it to [illegible] and given a
half interest in the purchase.

The witness then stated, "I prepared in accordance
with the requirements an opinion of title, showing the condi-
tion of the property, and I sent copy to the [illegible] office
and the [illegible] Title & Trust Company had prepared from the
records an opinion of title." Upon objection, the court
struck that out. That was, obviously, error. He was asked,
"What was the purpose of your preparing an opinion of title?"
to which he answered, "The purpose was to get [illegible] to ad-
vance sufficient money to take care of the situation and the

interest past due at the bank and prevent foreclosure." He was then asked, "And for whom were you working when you prepared that opinion?" to which he answered, "I was working for my clients." That was objected to and stricken out by the court. He was then asked, "After you prepared that opinion of title what did you do?" He answered, "I went over to the Title & Trust Company with this attorney and showed him over the records, showed him what - why I had waived some of the objections, in the opinion - my reason for it - and then he asked for a guarantee, and I gave him the guarantee, a written agreement personally that as a lawyer I would stand back of that opinion of title." That, upon objection, was stricken out. That was error. Wigmore on Evidence, Sec. 1772. The answer was very definite evidence, apparently, of very valuable services on the part of the plaintiff's attorney. The defendant was then asked, "Then what did you do?" to which he answered, "Then Mr. Roskey did not raise the money and I got him into my office, both he and Sinkus, and told him we had to have the money." An objection to that was sustained, the trial judge stating, "A lawyer don't charge for what he says to people, he charges for his time that he spends in those transactions and for results obtained." That ruling was erroneous. The testimony of the defendant was simply a statement of part of what he did as attorney for the plaintiff in endeavoring to conserve her interests in the property. Wigmore, supra.

The defendant then testified that he went with Roskey and Sinkus out to Roskey's bank in order to try to help Roskey get a loan. When asked what was the purpose of the loan, he answered, "The purpose of the loan was to take care of the past due interest and extension charges; for the

purpose of avoiding a foreclosure, jeopardizing our client's interests." An objection to that was sustained. That was error, as it was merely a statement showing the nature and quality of certain services which he rendered for the plaintiff. He was then asked what he did out at the bank, and he answered, "I talked with the bank and explained to them what the situation was. I also explained I had given an opinion to M. Ambrosius, who represented Mr. Roskey and I explained how the money was to be distributed, and what security had to be given him. I explained to him we could make an escrow of the deeds of the defendants procured some weeks prior to that day, so that there would be no possibility of a redemption, and we were willing to leave the deeds in escrow, and would give in addition to that the deeds from the boys, so that he would be protected or in any event be free from loss. He asked me to draw up the papers and I drew up the papers." Although counsel for defendant explained very lucidly the purpose of the testimony, an objection to it was sustained. That was error.

The defendant then testified that he prepared a deed and went over to plaintiff's house to get her and her husband to sign it, and that he explained it to them. He was then asked what explanation he made, to which he answered, "I made it to both Mr. and Mrs. Wallace, the explanation that this money was going to save the day for us, and prevent foreclosure, and Minkus and Roskey were raising the money for the purpose of paying the bank up and the interest -"

The defendant further testified that Mr. Wallace told him that he would not sign unless he got $300 out of it;

purpose of securing a [illegible], jeopardizing our client's interests." An objection to that was sustained. That was error, as it was merely a statement showing the nature and quality of certain services which he rendered for the plaintiff. He was then asked what he did at the bank, and he answered, "I talked with the bank and explained to them what the situation was. I also explained I had given an [illegible] to W. [illegible], who represented Mr. [illegible] and I explained how the money was to be distributed, and what security had to be given him. I explained to him we would make an attempt at the [illegible] of the defendants' property [illegible] would [illegible] in that way, so that there would be no possibility of a [illegible] campaign, and we were willing to leave the deeds in escrow, and would give an option to that one [illegible] from the bank, so that he would be protected in any event he [illegible] loss. He asked me to look at the papers and I drew up the papers." Although counsel for defendant explained very lucidly the purpose of the testimony, an objection to it was sustained. That was error.

The defendant then testified that he prepared a deed and went over to plaintiff's house to get her and her husband to sign it, and that he explained it to them. He was then asked what explanation he made, to which he answered, "I said it to both Mr. and Mrs. Williams, the explanation that this money was going to save the day for us, and prevent foreclosure, and [illegible] and [illegible] were raising the money for the purpose of paying the bank up and the interest —"

The defendant further testified that Mr. Williams told him that he would not sign unless he got [illegible] out of it;

that he told Wallace that would spoil their plans, but Wallace said it would have to be done; that he stepped out to the automobile and Sinkus was waiting; that he told him that he would have to give Mr. Wallace $300 because the time was short, and that he was afraid if that was not done, Wallace would not sign the deed, so it was agreed that Wallace should get $300 provided he signed the deed; that the deed was signed, and then he went to the bank and closed the matter up, and from there to the Southwest Trust & Savings Bank and made arrangements with them, giving them $2300; that he then took Wallace the $300; that at the time of the sale and after he had procured an agreement with the attorney representing the mechanic's lien claimant to let the property be bought in the plaintiff's name, he himself, the defendant, advanced $1,065 of his own money; that as the plaintiff had no abstract to the property, he, the defendant, negotiated with the Chicago Title & Trust Company, and finally got that Company to give a guaranty policy for $500; that within three or four weeks after ordering it, he got the opinion of that company, which was made up of five or six pages of objections; that he spent from twenty-five to thirty hours cleaning those up; that his statement of account which plaintiff attached to her statement of claim does not show any charge for those services; that the plaintiff and her husband came to his office and said that they were not going to sell the property, as they had a buyer who would pay more for it; that they were advised not to sell at that price; that he later was told by attorney Waldron, who represented Sinkus and Roskey that the man who advised them was attorney

Boylan; that he, the defendant, was gradually getting the price up when that trouble came; that he had at least fifteen or twenty conferences with Roderick over the settlement of the matter; that the plaintiff's daughter-in-law "really had title to the property that is, through her husband, she had a dower right"; that at first the plaintiff's daughter-in-law wanted seven of the buildings; that at the conclusion of numerous conferences, her attorney agreed on one building and a $500 mortgage on one of the other buildings; that he put in about 100 hours in conferences with Roderick in negotiating settlement with plaintiff's daughter-in-law, and about forty or fifty hours in negotiating the sale, and from 100 to 150 hours in negotiations with the bank in preventing a foreclosure, and in conferences with plaintiff and her husband, over 100 hours; that his charges were $5.00 an hour, with the exception of the services rendered in the foreclosure matter, where he took the amount of the fee which was allowed the complainant under the provision of the trust deed; that he put in approximately 100 hours getting deeds from the children; that he had difficulty getting the deeds; that he went to several banks to see if he could get money on the certificates, in order to buy the deeds; that he considered the possibility, and looked up the authorities, of filing a bill for partition; that he examined the files in the Probate Court in the matter, then had an interview with the attorney for the Administrator to see whether the latter would cooperate in a partition proceeding; that he had a conference with Bodinghouse, of the Title & Trust Company in regard to the matter; that about that time the plaintiff with her husband called at his office every day; that he told them that it

anybody else is, the defendant, was gradually getting
the parties to where this trouble among them he had to
leave Hillside at family settlements with probate were
the settlement of the estate; that the plaintiff's
daughter-in-law finally had title to the property that he,
although her husband, who had a dower right, that he filed
the plaintiff's grandchildren's names of the daugh-
ter; that at the conclusion of numerous conferences, the
[illegible] in the building had a [illegible] to one
of the other buildings [illegible] to him in [illegible]
[illegible] with [illegible] in [illegible] settlement with
plaintiff's daughter-in-law, and about forty or fifty hours
in negotiating the will, and from [illegible] in nego-
tiating with the [illegible] in presenting a [illegible], and in
conferences with plaintiff and his husband, from [illegible],
that his charges were [illegible], with the exception of
the services rendered in his [illegible] action, where he
took the amount of the fee which was allowed the executrix
under the provisions of the first will; that he was in corres-
pondence [illegible] getting deeds from [illegible] building that he
had difficulty getting the deeds; that he went to several
[illegible] to see if he could get [illegible] on the settlement, in
order to get the deeds; that he considered the possibility,
and looked up the authorities, of filing a bill for parti-
tion; that he examined the files in the Probate Court in
the matter, that and an interview with the attorney for the
[illegible] to see whether the latter would cooperate in
a partition proceeding; that he had a conference with [illegible]
[illegible], of the [illegible] [illegible] company in [illegible] to the
matter, that after that time the plaintiff with the various
[illegible] of his office every day; that he told them that it

was getting late for the deeds; that he finally got all of them to sign that night; that they started out about 6 p.m. and got back at one o'clock in the morning; that plaintiff and her husband were both delighted and surprised that he had procured the deeds.

He further testified that he filed an attorney's lien "in a hurry, you know, so they could not convey the property away after they went over to Boylan's, and he had refused to come over to see me on that lien - to protect me - in my office;" that, subsequently, they found that they would have to clear up the record, "and they came over and negotiated with me throughout a period of thirty days". That was objected to and the objection sustained. He also testified that the money was paid to him by Master in Chancery Humphrey; that after the negotiations he stipulated to dismiss his attorney's lien; that at that time he had in his possession the 2200 odd dollars, which is what the plaintiff is now suing for; that the money was paid to him by the Master in Chancery "on account of Mr. and Mrs. Wallace." On cross-examination he testified that he got from the Master in Chancery $2,264, which he applied toward various accounts, and the balance toward his attorney's fees; that he, himself, had advanced $1,065; that he would not dismiss his lien until he was paid, that in filing the stipulation to dismiss, the words "Without prejudice" were put in at his request, he says, "because I was not paid in full;" that his entire bill, including foreclosure, was $3,361.60; that he was willing to take $3,300 in full settlement then; that what he got, figures approximately $3300; that holding off the first mortgagees from foreclosure

was not part of his duty in foreclosing; that he thought it good business to get rid of plaintiff's daughter-in-law by settlement.

One Waldron, the lawyer who represented Sinkus and Roskey, testified that he carried on negotiations with the defendant aggregating seven or eight hours; that he, the witness, represented the buyers on January 8, 1920; that he deposited with the Master the amount necessary to redeem the Master's certificate; that he told the defendant he was going to make redemption and bring in the Master's certificate; that the defendant delivered to him satisfactions of two judgments against the property; that the negotiations took several hours; that they had further negotiations in one Cooling's office, which took an hour and a half; that the Master turned the money which he, the witness, gave him over to the defendant for the Master's certificate.

A hypothetical question, purporting to contain the substance of the evidence as to the defendant's services, was propounded to Waldron, in which the hours of service were fixed at 487, and in which it was stated that as a result, or partial result of the efforts of the defendant, the plaintiff obtained not only the amount of the mortgage, but $20,000 in excess of that amount; that he was asked what in his opinion would be the usual and customary fee for the services rendered by the defendant, and he answered ten dollars an hour, considering "the character of the work, it all being of a character to conserve their rights, their property rights, the foreclosure proceedings, and the Probate Court and sale of the property." On cross-examination, he testified that he paid

$2,575 to the Master, and that the Master turned the money over to the defendant; that the redemption was made of the matters pending before both masters, and the defendant stipulated to release his attorney's lien.

A similar hypothetical question was put to John Vennema, an attorney, and he fixed the reasonable value of such services at $10.00 per hour. His answer was, "At least $10.00 per hour, and there are many reputable lawyers at the bar who would charge more than $10.00 per hour, $10.00 to $15.00 an hour."

The testimony of the plaintiff and her husband is all, more or less, consistent with the testimony of the defendant himself, but does not recite with the same detail the nature and time of the various services claimed by the defendant to have been rendered the plaintiff. The children of the plaintiff testified in regard to the deeds which they executed, and undertook to show that very little time was consumed by the defendant in obtaining their deeds. Felgar and Riley, lawyers, in answer to a hypothetical question, which did not set forth the number of hours, but which recited in a general way the filing of the bills for foreclosure and, in a general way, work done thereunder, both stated substantially that $1,000 would be a reasonable fee. Considering the evidence, however, as the record shows it, it is quite obvious that the quality and quantity of the services rendered by the defendant were not all considered by those two witnesses in giving their answers.

Our examination of this record leads us definite-

ly to the conclusion that the verdict of the jury was manifestly against the weight of evidence.

Generally in a protracted matter, being in its essence one of great detail, it is difficult to prove legal services that have been rendered in a complicated matter extending over a long period of time. It is reasonable to infer, from the evidence that was introduced, that the defendant was instrumental in bringing order out of a very chaotic situation, and that his services were in many ways of considerable value, apart from the conventional services rendered in the normal foreclosure of the two trust deeds. Obviously, when he began his work there was a great deal to be done before foreclosure could be begun and then afterwards, there being prior incumbrances on the properties, and a mechanic's lien, and there being insufficient money obtainable to make a successful bid at the judicial sale, it required, necessarily, a great deal of labor, involving matters of business, as well as of law, in order to bring the matter to a successful conclusion. The amount of fees testified to by Felgar and Riley seem to be wholly inadequate compensation for the services, which even the plaintiff herself admits were rendered.

Our examination of the record leads us definitely to the conclusion that, although errors were committed in ruling out evidence offered on behalf of the defendant, he sufficiently proved that the legal services rendered by him for the plaintiff in the matters entrusted to him as attorney, when charged for at a fair, reasonable and customary rate,

ly to the conclusion that the verdict of the jury was manifestly against the weight of evidence.

Generally in a protracted matter, being in the measure one of great detail, it is difficult to prove legal services that have been rendered in a complicated matter extending over a long period of time. It is reasonable to infer, from the evidence that was introduced, that the defendant was instrumental in bringing order out of a very chaotic situation, and that his services were in many ways of considerable value, apart from the conventional services rendered in the actual foreclosure of the two trust deeds. Obviously, when he began his work there was a great deal to be done before foreclosure could be begun and then, afterwards, there being prior incumbrances on the properties, and a mechanic's lien, and there being insufficient money available to make a successful bid at the judicial sale, it required, necessarily, a great deal of labor, involving matters of business, as well as of law, in order to bring the matter to a successful conclusion. The amount of fees testified to by Dolgin and Riley seem to be wholly inadequate compensation for the services, which even the plaintiff herself admits were rendered.

Our examination of the record leads us definitely to the conclusion that, although errors were committed in ruling out evidence offered on behalf of the defendant, he sufficiently proved that the legal services rendered by him for the plaintiff in the matters entrusted to him as attorney, when charged for at a fair, reasonable and customary rate,

were worth more than the amount of money which he retained.

The judgment will be reversed and judgment entered here in favor of the defendant, with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the defendant rendered legal services to the plaintiff which were of greater value than the amount of money which he retained.

405 - 28379

PEOPLE EX REL, SCOTT JORDAN, AND CLIFFORD HALL JORDAN,

Appellants,

v.

CITY OF CHICAGO, a municipal corporation, ET AL,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 622

Opinion filed Feb. 20, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On June 19, 1922, Scott Jordan and Clifford Hall Jordan filed a petition in the Circuit Court of Cook County against the City of Chicago and Charles Bostrom, Commissioner of Buildings, praying that a writ of mandamus be directed to the City and the Commissioner commanding them to issue a permit in order that the petitioners might have the right to construct a certain building in accordance with an application and plans which had already been submitted to the Commissioner of Buildings.

On June 29, 1922, the respondents, the City of Chicago and Bostrom, the Building Commissioner, filed a joint and several answer in which they admitted some of the matters set up in the petition and denied others. On July 10, 1922, counsel for the petitioners notified the corporation counsel and attorney for the respondents that on July 11, 1922, they would make a motion that the petition for mandamus and the answer be set for immediate hearing. On July 11, 1922, the

451 - 1953

SCOTT JORDAN, SCOTT JORDAN,
AND CLIFFORD JORDAN,

Appellants,

v.

CITY OF CHICAGO, a municipal
corporation, et al.,

Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

253 I.A. 69

Opinion filed Feb. 23, 1954.

MR. PRESIDING JUSTICE delivered the opinion of the court.

On June 19, 1953, Scott Jordan and Clifford and Jordan filed a petition in the Circuit Court of Cook County against the City of Chicago and Russell Sullivan, Commissioner of Buildings, praying that a writ of mandamus be directed to the City and the Commissioner commanding them to issue a permit in order that the petitioners might have the right to construct a certain building in accordance with an application and plans which had already been submitted to the Commissioner of Buildings.

On June 26, 1953, the respondents, the City of Chicago and Sullivan, the Building Commissioner, filed a joint and several answer in which they admitted most of the matters set up in the petition and denied others. On July 10, 1953, counsel for the petitioners notified the corporation counsel and attorney for the respondents that on July 13, 1953, they would make a motion that the petition for mandamus and the answer be set for immediate hearing. On July 13, 1953, the

following order was entered:

> "This cause having come on to be heard upon the Petition for Writ of Mandamus and Answer of respondents herein filed, and the Court having heard the evidence and evidence and arguments of counsel, and it appearing to the Court that the facts in said petition set forth are true, and the Court being fully advised in the premises
>
> It is therefore considered and ordered that a peremptory Writ of Mandamus, issue forthwith in accordance with the prayer of the Petition herein filed, directed to the respondent, Charles Bostrom, Commissioner of Buildings of the City of Chicago, commanding him forthwith to accept the tender of the papers, documents, plans and fees referred to in said Petition, and commanding him to issue a permit to Scott Jordan and Clifford Hall Jordan, petitioners herein, to construct a building upon the premises referred to in said petition and known as 6301-13 Kenmore avenue, Chicago, Illinois, in accordance with the plans in said petition referred to.
>
> And it is further considered and ordered by the Court that the petitioners have and recover of and from the respondents their costs in this behalf expended."

An appeal was prayed to the Appellate Court, and the respondents given ten days within which to file their Bill of Exceptions.

On July 28, 1923, pursuant, apparently, to notice served the day before on the petitioners, one Harriet M. Macomber (hereinafter called "intervenor") made a motion to vacate and set aside the judgment, and that she, the intervenor, be made a party defendant to the petition for a Writ of Mandamus theretofore filed; that she be given leave to plead, answer, or demur to the petition for a Writ of Mandamus; that the Writ of Mandamus theretofore issued, in accordance with the judgment and order, be recalled and quashed, and that the permit theretofore issued by the Commissioner of Buildings, pursuant to the Writ of Mandamus which was issued, be revoked and cancelled. Attached to the motion there was what purports to be an affidavit which was signed and sworn to by the husband of the Intervenor.

that the Writ of Mandamus

On July 29, the Intervenor filed an answer setting up, among other things, that the petitioner desired permission to erect a twenty-four flat building at 6301-6313 Kenmore avenue, Chicago, without complying with an ordinance of November 30, 1921, which provided that it should be unlawful to erect a building occupying more than thirty-five per cent of the area of the lot on which it was to be erected in the neighborhood in question, without first securing written consent of the owners of a certain portion of the frontage; that the petitioners had not properly secured written consent of the owners as provided for in the ordinance; that the erection of such a building for the purposes in question would irrevocably injure certain premises owned by her, the Intervenor, and which are contiguous to the premises owned by the petitioners themselves. In the affidavit which contained in substance similar allegations to those in her answer, it is stated, "That none of the facts hereinbefore set forth showing the right and interests of the undersigned in thesubject-matter of this cause and the character and value of the property owned by the undersigned and the character and value of the improvements situated upon the lots fronting upon Kenmore avenue in the block in which the premises of the relators are situated and the refusal of the owners of said lots to consent to the erection of the proposed apartment building by relators have heretofore in any way appeared in the record of this cause and each and all of them were unknown to the court and have not been ruled upon or passed upon by the court in this cause."

On July 28, 1922, the petitioners filed a demurrer to the motion of the Intervenor. The grounds of demurrer were as follows: (1) The motion does not seek to vacate the

On July 11, the intervenor filed an answer setting up, among other things, that the petitioners desired permission to erect a fourteen-story flat building at [illegible] Drive street, Chicago, without complying with an ordinance of November 23, 1921, which provides that it should be unlawful to erect a building occupying more than thirty-five per cent of the area of the lot on which it was to be erected in the neighborhood in question, without first securing written consent of the owners of a certain portion of the frontage; that the petitioners had not procured written consent of the owners as provided for in the ordinance; that the erection of such a building for the purposes in question would irreparably injure certain property owned by her, the intervenor, and would be detrimental to the property owned by the petitioners themselves. In the affidavit which contained in substance similar allegations to those in her answer, it is stated, "That some of the facts hereinbefore set forth showing the right and interests of the undersigned in the neighborhood of this cause and the character and value of the property owned by the undersigned and the character and value of the improvements placed upon the lots fronting upon Liberty Avenue in the block in which the premises of the relators are situated and the refusal of the owners of said lots to consent to the erection of the proposed apartment building by relators have heretofore in any way appeared in the record of this cause and each and all of them were unknown to the court and were not been ruled upon or passed upon by the court in this cause."

On July 28, 1922, the petitioners filed a demurrer to the answer of the intervenor. The grounds of demurrer were as follows: (1) The answer does not seek to vacate the

judgment for any error of fact made by the Court in the rendition of the judgment within the meaning of the Statute; (2) does not tender any facts or issues which were not directly in issue and before the Court at the time the judgment was rendered; (3) tenders only facts and issues which were directly in issue and before the Court, and which were passed upon by the Court at the time said judgment was rendered; and (4) that the motion and affidavit in support thereof are in other respects insufficient."

On July 29, 1922, an order was entered reciting that the cause having come on to be heard upon the motion of Harriet M. Macomber to vacate and set aside the judgment of July 11, 1922, and for leave to her to intervene in the proceedings and become a party and to plead, and upon the demurrers of petitioners to said motion, said demurrers were overruled. The order further drecited that as the petitioners elected to stand by their demurrers, the Court finds "that the material allegations set forth in said motion are confessed as true, and that errors in fact were committed in this cause which, by the common law, could have been corrected under the writ of error coram nobis." An order was then entered that the order and judgment entered on July 11, 1922, directing that a writ of mandamus be issued against Charles Bostrom, Commissioner of Buildings of the City of Chicago, be vacated and set aside; that the writ of mandamus issued upon said judgment and order be recalled, annulled and quashed, "that the above cause be and hereby is reinstated," etc. This appeal is by the petitioners from that order.

From the foregoing, it will be seen that the substantial question involved is whether in a mandamus proceeding,

after final judgment and the expiration of the term, a third party may upon motion and affidavit be allowed to intervene and have the judgment set aside on the ground that at the trial that took place there was not presented certain evidence that may have pertained to the issues involved and changed the determination of the court. By section 89 of the Practice Act, it is provided:

> "The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

On July 28, 1932, after the expiration of the term, at which the original judgment was entered, the Intervenor filed her written motion, affidavit and answer, and the petitioners their demurrer thereto. That precipitated an issue as to whether "errors in fact" were committed in the original proceedings "which by the common law, could have been corrected" by the writ of error coram nobis.

Are the matters stated by the Intervenor in her motion, affidavit and answer, a recitation of such "errors in fact" as are intended by Section 89 of the Practice Act, and which could have been corrected by the common law writ of error coram nobis?

The relief the petitioners sought was the issuance of a permit from the City. The Intervenor was not an original party. There was a trial and the original order recites that, "the Court having heard the evidence and the arguments of counsel, and it appearing to the court that the facts in said

after final judgment and the expiration of the term, a third party may upon motion and affidavit be allowed to intervene and have the judgment set aside on the ground that at the trial there was not presented certain evidence that may have pertained to the issues involved and through the determination of the court. By section 89 of the Practice Act, it is provided:

> "The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any courts of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the cause, upon reasonable notice."

On July 26, 1928, after the expiration of the term, at which the original judgment was entered, the intervenor filed her written motion, affidavit and answer, and the petitioners filed demurrer thereto. That proceeding as treated by the parties, "errors in fact" were considered in the original proceedings "which by the common law, would have been corrected by the writ of error coram nobis.

Are the matters stated by the intervenor in her motion, affidavit and answer, a recitation of such "errors in fact" as are intended by Section 89 of the Practice Act, and which could have been corrected by the common law writ of error coram nobis?

The relief the petitioners sought was the issuance of a permit from the City. The intervenor was not an original party. There was a trial and the original order recites that, "the court having heard the evidence and the arguments of counsel, and it appearing to the court that the facts in said

petition set forth are true," it is ordered that a peremptory writ of mandamus issue. That was a final order at the close of the trial. There is no bill of exceptions, so we are not informed as to what evidence was presented to the court.

The contention of counsel for the Intervenor is that the issue made by the pleadings in the original mandamus proceedings did not result in a disclosure of the fact that the neighborhood in question was of a residential character; nor that the buildings thereon were used exclusively for residence purposes and covered not in excess of thirty-five per cent of the area of the respective lots; nor that the said lots were such as to render the ordinance of November 30, 1921 applicable; nor that the Intervenor had a substantial interest in the mandamus proceedings. Counsel argues that "The petition for the writ of mandamus and the answer of the original respondents, therefore, raised false issues of fact, which resulted in errors of fact," and that "the court decided the case was upon a misconception of the facts applicable thereto." That attack, it will be seen, goes directly to all the original proceedings. It undertakes to undermine all that transpired in the original suit. It does not charge that one of the parties was incompetent, being an infant, or insane, or died before judgment, or that there was a misprision of the clerk, or any one of the conventional errors of fact which are generally understood to be covered by Section 89 of the Practice Act. Nor is fraud alleged. It attacks the issue made by the pleadings, the subsequent proceedings of the court, and the final judgment. The phrase, in Section 89, "all errors in fact, committed in the proceedings of any court of record" does not mean that one who is dissatisfied with the judgment of the court

petition for writ are true," it is urged that a peremptory writ of mandamus issue. This was a final order at the close of the trial. There is no bill of exceptions, so we are not informed as to what evidence was presented to the court.

The contention of counsel for the intervener is that the issue made by the pleadings in the original mandamus proceedings did not result in a disclosure of the fact that the neighborhood in question was of a residential character and that the buildings thereon were used exclusively for residence purposes and covered not in excess of thirty-five per cent of the area of the respective lots; and that the said lots were such as to render the ordinance of [illegible], 1927 applicable nor that the intervener had a substantial interest in the mandamus proceedings. Counsel argues that "the petition for the writ of mandamus and the answer of the original respondents, therefore, raised false issues of fact, which resulted in errors of fact," and that "the court decided the case upon a misconception of the facts applicable thereto." That attack, it will be seen, goes directly to all the original proceedings. It manifestly is [illegible] all that transpired in the original suit. It does not charge that one of the parties was incompetent, being an infant, or insane, or died before judgment, or that there was a [illegible] of the [illegible], or any one of the conventional errors of fact which are generally understood to be covered by section [illegible] of the Practice Act, nor is fraud alleged. It attacks the issue made by the pleadings, the subsequent proceedings of the court, and the final judgment. The phrase, in section [illegible], "all errors in fact committed in the proceedings of any court of record" does not mean that one who is dissatisfied with the judgment of the court

after a trial of the issues presented, and a consideration of the evidence, may by written motion and affidavit, after term time, be entitled to have the Court again take jurisdiction of the very matters involved in the original proceeding, and retry the case. Judgments, with very few exceptions, are inviolable; they are finalities. The cases of Powell v. People, 214 Ill. 475; People v. Glecki, 303 Ill. 353, and People v. Elgin Motor Co., 208 Ill. App. 601, are not in point. In none of those cases does it appear that a motion was made after the expiration of the term at which judgment was entered.

In the recent case of Marabia v. Thompson Hospital, 309 Ill. 147, Mr. Justice Dunn used the following language:

> "The errors of fact which could be made the basis of such a writ and can now be made the basis of a motion were not errors upon such questions of fact as arose upon the pleadings in the original case, or questions of fact averred in the pleadings upon which issue might have been taken, or such questions of fact as constituted the basis of the cause of action or defense upon the merits of the case or might have been pleaded as a defense to the merits."

The judgment will be reversed and the cause remanded with directions to reinstate the original judgment of July 11, 1922.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, J. AND THOMSON, J. CONCUR.

260 - 28095

BALDWIN PALMER, doing business as Evergreen Knitting Mills Co.,
Appellee,

v.

L. H. RUEHL & COMPANY, a corp.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 632

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover balance due on merchandise which the plaintiff sold and delivered to the defendant. The amount of the claim was $1708.50. There was a verdict and judgment in favor of plaintiff for the amount it claimed and the defendant prosecutes this appeal.

The record discloses that plaintiff was engaged in the business of making and selling sweaters in New York and that the defendant was engaged in selling sweaters in Chicago. That on November 4, 1919 the defendant called on plaintiff at his place of business in New York City and entered into a written contract, whereby plaintiff agreed to sell and the defendant agreed to buy men's, boys and ladies' sweaters. The contract was for 60 dozen sweaters known as style No. 503 at $54.00 per dozen; 24 dozen of style No. 402 at $42.00 per dozen and 90 dozen of style No. 52 at $40.00 per dozen. It seems to be conceded by both parties

that plaintiff delivered to the defendant the 60 dozen and the 24 dozen and delivered 41-11/12 dozen of style No. 52, and that the 60 dozen and 24 dozen have been paid for.

Plaintiff states in his brief "Defendant accepted styles No. 502 and 402 and paid plaintiff for the same. This is not disputed. The dispute or controversy, in the trial court, was as to style No. 52 only." and two pages later in his brief he sets up an itemized statement of what he claims to be due and in this itemization there is an item of $310.50 for No. 502 sweaters and $189.00 for No. 402, and this is in accordance with plaintiff's statement of claim. This is clearly contrary to the statement just quoted, viz. that styles No. 502 and 402 have been paid for in full. But since counsel for both sides proceed upon the theory in the trial court and likewise in this court that the balance which plaintiff claims to be due is for style No. 52, we shall assume for the purpose of this opinion that this is correct.

The evidence shows that shortly after the order was taken, plaintiff sent some samples to the defendant, and during the months of January, February and March sent all of the sweaters known as Nos. 502 and 402; that during this period he sent 41-11/12 dozen of style No. 52; that on February 6, 1920 defendant wrote a letter to plaintiff as follows:

> "Referring to order No. 1128, placed with you Nov. 4th,'19, we hereby request you to cancel your No. 52, as we find this number to be an exact duplicate of one we purchased from a New York Jobbing house, at a much less quotation, and regret that we cannot use two numbers alike in such extreme large quantity.
>
> Would greatly appreciate your reply by return mail, acknowledging receipt of the above cancellation, and greatly oblige"

Plaintiff contends that this letter was not received

by him, but that the first he learned of it was when he received a carbon copy of it enclosed in a letter written to him by defendant, dated March 1st. Afterwards correspondence passed between the parties. The defendant taking the position that the 41-11/12 dozen received of No. 52 was held by defendant, subject to plaintiff's order, and requesting plaintiff to give him instructions as to what to do with them. The plaintiff throughout the correspondence refused to permit defendant to return these sweaters, but agreed to cancel the order for the No. 52 style as to the balance of the 90 dozen. On or about June 26, 1920 defendant returned 40-2/12 dozen of these sweaters but plaintiff refused to accept them and it is to recover the purchase price of the 41-11/12 dozen that this suit is brought.

Defendant in its affidavit of merits set up that on February 6, 1920 it cancelled the order for the No. 52, and that this was before plaintiff had manufactured any of the sweaters; that notwithstanding this notice of cancellation plaintiff proceeded to manufacture the sweaters and forward them to defendant; that upon receipt of the sweaters, the defendant forthwith returned them. On the trial of the case the defendant attempted to show that the written order which he gave to plaintiff, provided that the sweaters should be made from zephyr yarn, but that as a matter of fact, they were made, as testified by witnesses on behalf of defendant, of worsted yarn and that the latter yarn was not as good or expensive as zephyr yarn. This evidence was objected to by plaintiff on the ground that it was not within defendant's affidavit of merits, but the objection was overruled and the evidence admitted. We think that this evidence should have

been excluded, but it cannot make any difference in the decision, because plaintiff recovered all that he claimed.

The contract entered into between the parties was for a certain quantity of three specific styles of sweaters. It was an entire contract, and the defendant could not accept two of these styles of sweaters and reject the third style. And since there is no contention that if plaintiff is entitled to recover for style No. 52 the amount of the judgment is correct, the judgment of the Municipal Court must be affirmed.

What we have said is sufficient answer to the contention made by the defendant that the instructions given were erroneous and that the court erred in refusing to give instructions offered by it.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

278 - 28113

O. PRICE,

Appellee,

v.

THOMAS PULLEM AND THOMAS LAWRENCE

THOMAS PULLEM,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 62

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

O. Price brought an action of forcible detainer against Thomas Pullem and Thomas Lawrence, claiming that he was entitled to the possession of a certain portion of the premises known as No. 3833 South Dearborn Street, Chicago, and that the defendants wrongfully withheld the possession of such premises from him. Pullem alone was served. The case was tried before a judge and a jury, and a verdict rendered as follows: "We, the jury find the defendants, Thomas Pullem and Thomas Lawrence, guilty of unlawfully withholding from the plaintiff the possession of the premises described in plaintiffs complaint herein, known as 2nd floor rear at 3833 South Dearborn St., and that the right to the possession of said premises is in theplaintiff." The defendant Pullem, prosecutes this appeal.

Plaintiff to substantiate his right to the possession of the premises in question offered in evidence a written document, addressed to him and purported to be signed by one Edwin D. Buell, Trustee of the Estate of John F. Jorn, Bankrupt;

that document so far as material is as follows:

> "Subject to the order of any court of competent jurisdiction, you are privileged by me, as Trustee of the estate of John F. Jorn, bankrupt, to occupy the rear apartment of cottage on front of lot locally described as 3833 South Dearborn Street, Chicago, Illinois."

We further gather from the record, although it is by no means clear, that a part of the premises was occupied by defendant Pullem and a part of it by one Smith. The evidence further tends to show that Pullem claimed to be occupying the premises under the authority of one Bernstein, who claimed to be the owner of the property. There is no proof in the record that the property in question belonged to the bankrupt estate of John F. Jorn, nor is there any evidence that Buell had any connection with it except as the trustee of the Jorn estate. Before the plaintiff would be entitled to recover the possession of these premises, even if this action of forcible detainer would lie, (which question we do not decide Whitehill v. Cooke, 140 Ill. App. 530), he would at least have to show that the property belonged to the bankrupt estate of Jorn, and that Buell was authorized to rent it to him. There is no proof of this kind in the record, and therefore, the judgment cannot stand, as in such a proceeding, plaintiff must show a right of possession in himself and cannot rely upon the lack of right in the defendant. McIlvain v. Karstens, 152 Ill. 135.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

288 - 28123

THOMAS CUSACK COMPANY, a corp., Appellee, v. J. R. MYERS COMPANY, a corp., Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 629

Opinion filed Feb. 20, 1924

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible detainer against the defendant, claiming that he was entitled to the possession of a certain piece of real estate in Chicago and that the defendant wrongfully withheld the same from it. The case was tried before the court without a jury and there was a finding and judgment in the plaintiff's favor and the defendant prosecutes this appeal.

The facts which are undisputed are: Thomas R. Sheare was the owner of a piece of vacant real estate in Chicago and on May 27, 1921 leased it to the defendant for the purpose of erecting and maintaining billboards, advertising signs, signboards and bulletinboards thereon from the first day of June, 1921 to the thirty-first day of May, 1924, at a rental of $115.00 per year, payable semi-annually. The written lease contained the following provision:

> "It is expressly agreed that the lessor may terminate this lease by giving the lessee thirty days' notice in writing and refunding to the lessee, pro-rata, the rent paid in advance, in case the les-

> sor sells the said premises or improves the same by erecting a permanent building thereon requiring the removal of the lessees signs, billboards, signboards or bulletin boards; provided that in case any proposed sale shall not be consummated or proposed improvements made within a reasonable time after the giving of such notice to the lessee, such notice shall not be effective as a termination of this lease, but the same shall continue in full force for the term above provided."

Afterwards and while the lease was in full force and effect, the lessors, Thomas R. Shearer and his wife, on the first day of August, 1921, conveyed the premises in question, by a quit claim deed to Greenebaum Sons Bank & Trust Company. Following this on November 30, 1921, Greenebaum Sons Bank & Trust Company, entered into a written lease with the plaintiff Thomas Cusack & Company, a corporation, demising the same premises from the first day of December, 1921 to the first day of December, 1924, at a rental of $600.00 per year. Cusack & Company were authorized by the lease to use the premises for erecting and maintaining advertising signs, signboards and bulletin boards.

On December 13, 1921, Cusack & Company served a written notice on the defendant, demanding immediate possession of the premises. December 23, 1921, plaintiff served another notice on the defendant. This notice was signed by the original landlord, Thomas R. Shearer, and notified the defendant that he had sold the property and that in accordance with the terms of the lease given the defendant, it was notified to vacate the premises and to remove all of its property therefrom within thirty days and tendering $40.00 to the defendant. The notice stating "the same being the pro rata rent paid in advance under the terms of said lease." Tender of the $40.00 was made at that time to the defend-

ant, but it refused to accept the money or to vacate the premises. Afterwards on January 4, 1932, the same notice was served on the defendant and the money again tendered and refused. And on February 6, 1932, the suit in question was instituted.

The facts not being in dispute, the controlling question is the construction of the provision of the lease above quoted. By the terms of the lease it was provided, that the lessor in case he sold the property, might terminate the lease by giving the lessee thirty days' notice in writing and refunding to the lessee the pro rata rent paid in advance. It is clear that this provision of the lease was inserted for the benefit of the lessor so that he might not be prevented from selling the property in case the prospective purchaser would not take it subject to the lease. That it was not necessary for him to terminate the lease to effect the sale is shown by the fact that he conveyed the premises to Greenebaum Sons Bank & Trust Company on the first day of August. The Bank & Trust Company permitted the defendant to peaceably occupy the premises, at least the record fails to show that the Bank & Trust Company took any action, until November 30, 1931, which was four months after it had purchased the property, when it then leased the property to the plaintiff for $600.00 per year. And it was not until December 23rd that the defendant was tendered the pro rata rent which it had paid in advance. Under these circumstances, the original lessor, Thomas R. Shearer, could not terminate the lease nor could the Greenbaum Sons Bank & Trust Company do so, until it in turn secured a purchaser. We gave careful consideration to a similar question in Gates v. Norton, Appellate Court, First District,

No. 27944, opinion filed February 16, 1923, and reached the conclusion that a provision in the lease there, which authorized the landlord, in the event of sale of the premises, to terminate the lease upon giving certain notice, did not authorize the grantee of the landlord, after he had recognized the tenant for a number of months, to terminate the lease until the grantee should in turn find a purchaser. We there discussed the authorities and are entirely satisfied with the conclusion we then reached, and it will therefore, be unnecessary to discuss the authorities again. From what we have said, it follows that neither Shearer, the original landlord, nor his grantee, Greenebaum Sons Bank & Trust Company, have the right under the facts before us to terminate the defendant's lease.

The judgment of the Municipal Court of Chicago is wrong, and it is reversed and the cause remanded with directions to dismiss the suit.

REVERSED AND REMANDED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

No. 57044, opinion filed February 16, 1927, and reached the conclusion that a provision in the lease there, which authorized the landlord, in the event of sale of the premises, to terminate the lease upon giving certain notice, did not authorize the grantee of the landlord, after he had recognized the tenant for a number of months, to terminate the lease until the grantee should in turn find a purchaser. We there discussed the authorities and are entirely satisfied with the conclusion we then reached, and it will therefore, be unnecessary to discuss the authorities again. From what we have said, it follows that neither [illegible], the original landlord, and his grantee, [illegible] Bank & Trust Company, have the right under the facts before us to terminate the defendant's lease.

The judgment of the Municipal Court of Chicago is wrong, and it is reversed and the cause remanded with directions to dismiss the suit.

REVERSED AND REMANDED.

TAYLOR, P. J. AND THOMSON, J. CONCUR.

298 - 28133

EMMA BODENSCHATZ, Appellee, v. CHRISTOPHER STEPHAN, et al on appeal of THOMAS MACK, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 [illegible]

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal Thomas Mack seeks to reverse a decree of the Circuit Court of Cook County entered in a suit for partition.

The record discloses that John Stephen died testate, disposing of certain real estate in Chicago. He left surviving him five children and a widow. The widow and one child have since died. It is not necessary to a decision of the case at set up in detail all of the facts, but it is sufficient to say that one of the heirs of the deceased, executed a trust deed or mortgage on her undivided part of the real estate in question to secure an indebtedness of $16,000.00; that about the same time a suit for partition of the premises was filed, which was later dismissed and the heirs of the deceased entered into an amicable partition whereby deeds were passed conveying certain of the real estate to the several heirs. These deeds were dated February 5, 1918. It seems that some of the lots were more valuable than others and to equalize the difference, one of the heirs, Christopher Stephan, gave his note for

$2,000.00 to his sister Jennie, and to secure the payment of it, executed a trust deed or mortgage on the lots which on that date had been transferred to him. This note and trust deed was given by Jennie to the defendant Thomas Mack, who had acted as an attorney for all of the parties in the amicable partition, and knew the circumstances under which the note and trust deed were given to Jennie, and that no other consideration was given for the note except to equalize the difference in the value of the lots. Afterwards a bill was filed to foreclose the mortgage of $16,000.00 above mentioned. And in that suit it was decreed that the amicable partition was void and of no effect because all of the parties interested in the real estate had not joined in the agreement and at least one of them was a minor.

The decree in the instant case finds substantially all the facts and the defendant, Thomas Mack is ordered to deliver up the note for $2,000.00, together with certain coupons. The court finding that the only consideration given to Christopher by Jennie was to equalize the value of the lots deeded to them respectively. And it was further decreed that the amicable partition was null and void, and that the deeds given at that time together with certain notes and interest coupons and trust deeds were declared void and cancelled. All of the parties seem to be satisfied with the decree except the defendant, Thomas Mack.

The decree was entered May 15, 1922, and on the same day the defendant prayed for and was allowed an appeal to this court, "so far as same effects the interests of Thomas Mack", upon filing his bond within 20 days. On June 2, 1922, he filed his bond and it was approved on that date. June

$3,000.00 to his sister Jennie, and to secure the payment of it, executed a trust deed or mortgage on the lots which on that date had been transferred to him. This note and trust deed was given by Jennie to the defendant Thomas Mack, who had acted as an attorney for all of the parties in the amicable partition, and knew the circumstances under which the note and trust deed were given to Jennie, and that no other consideration was given for the note except to equalize the difference in the value of the lots. Afterwards a bill was filed to foreclose the mortgage of $16,000.00 above-mentioned. And in that suit it was decreed that the amicable partition was void and of no effect because all of the parties interested in the real estate had not joined in the agreement and at least one of them was a minor.

The decree in the instant case finds substantially all the facts and the defendant, Thomas Mack is ordered to deliver up the note for $3,000.00, together with certain coupons. The court finding that the only consideration given to Christopher by Jennie was to equalize the value of the lots deeded to them respectively. And it was further decreed that the amicable partition was null and void, and that the deeds given at that time together with certain notes and interest coupons and trust deeds were declared void and cancelled. All of the parties seem to be satisfied with the decree except the defendant, Thomas Mack.

The decree was entered May 15, 1907, and on the same day the defendant prayed for and was allowed an appeal to this court, "so far as same affects the interests of Thomas Mack", upon filing his bond within 20 days. On June 8, 1907, he filed his bond and it was approved on that date. June

16, 1922, the court entered an order *nunc pro tunc* as of May 15, 1922, which purported to amend the order allowing the appeal so that the order would show that the appeal was allowed from that portion of the decree which decreed the note held by Mack be delivered up and cancelled. This last order was of no effect because the court was without authority to enter it.

It is the general rule of procedure in this state that when an appeal bond is filed and approved pursuant to an order allowing an appeal, the case is then considered pending in the court to which the appeal was taken, and under such conditions, it is beyond the power and jurisdiction of the trial court to enter any orders effecting the rights of the parties. This rule is subject to the qualification that the trial court may during the term in which the final judgment or decree is entered, set aside the order approving the appeal bond and grant a new trial. *Briggs* v. *Denne*, 163 Ill. 36; *Finkelstein* v. *Lyons*, 250 Ill. 27; *Mason & Trent Bros.* v. *Beal*, 204 Ill. App. 530. But in the instant case, the trial court having approved the appeal bond, it could not afterwards amend the order allowing the appeal without first setting aside the order approving the bond, and this not having been done, the order entered June 16th was void. It could not be made valid by attempting to enter it *nunc pro tunc* as of May 15, 1922, as there was no basis to warrant such an order.

Counsel for the defendant Mack strenuously insists that the decree in the instant case takes a $2,000.00 note

"without the shadow of an excuse." He further contends that Christopher Stephan, who executed and delivered the note to Jennie, his sister, received a consideration for it in that he was enabled to collected a larger amount of rents than he otherwise would because the lot given to him in the amicable partition was more valuable, than the lot deeded to Jennie. This latter argument overlooks the fact that the decree in the instant case provides that there shall be an accounting of rents from February 5, 1918, the very date the amicable partition and note in question were made.

It is clear under the circumstances disclosed by the record that since Christopher made, executed and delivered the $2,000.00 note in question in consideration of the fact that he received a more valuable piece of property than Jennie in the amicable partition, and since such partition has been decreed to be null and void, that Christopher received no consideration for the note. It is obvious, therefore, that Jennie could not enforce payment of the note. And since the record discloses that the defendant, Mack, knew all of the facts in connection with the making and execution of the note, he is in no better position. It certainly would be most inequitable under the circumstances to permit Mack to enforce his $2,000.00 lien against Christopher when Christopher received nothing for it.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

without the absence of an excuse," he further contends that Christopher Stephan, who executed and delivered the note to Jennie, his sister, received a consideration for it in that he was enabled to withdraw a larger amount of money than he otherwise would because the lot given to him in the amicable partition was more valuable than the lot deeded to Jennie. This latter argument overlooks the fact that the decree in the instant case provides that there shall be an accounting of rents from February 4, 1913, the very date the amicable partition was made.

It is clear under the circumstances disclosed by the record that since Christopher made, executed and delivered the $5,000.00 note in question in consideration of the fact that he received a more valuable piece of property than Jennie in the amicable partition, and since such partition has been decreed to be null and void, that Christopher received no consideration for the note. It is obvious, therefore, that Jennie could not enforce payment of the note. And since the record discloses that the defendant, Heck, knew all of the facts in connection with the making and execution of the note, he is in no better position. It certainly would be most inequitable under the circumstances to permit Heck to enforce his $5,000.00 lien against Christopher when Christopher received nothing for it.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

MATCHETT, P.J. AND O'CONNOR, J. CONCUR.

307 - 28142

KAREL BLAHA,
Appellee,

v.

FRANK VOSEJPKA,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A.

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible detainer against the defendant to obtain possession of a certain part of premises known as No. 3325 South Spaulding avenue, and which were occupied by the defendant, plaintiff claiming that the defendant wrongfully withheld the possession of such premises from him. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor.

The complaint and summons described the premises as follows:

> "The ground floor consisting of store and four living rooms and other rooms in the rear of said store, located in the two story brick building known as 3325 So. Spaulding Avenue."

And plaintiff offered evidence tending to show that he was the owner of the premises known as No. 3325 South Spaulding avenue. He also offered in evidence a notice given to the defendant on the third day of January, 1923, whereby the defendant was notified that plaintiff had elected to terminate defendant's tenancy of the property described in the summons and complaint, and further notified defendant to quit

and deliver up the possession of the premises by the 31st day of March, 1922. Plaintiff also offered in evidence a written document signed by the defendant, in which the defendant stated that he had received the notice, dated January 30, 1922 to vacate the premises March 31, 1922. This document also contained the following:

> "And in consideration of extension of Thirty (30) days time, I hereby waive all my right, claim and interest whatever I may have as tenant in the above described premises and further agree to quit and deliver up possession of said premises not later than April 30, 1922."

The evidence further shows that the defendant was still occupying the premises at the time of the trial; and that at the time of the beginning of the suit and until the night before the trial was begun, the number actually attached to the building was No. 2323 South Spaulding avenue.

The defendant contends, as we understand from his argument filed, that the judgment is wrong because the number physically attached to the building at the time of the beginning of the suit until the day previous to the trial was No. 2323 South Spaulding avenue, while the complaint and summons described the premises as No. 2325 South Spaulding avenue, and that this constitutes such a variance as to warrant a reversal of the judgment. There is no merit in this contention. The evidence shows without dispute that defendant was plaintiff's tenant, occupying certain specified premises, and it is to recover these premises that the suit was brought and the fact that a wrong number had been physically attached to the premises can in no way effect the merits of the case. The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

and deliver up the possession of the premises by the first day of March, 1953. Plaintiff also offered in evidence a written document signed by the defendant, in which the defendant stated that he had received the notice, dated January 29, 1953 to vacate the premises March 1, 1953. This document also contained the following:

> "And in consideration of extension of thirty (30) days time, I hereby waive all my rights, claims and interest whatsoever I may have or demand in the above described premises and further agree to quit and deliver up possession of said premises not later than April 30, 1953."

The evidence further shows that the defendant was still occupying the premises at the time of the trial; and that at the time of the beginning of the suit and until the night before the trial was begun, the number actually attached to the building was No. [illegible] South Spaulding avenue.

The defendant contends, as we understand from the argument filed, that the judgment is wrong because the number physically attached to the building at the time of the beginning of the suit until the day previous to the trial was No. [illegible] South Spaulding avenue, while the complaint and summons described the premises as No. [illegible] South Spaulding avenue, and that this constitutes such a variance as to warrant a reversal of the judgment. There is no merit in this contention. The evidence shows without dispute that defendant was plaintiff's tenant, occupying certain specified premises, and it is to recover these premises that the suit was brought and the fact that a wrong number had been physically attached to the premises can in no way affect the merits of the case.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TUOHY, P.J. AND ROBSON, J. CONCUR.

320 - 28155

HUGH McNULTY, Appellee, v. CITY OF CHICAGO, Appellant.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 62

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the City of Chicago to recover damages for personal injuries claimed to have been sustained by him by reason of his falling from an unguarded sidewalk onto the adjoining lot, which was some eight to fifteen feet lower than the sidewalk, resulting in a fracture of the humerus. There was a verdict and judgment in plaintiff's favor for $3,000.00, to reverse which the City of Chicago prosecutes this appeal.

The evidence tends to show that about one o'clock in the morning of December 23, 1920, plaintiff was walking north on the west sidewalk of Baltimore avenue between 91st and 92nd streets in the City of Chicago. The night was dark and there were no lights alongthe sidewalk at the place in question. There was a strong wind blowing and it had been raining and sleeting so that the sidewalk was slippery. The lots immediately adjoining the sidewalk on the west were vacant and the surface was from eight to fifteen feet below that of the sidewalk. Wooden posts were erected along the west side of the sidewalk, to which two boards running

parallel to the sidewalk were nailed forming a crude fence. Plaintiff was walking north on the sidewalk, holding on to the boards to keep from being blown off by the high wind. Some of the boards were broken and when plaintiff reached this place, he fell off the sidewalk onto the ground below. It appears that this crude fence had been in such defective condition for a considerable period of time prior to the date in question. As a result of the fall plaintiff received a fracture of the upper end of the humerus which extended into the shoulder joint and seems to have caused a shortening of plaintiff's arm. The shoulder is stiff and he has difficulty in putting on his coat and vest. There is also evidence that, as a result of the injury, there is a permanent limitation of motion of the shoulder. The arm was still sore at the time of the trial, which was held April 10, 1922.

The defendant contends, (1) that the evidence discloses that plaintiff was guilty of contributory negligence; and (2) that the judgment is excessive.

Of course, it is the law that to warrant a recovery plaintiff must show that he was in the exercise of due care and caution for his own safety,- that he wasnot guilty of contributory negligence. The defendant argues that since the evidence shows that plaintiff worked about a block from the place where he was injured and lived about two blocks from the place, and had passed on Baltimore avenue frequently, he knew of the condition of the sidewalk, and the hole in the fence through which he fell. The evidence does show that plaintiff had been working for a number of months as a bartender at a place located about a block from the place where

parallel to the sidewalk that [illegible] through a grain field. Plaintiff was walking north on the sidewalk, holding on to the boards to keep from being blown off by the high wind. Some of the boards were broken and when plaintiff leaned against this place, he fell off the sidewalk to the ground below. It appears that this walk had been in such defective condition for a considerable period of time prior to the date in question. As a result of the fall plaintiff received a fracture of the upper end of the humerus which extended into the shoulder joint and seems to have caused a shortening of plaintiff's arm. The shoulder is stiff and he has difficulty in putting on his coat and vest. There is also evidence that, as a result of the injury, there is a permanent limitation of motion of the shoulder. The arm was still sore at the time of the trial, which was held April 16, 19[illegible].

The defendant contends, (1) that the evidence discloses that plaintiff was guilty of contributory negligence; and (2) that the judgment is excessive.

Of course, it is the law that to warrant a recovery plaintiff must show that he was in the exercise of due care and caution for his own safety,— that he was not guilty of contributory negligence. The defendant argues that since the evidence shows that plaintiff worked about a block from the place where he was injured and lived about two blocks from the place, and had passed on Baltimore avenue frequently, he knew of the condition of the sidewalk, and the hole in the fence through which he fell. The evidence here shows that plaintiff had been working for a number of months as a carpenter at a plant located about a block from the place where

he was injured, and that he lived about two blocks from that place. It is not very clear whether he observed the hole in the fence prior to the time he was injured, unless this might be inferred from the fact that sometimes he passed along this street. But the evidence tends to show that he generally went from his place of business to where he lived on other occasions by traversing other streets. But even if we might assume that he did know of the hole in the fence, yet we think that, considering all the evidence in the case - that the sidewalk was slippery; that it was very dark; that the wind was blowing at a great gale and that the plaintiff was endeavoring to pass along the sidewalk by holding onto the fence; all reasonable minds would not reach the conclusion that plaintiff was not in the exercise of due care and caution for his own safety. In these circumstances the question was one for the jury to determine. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

Nor can we say that the judgment is so excessive as to warrant us in disturbing it. The evidence shows that plaintiff was precipitated head foremost onto the surface of the lots adjoining the hole in the fence, and that the humerus was fractured; the fracture extending practically to the shoulder joint; that he was in the hospital three weeks; that he was earning $50.00 per week at the time he was injured; and paid $17.00 per week while he was there as well as some small extras; that his arm was placed in a splint by the surgeon; that this was removed and another splint put on; that he was laid up and unable to work from the time he was injured until May 6, 1931; that a reasonable charge for the services rendered by the surgeon was $100.00. Of course, he suffered great pain

he was injured, and that he lived about two blocks from that place. It is not very clear whether he observed the hole in the fence prior to the time he was injured, unless this might be inferred from the fact that sometimes he passed along this street. But the evidence tends to show that he generally went from his place of business to where he lived as other sustained by traversing other streets. But even if we might assume that he knew of the hole in the fence, yet we think that, considering all the evidence in the case - that the sidewalk was slippery; that it was very dark; that the wind was blowing at a great gale and that the plaintiff was endeavoring to pass along the sidewalk by holding onto the fence; all reasonable minds would not reach the conclusion that plaintiff was not in the exercise of due care and caution for his own safety. In these circumstances the question was one for the jury to determine. [illegible] Ill. 408.

Nor can we say that the judgment is so excessive as to warrant us in disturbing it. The evidence shows that plaintiff was [illegible] with the surface of the lots adjoining the hole in the fence, and that the bruises was [illegible] the bruises extending principally on the shoulder joint; that he was in the hospital three weeks; that he was earning $33.00 per week at the time he was injured; and paid $17.00 per week while he was there as well as some small extras; that his arm was placed in a splint by the surgeon; that this was removed and another splint put on; that he was laid up and unable to work from the time he was injured until May 8, 1921; that a reasonable charge for the services rendered by the surgeon was $150.00. Of course, he suffered great pain

and is permanently injured. In these circumstances we think it clear that the judgment is not excessive.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

357 - 28193

ELIZABETH PETERSON, Appellee, v. JOSEPH MARTIN and CHRISTOPHER GROEN, on appeal of JOSEPH MARTIN, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 624

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendants to recover damages for personal injuries. There was a verdict and judgment in her favor against both defendants for $3,000.00 and the defendant Martin prosecutes this appeal.

The record discloses that about noon on November 16, 1919, plaintiff, a woman about forty-one years old, was standing at the southwest corner of Avers and Fullerton avenue, Chicago. Avers avenue is a north and south street and Fullerton avenue an east and west street. The roadway of Avers avenue is about 30 feet wide and at the time in question was paved with asphalt. The roadway of Fullerton avenue, which is a business street, is about 60 feet wide, paved with brick and is occupied by a double line of street car tracks. It had been raining prior to the accident and the pavements were wet and slippery. The defendant, Martin, was driving his automobile south in Avers avenue and the defendant Groen, was driving his automobile west in Fullerton avenue between the north street car track and the curb. When it became apparent to

to both defendants that a collision was imminent, the defendant Groen turned his car toward the southwest and passed in front of Martin's car which came to a stop near the north rail of the westbound street car track. As Groen's automobile passed in front of Martin's, he turned to the northwest to avoid striking the curb at the southwest corner of the street intersection. His car skidded, struck the plaintiff and severely injured her. At the same time a Mrs. Olson, an old lady, was standing near the plaintiff, Mrs. Peterson. The defendant, Groen's car struck Mrs. Olson and she died as a result of the injury received.

The administrator of Mrs. Olson's estate brought suit, and that case and the instant case were consolidated for trial. There was a verdict for the plaintiff in each of those cases, but the verdict was not in regular form and a new trial was granted. Afterwards the case brought by the administrator of Mrs. Olson's estate was tried and a verdict rendered for $1,000.00 against both defendants and on appeal by Martin to this court, the judgment was affirmed. Foreman Bros. Banking Co., Adm. v. Groen, et al. Appellate Court, First District, No. 27785, not yet published.

The instant case was tried before a jury and a verdict rendered in plaintiff's favor against both defendants as above stated. So that it appears that three juries have passed upon the facts in the case. The evidence in the Foreman case and in the instant case is substantially the same. As is generally the case in suits of this kind, the testimony of the several occurrence witnesses varies considerably as to the rate of speed each car was traveling at and prior to the time

in question, as well as on other matters of detail as to how the accident occurred.

The defendant Martin contends that the manifest weight of the evidence shows that he was guilty of no negligence; that he was running his automobile at a careful and moderate rate of speed and was in no way to blame for the unfortunate accident. Of course, there was evidence that Martin was driving his car no faster than the law warranted and that he stopped his automobile a considerable distance north of the north rail of the westbound street car track. And it is argued that the defendant Groen could have passed safely in front of him without injuring plaintiff had he not been careless and wreckless. On the other hand there was evidence that the defendant Groen's car was not traveling at an excessive rate of speed but that Martin's was.

It would serve no useful purpose of analyze the evidence in detail, but we think it sufficient to say that after careful consideration of it, we are clearly of the opinion that whether Martin was free from negligence, was a question of fact for the jury. It is certain that all reasonable minds would not reach the conclusion that Martin was free from negligence. In these circumstances the question therefore was one for the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206. Nor can we say that the finding of the jury to the effect that Martin was guilty of negligence is against the manifest weight of the evidence. We would not, therefore, be warranted in disturbing the verdict on the ground of the insufficiency of the evidence to support it.

in question, as well as the other matters of record for re-
view the [illegible].

The defendant Martin contends that the manifest weight of the evidence shows that he was guilty of no negligence; that he was running his automobile at a careful and adequate rate of speed and was in no way to blame for the unfortunate accident. Of course, there was evidence that Martin was driving his car so fast [illegible] and that he stopped his automobile a considerable distance north of the north wall of the [illegible]. And it is argued that the defendant Martin could have [illegible] in front of the [illegible] plaintiff had he not been [illegible] and [illegible]. On the other hand there was evidence that the defendant Martin's car was not traveling at an excessive rate of speed and that Martin's was.

It would serve no useful purpose to analyze the evidence in detail, but we think it sufficient to say that after careful consideration of it, we are clearly of the opinion that whether Martin was free from negligence, was a question of fact for the jury. It is certain that all reasonable minds would not reach the conclusion that Martin was free from negligence. In these circumstances the question therefore was one for the jury. [illegible] Nor can we say that the finding of the jury to the effect that Martin was guilty of negligence is against the manifest weight of the evidence. We could not, therefore, be warranted in disturbing the verdict on the ground of the insufficiency of the evidence to support it.

The defendant further contends that even if it should be found that Martin was guilty of negligence, yet such negligence was not the proximate cause of the injuries received by plaintiff, because the evidence shows that after the defendant Green, saw there would be a collision and after he saw that Martin's car had stopped north of the westbound street car track, he continued to drive his car at an excessive rate of speed and operated it so carelessly that plaintiff was injured in the skidding of the car. And counsel earnestly contend that the evidence shows there was no causal relation between any negligence of which Martin might be guilty and the injuries received by plaintiff, but that on the contrary, the evidence shows that plaintiff was injured as a result of the independent negligence of the defendant Green. Of course, if Martin's negligence was not the proximate cause of plaintiff's injuries, he would not be liable, but whether in a given case the negligence of a defendant is theproximate cause of the injuries for which plaintiff sues is often difficult of solution. In cases involving quite similar facts, the courts have arrived at opposite conclusions. Heiting v. C. R. I. & P. Ry. Co. 252 Ill. 466; Carlin v. C. & W. I. R. R. Co., Appellate Court, First District, No. 25039; same case affirmed Carlin v. C. & W. I. R. R. Co., 297 Ill. 184. In the Heiting case, the court said, pp. 473 and 474; "No two cases are precisely alike. In cases involving quite similar facts courts have arrived at opposite conclusions. The question for our determination is whether there was any evidence requiring the submission of the question of proximate cause to a jury, and if the facts are such that men of ordin-

ary judgment may arrive at different conclusions as to whether or not a fence would probably have prevented the accident, then the condition was such as required the submission of the case to the jury." In the instant case the question for our determination is, was there evidence requiring the submission of the question of proximate cause to the jury? If the facts are such that men of ordinary judgment would arrive at different conclusions as to whether plaintiff would have been injured had the defendant Martin not operated his car as he did, then the question was one for the jury. In our opinion the evidence was such that men of ordinary judgment might reasonably arrive at different conclusions and such being the fact, the question was a proper one for the jury. It follows that the contention of the defendant, Martin, is untenable.

The judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

396 - 28231

MAURICE O'DONNELL, Appellee, v. JOSEPH P. GEARY, et al, Appellants.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 624

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal the respondents seek to reverse an order of the Circuit Court of Cook County, striking from the return of respondents to the petition for a writ of certiorari certain pages denying the respondents' motion to quash the writ and sustaining the petitioner's motion to quash the proceedings, before the Civil Service Commission, whereby the petitioner was discharged from the police force of Chicago.

Maurice O'Donnell filed his petition, setting up that for many years he had been in the employ of the City of Chicago as a patrolman in the classified civil service; that the respondents who were the Civil Service Commissioners of Chicago, without any jurisdiction of the petitioner or the subject-matter, entered an order discharging him from the office or position of patrolman. And it was averred that such order was void because the Commission was without jurisdiction. A writ of certiorari was issued as prayed for and as a return to the writ, the respondents set up, among other things, all of the proceedings that took place before the Civil Service Commission, showing that charges were filed

against the petitioner and that upon a hearing, he was found guilty and discharged. Upon this return being filed, the petitioner moved that certain parts of the return, especially that which included the transcript of the evidence taken and heard before the Civil Service Commissioners on the hearing of the charges against the petitioner, be stricken; claiming it was not in existence at the time of the filing of the petition, nor at the time the writ of certiorari was served, but that it was afterwards "made up". In support of this motion, an affidavit was filed, which tended to support petitioner's contention, and a counter affidavit was filed on behalf of the respondents to the effect that the evidence taken before the Civil Service Commission on the hearing of the charges against the petitioner, was taken down in shorthand and the shorthand notes filed with the secretary of the commission, and so remained a part of the record of that body, and that after the service of the writ of certiorari in the instant case, the court reporter transcribed his notes and such transcript was set up as a part of the return to the writ. The court sustained the petitioner's motion, and in this we think there was error.

No authority is cited to the effect that the method of preserving the evidence as followed by the Civil Service Commission is against the law, and we have been unable to find any. We think the evidence might probably be preserved by the Civil Service Commission, as was done in the proceedings before it.

Counsel for the petitioner further contend that even if the action of the Circuit Court of Cook County in

against the petitioner; that upon a hearing, he was found guilty and discharged. Upon this return being filed, the petitioner moved that certain parts of the return, especially that which included the transcript of the evidence taken and heard before the Civil Service Commission on the hearing of the charges against the petitioner, be stricken, claiming it was not in existence at the time of the filing of the petition, nor at the time the writ of certiorari was served, but that it was afterwards "made up". In support of this motion, an affidavit was filed, which tended to support petitioner's contention, and a counter affidavit was filed on behalf of the respondents to the effect that the evidence taken before the Civil Service Commission on the hearing of the charges against the petitioner, was taken down in shorthand and the shorthand notes filed with the secretary of the commission, and so remained a part of the record of that body, and that after the service of the writ of certiorari in the instant case, the court reporter transcribed the notes and such transcript was set up as a part of the return to the writ. The court overruled the petitioner's motion, and in this we think there was error.

No authority is cited to the effect that the method of preserving the evidence as followed by the Civil Service Commission is against the law, and we have been unable to find any. We think the evidence might properly be preserved by the Civil Service Commission, as was done in the proceedings before it.

Counsel for the petitioner further contend that even if the action of the Circuit Court of Cook County in

sustaining plaintiff's motion in striking the evidence from the return was wrong, its action in doing so, cannot be reviewed because no such error is assigned by the respondents. One of the assignments is "Said Circuit Court erred in quashing the proceedings of the Civil Service Commission as set fo in the return of respondents to the writ of certiorari." We think this assignment was sufficient, because it is certain that the proceedings before the Civil Service Commission would not have been quashed had the court not stricken the evidence taken before the commission from respondents' return to the writ. Cases almost identical with the one before us are McCarthy v. Geary, et al, Appellate Court, First District, No. 28229 and Buttimer v. Geary, et al, Appellate Court, First District, No. 28230, decided by other divisions of this court, where the same ruling was made.

The court further erred in overruling the responden motion to quash the writ. The order of the Circuit Court of Cook County will, therefore, be reversed and the cause remande with directions to overrule the petitioner's motion to quash the proceedings before the commission.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

sustaining plaintiff's motion in striking the evidence from the return was wrong, its action in doing so, cannot be reviewed because no such error is assigned by the respondents. One of the assignments is "Said Circuit Court erred in quashing the proceedings of the Civil Service Commission as set out in the return of respondents to the writ of certiorari." Under this assignment was sufficient, because it is certain that the proceedings before the Civil Service Commission would not have been quashed had the court not stricken the evidence taken before the commission from respondents' return to the writ. Cases almost identical with the one before us are [illegible] v. [illegible], et al. Appellate Court, First District, No. [illegible] and [illegible] v. [illegible], et al. Appellate Court, First District, No. [illegible], decided by other divisions of this court, where the same ruling was made.

The court further erred in overruling the respondents' motion to quash the writ. The order of the Circuit Court of Cook County will, therefore, be reversed and the cause remanded with directions to overrule the petitioner's motion to quash the proceedings before the commission.

REVERSED AND REMANDED WITH DIRECTIONS.

TAYLOR, P.J., AND O'CONNOR, J., CONCUR.

403 - 38342

ALBERT WORMUTH AND MARIE WORMUTH, Appellees,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
ANNA PLATH, Appellant.	)	OF CHICAGO.

233 I.A. 624

Opinion filed Feb. 20, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought an action of forcible detainer to recover possession of the store, kitchen and shed upon the premises known as 5803 South Hermitage avenue, Chicago. There was a jury trial and a verdict and judgment in plaintiff's favor.

The record discloses that plaintiffs jointly owned the premises and lived at No. 5803 South Hermitage avenue, the premises in question; the defendant living in the basement, occupying the store, kitchen and shed in the rear. Defendant had occupied a part of the premises since about March, 1921, under a month to month tenancy. On the thirtieth day of June, 1922, plaintiff served a notice on the defendant, demanding possession of the premises by September 1, 1922. On the day following the service of this notice, viz. July 1, 1922, the defendant paid a month's rent and received the following receipt from Marie Wormuth:

"July 1st, 1932.

Received of Mrs. Plath Twenty four Dollars for Rent of store No. 5803 Hermitage Street for July month ending 31, 1934.

$24.00 Mr. Wormuth."

The evidence on behalf of the defendant is to the effect that at the time she paid the rent and was given the receipt, plaintiff, Marie Wormuth, told her she could stay for two years more, and thereupon the receipt was written out by Mrs. Wormuth and given to the defendant. Mrs. Wormuth denies that there was any such conversation. She also denies that she wrote "1934" upon the receipt. And it was claimed that it was changed by the defendant after the delivery of the receipt to her.

The defendant contends that this receipt is a sufficient memorandum in writing to prevent the contract from being void on account of the Statute of Frauds. That statute requires that contracts concerning an interest in lands for a longer term than oneyear shall be in writing, or that there shall be some memorandum thereof, signed by the party to be charged, or some person authorized by him in writing. It is perfectly clear, that even if plaintiff executed the receipt, it would not be such a memorandum in writing as would obviate the Statute of Frauds. Both plaintiffs own the premises jointly. The receipt is not signed by Mrs. Wormuth. And there is no evidence that Mr. Wormuth authorized his wife in writing to sign his name to it. Nor is the receipt sufficient evidence in itself to warrant the inference that defendant was authorized to occupy the premises for a period of two years, ending July 31, 1934. The words of the receipt do not indicate this at all.

We think it is unnecessary to discuss the case further because it is evident that there is no merit in this appeal.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

217 - 28052

CHARLES HUDSON, Appellant,	APPEAL FROM
v.	CIRCUIT COURT,
COLONIAL TRUST & SAVINGS BANK, a corp., et al, Appellee.	COOK COUNTY.

233 I.A. 624

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the complainant Hudson seeks to reverse a decree of the Circuit Court of Cook County dismissing his creditor's bill, filed against the defendant Bank, for want of equity.

One Sturtevant recovered a judgment against the Freemont Power & Light Company, an Ohio corporation, in the Circuit Court of Cook County, Illinois. This judgment was for $19,776, and was recovered in December, 1911. Execution was issued on this judgment and returned nulla bona. About three weeks after the judgment was recovered it was assigned to the complainant Hudson. In June 1912, Hudson commenced garnishment proceedings against the defendant Bank and these proceedings were later transferred to the equity side of the court, under the provisions of the statute, and became the suit now before this court on this appeal.

By its answer, the defendant Bank admitted that it held a fund amounting to $23,885.76, as Trustee, and the record shows this fund to have come into the Bank's hands,

pursuant to the terms of a decree entered by the Court of Common pleas of Sandusky County, Ohio. It appears from the record that early in May, 1911, one King instituted proceedings against the Freemont Power & Light Company, in Sandusky County, seeking to foreclose a mechanic's lien. The Colonial Trust & Savings Bank, as Trustee, intervened in that case, and filed a cross petition seeking to foreclose a Trust Deed, which had been executed by the Freemont Power & Light Company in September, 1909, conveying all its property to the Bank, as Trustee, to secure a bond issue amounting to $750,000. In May 1912, the court of Common Fleas, in Ohio, entered a decree in the case referred to, finding that the Freemont Power & Light Company were in default for want of an answer to the cross-petition of the Bank; that the Power & Light Company had, in 1909, authorized an issue of bonds in the sum of $750,000, that it had executed its trust deed to secure said bonds, conveying tracts of land which were specified and described in the decree, that said bonds, to the extent of $200,000 had been sold to _bona fide_ holders; that default had been made in the payment of interest on these bonds, in March, 1911 and the Trustee had declared the principal due; that there was due on said bonds in principal and interest, $219,830, and that the Trustee had incurred expenses to the extent of $2,116.30; and that the Bank, as Trustee, was entitled to recover from the Power & Light Company, the sum of $2[illegible],234.14. It was then "ordered, adjudged and decreed, by consent of the Freemont Power & Light Company," that unless the Company paid the amount found due, to the Trustee within three days, the premises should be sold and that "all liens shall attach to the proceeds of said sale and

pursuant to the terms of a decree entered by the Court of Common Pleas of Sandusky County, Ohio. It appears from the record that early in May, 1911, one Tring instituted proceedings against the Fremont Power & Light Company, in Sandusky County, seeking to foreclose a mechanic's lien. The Colonial Trust & Savings Bank, as Trustee, intervened in that case, and filed a cross petition seeking to foreclose a Trust Deed, which had been executed by the Fremont Power & Light Company in September, 1908, conveying all its property to the Bank, as Trustee, to secure a bond issue amounting to $750,000. In May 1912, the Court of Common Pleas, in Ohio, entered a decree in the case referred to, finding that the Fremont Power & Light Company were in default for want of an answer to the cross-petition of the Bank; that the Power & Light Company had, in 1908, authorized an issue of bonds in the sum of $750,000, that it had executed its trust deed to secure said bonds, conveying tracts of land which were specified and described in the decree, that said bonds, to the extent of $300,000 had been sold to bona fide holders; that default had been made in the payment of interest on these bonds, in March, 1911 and the Trustee had declared the principal due; that there was due on said bonds in principal and interest, $318,000, and that the Trustee had incurred expenses to the extent of $1,118.19; and that the Bank, as Trustee, was entitled to recover from the Power & Light Company, the sum of $319,118.14. It was thereupon, adjudged and decreed, by consent of the Fremont Power & Light Company," that unless the Company paid the amount found due, to the Trustee within three days, the premises should be sold and that all liens shall attach to the proceeds of said sale and

in the same manner as they would have attached to the property itself had it not been sold." Pursuant to the terms of this decree the sheriff sold the various tracts referred to in the decree, for $36,700 and on June 10, 1913, the Ohio court entered an order approving the sale and finding the trust deed a first lien on all the property (except one tract) and directing that the proceeds of the sale to the extent of $23,865.76 be turned over to the Bank, as Trustee, which was done. Very shortly thereafter, the Bank having removed the proceeds of the sale in Ohio, to this jurisdiction, the complainant, Hudson, instituted the proceedings at bar.

In support of his appeal, the complainant contends, (1) that the defendant Bank never complied with the requirements of the statutes of Ohio regarding Trust Companies; that it could therefore not legally act as Trustee, and consequently the trust deed securing the bond issue, was void; (2) that, under the laws of Ohio, the trust deed was not a lien on any of the property of the Freemont Power & Light Company, which it acquired after the date on which the trust deed was recorded; that a number of the tracts covered by the decree and sold pursuant to the terms thereof, were acquired by the Company after that date; that this question was not raised in the Ohio case and was not passed upon by that court; (3) that the decree of the Ohio Court was procured through collusion of the parties and can therefore be attached collaterally wherever and whenever it conflicts with the interest of anyone who has been defrauded, and the Ohio decree cannot bind the complainant in the proceedings at bar because he was not a party in the Ohio case, and (4)

in the same manner as they would have attached to the property itself had it not been sold." Pursuant to the terms of this decree the sheriff sold the various tracts referred to in the decree, for $[illegible],700 and on June 1[illegible], 193[illegible], the State court entered an order confirming the sale and finding the trust deed a first lien on all the property (except one tract) and directing that the proceeds of the sale to the extent of $[illegible].79 be turned over to the Bank, as trustee, [illegible]. Very shortly thereafter, the Bank having received the proceeds of the sale in Ohio, in this jurisdiction, the complainant, herein, instituted the proceedings at bar.

In support of his appeal, the complainant contends, (1) that the defendant Bank never complied with the requirements of the statutes of this state regarding trust companies; that it could therefore not legally act as trustee, and consequently the trust deed securing the bond issue, was void; (2) that, under the laws of Ohio, the trust deed was not a lien on any of the property of the Fremont Power & Light Company, which it acquired after the date on which the trust deed was recorded; that a number of the tracts covered by the decree and sold pursuant to the decree thereof, were acquired by the company after that date; that this question was not raised in the Ohio case and was not passed upon by that court; (3) that the decree in the Ohio court was obtained through collusion of the parties and was therefore [illegible] collusively secured and therefore in conflicts with the interest of people who had been defrauded, and the Ohio decree cannot bind the complainant in the proceedings at bar because he was not a party in the Ohio case, and (4)

that by filing his bill in the proceedings at bar, the complainant accomplished an equitable levy on the funds in the possession of the defendant Bank.

In our opinion there is nothing in the record, showing or tending to show, any fraud or collusion in the Ohio proceedings. So far as the evidence shows, the original petitioner in the Ohio case, King, had a valid and <u>bona fide</u> claim against the Power & Light Company for labor and services for more than $1,000 and the bonds issued by that Company were sold to bona fide purchasers for a good, and valuable consideration and a default in the payment of interest on the bonds outstanding, having occurred, the Bank, as Trustee, declared the whole amount due and intervened in the proceedings instituted by King, and foreclosed. The only facts apparently relied upon by complainant in support of his contention that the proceedings in Ohio were collusive and fraudulent are that the Power & Light Company defaulted and, according to the recitation in the decree entered in that case, consented to the entering of the decree. Certainly, without more, those facts, do not prove collusion or fraud, affecting the jurisdiction of the Ohio court. For all that appears that may have been quite the proper thing to do, under the circumstances.

The fact that Hudson was not a party to the Ohio proceedings, does not give him the right to attack those proceedings, as he is attempting to here. He was neither a necessary nor a proper party to the Ohio proceedings, as he was an unsecured creditor, without any lien against any of the property sought to be foreclosed in those proceedings. So far as any-

that by filing his bill in the proceedings at bar, the complainant accomplished an equitable levy on the [illegible] in the possession of the judgment debt.

In our opinion there is nothing in the record, showing or tending to show, any fraud or collusion in the Ohio proceedings. So far as the evidence shows, the original petitioner in the Ohio case, King, had a valid and bona fide claim against the [illegible] Company for labor and materials for more than $1,[illegible] and the bonds issued by that company were sold to bona fide purchasers for a good, and valuable consideration and a default in the payment of interest on the bonds outstanding, having occurred, the Bank, as Trustee, declared the whole amount due and intervened in the proceedings instituted by King, and foreclosed. The only facts apparently relied upon by complainant in support of his contention that the proceedings in Ohio were collusive and fraudulent are that the [illegible] Company defaulted and, according to the recitation in the decree entered in that case, consented to the entering of the decree. Certainly, without more, these facts, do not prove collusion or fraud, affecting the jurisdiction of the Ohio court. For all that appears that may have been quite the proper thing to do, under the circumstances.

The fact that Nelson was not a party to the Ohio proceedings, does not give him the right to attack these proceedings, as he is attempting to here. He was neither a necessary nor a proper party to the Ohio proceedings, as he was an unsecured creditor, without any lien against any of the property sought to be foreclosed in those proceedings. So far as dis-

thing in this record shows, the Ohio court had jurisdiction of the parties and of the subject-matter involved in that suit and its decree is a valid and binding decree and may not be attacked or nullified in such a manner as has been attempted by the complainant in the proceedings at bar. That being the situation, the other matters raised by the complainant are wholly immaterial and may neither be inquired into nor passed upon here. Omaha & St. Louis Ry. Co. v. O'Niell, 81 Ia. 463; Herring v. N.Y.L.E. & W. Ry. Co., 105 N.Y. 340; Forrest v. Fey, 218 Ill. 165; Merriam v. Merriam, 207 Ill. App. 474. Although the issues involved in the cases cited were not those involved here, the principles involved in those cases are applicable to the situation presented in the suit at bar. There is nothing whatever in this record indicating any fraud in the proceedings in the Common Pleas Court in Ohio, involving the jurisdiction of that court over the parties. That the court had jurisdiction of the subject-matter there involved, is not denied nor questioned. Its findings, therefore, that the trust deed was a valid lien against all the property covered by the decree, cannot be collaterally attacked, as complainant attempts to do here, nor the proceeds of the sale of the property be disturbed, nor the trustee prevented from disturbing those funds as provided by the terms of that decree.

For the reasons stated, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. and O'CONNOR, J. CONCUR.

Being in this record shown, that this court had jurisdiction of the parties and of the subject-matter involved in that suit and the decree is a valid and binding decree and may not be attacked or nullified in such a manner as has been attempted by the complainant in the proceedings at bar. That being the situation, the other matters raised by the complainant are wholly immaterial and may neither be inquired into nor passed upon here. [illegible] 21 Ill. [illegible]; [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible]. Although the issues involved in the cases cited were not those involved here, the principles involved in those cases are applicable to the situation presented in the suit at bar. There is nothing whatever in this record indicating any fraud in the proceedings in the Common Pleas Court in Ohio, involving the jurisdiction of that court over the parties. That the court had jurisdiction of the subject-matter there involved, is not denied nor questioned. Its finding, therefore, that the trust deed was a valid lien against all the property covered by the decree, cannot be collaterally attacked, as complainant attempts to do here, nor the proceeds of the sale of the property be disturbed, nor the trustee prevented from distributing these funds as provided by the terms of that decree.

For the reasons stated the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

McSURELY, P.J., AND O'CONNOR, J., CONCUR.

263 - 28098

EDWARD H. PULS,
Appellee,

v.

CHICAGO & NORTHWESTERN RAILROAD COMPANY, on appeal of WILLIAM WALLACE McCALLUM,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

232 I.A. 62

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Puls, brought an action against the defendant, Chicago & Northwestern Railroad Company, to recover damages resulting from personalinjuries received by him as a result of the alleged negligence of the said defendant. The petitioner William Wallace McCallum, an attorney, filed his intervening petition in that case, seeking to enforce an attorney's lien, claiming that the plaintiff had entered into a contract in October, 1921, employing him to represent him in the prosecution of his claim for damages; that he was not discharged by the plaintiff until sometime in the following February; and that he had, in the meantime, rendered valuable services, for which he was entitled to be paid. In behalf of the respondent Puls, it was urged (1) that no contract was ever entered into between him and the petitioner;(2)that if there had been such a contract, the petitioner was notified, within a few days after it is alleged to have been executed,that his services were not desired and he was requested to take no action regarding respondent's claim, and at this time he had rendered no services;

(2) that the alleged contract was procured by one James A. McCallum, a brother of the petitioner, not an attorney, through the solicitation of a Mrs. Spiers, by means of false representations; that James A. McCallum, though not an attorney, is a member of the firm of McCallum & McCallum, the other McCallum being the petitioner, and that James A. McCallum had an interest in all the business of that firm, contributing to its expenses and sharing its profits, and that as such partner, he has an interest, with his brother, in the fees sought to be recovered here; that the arrangement referred to is contrary to the statutes and the public policy of the State of Illinois; that a proceeding to enforce an attorney's lien is equitable in its nature and that the petitioner is not in court with clean hands; that in view of the circumstances the action of the trial court in dismissing the petition, should be affirmed.

In our opinion, the matters referred to in the last of the three points urged by the respondent, are decisive of the issues involved on this appeal. The evidence is to the effect that the firm of McCallum & McCallum maintains a law office in the City of Chicago. The members of that firm are the petitioner, who is an attorney, and his brother James A. McCallum, who is not an attorney. At the time the alleged contract with Puls was procured the petitioner was confined in the Presbyterian hospital by illness. Puls was confined, as a result of the injuries he had received, in St. Luke's Hospital.

James A. McCallum testified that on the day the alleged contract was entered into, he answered a telephone

(g) that the alleged contract was procured by one James A. McKillen, a brother of the petitioner, not an attorney, through the solicitation of a Mrs. Quinn, by means of false representations: that James A. McKillen, though not an attorney, is a member of the firm of McKillen & McKillen, the other McKillen being the petitioner, and that James A. McKillen had an interest in all the business of that firm, contributing to its expenses and sharing its profits, and that as such partner, or one so 'labeled', with his brother, in the fees sought to be recovered here; that the practice just referred to is contrary to the statutes and the public policy of the State of Illinois; that a proceeding to enforce an attorney's lien is equitable in its nature and that the petitioner is not in court with clean hands; that in view of the circumstances the action of the trial court in dismissing the petition, should be affirmed.

In our opinion, the matters referred to in the last of the three points urged by the respondent, are decisive of the issues involved on this appeal. The evidence is to the effect that the firm of McKillen & McKillen maintains a law office in the City of Chicago. The members of that firm are the petitioner, who is an attorney, and his brother James A. McKillen, who is not an attorney. At the time the alleged contract with Hale was procured the petitioner was confined in the Presbyterian hospital by illness. Hale was confined, as a result of the injuries he had received, in St. Luke's hospital.

James A. McKillen testified that on the day the alleged contract was entered into, he received a telephone

call at the office, which proved to be from Puls; that the latter stated he had been injured while working for the Northwestern Railroad and said he wanted the petitioner to come out to the Hospital to see him; that the witness explained that his brother was ill; that he then went out to the hospital and saw Puls who said the petitioner had been recommended to him by many people; that Puls stated that "Judge Devine, who was an assistant judge in the Probate Court, had recommended us very highly"; that he would not have gone out to St. Luke's Hospital that day except for the fact that his brother was sick "and it was for Mr. Puls entreaties over the 'phone that I went there before I went to the Presbyterian Hospital to see my brother."

On cross-examination, this witness testified that he had known Mrs. Spiers "since the time we took her husband's case", some two and a half years before; that during that time "I presume we have paid her $300 or $400"; that if any of the people in her neighborhood get hurt, "the first thing she does is to recommend Mr. W. W. McCallum, and we feel kindly to her for it and sometimes we make her a present"; that Mrs. Spiers had not told the witness anything about Puls; that the telephone number of Mrs. Spiers was Lawndale 53 and she could be reached there.

It is entirely clear from the testimony of petitioner's own witnesses that Mr. Devine was not consulted about the petitioner, by the respondent or in his behalf, until after the alleged contract had been procured by James A. McCallum and that the respondent did not know Devine and could have had no recommendation from him as to petitioner at that time. Devine, called by the petitioner, testified that he was consulted over

the telephone, on behalf of the respondent, with reference to the petitioner; that he was first consulted by one Frank, who was employed at the same place as a brother of the respondent, Elmer Puls. Frank, also called by petitioner, testified that he and Elmer Puls were employed at the same place and that Elmer asked him about the petitioner; that this was after "Mr. McCallum had a contract with Puls"; that the witness, at that time, took steps to ascertain the qualifications of the petitioner; that in the conversation in which Elmer Puls told the witness of the existence of the alleged contract, "Mr. Devine's name was mentioned as to Mr. McCallum's having tried some cases before him"; that the witness thereafter called up Devine and made inquiries about the petitioner. On cross-examination, this witness testified that Elmer Puls informed him his brother had signed a contract employing the petitioner and "he wanted me to find out what kind of a man McCallum was. He said that McCallum had told him he had tried a number of cases before Judge Devine. It was after that conversation that I called up Mr. Devine's office. Prior to that time I had not called him up. Before that time McCallum's name had not been discussed between me and Puls."

The testimony of Elmer Puls is to the same effect. He testified that two days after the alleged contract was signed, he talked with Frank and told him he had talked with the lawyer and that the latter had mentioned Devine's name and Frank said he would call Devine up and see what he had to say about McCallum, and he then did so.

This witness, as well as his mother and another relative, gave testimony tending to show that the employment of McCallum in this case, was solicited by Mrs. Spiers.

Edward Puls denied having called up McCallum, saying that he did not know where his office was or what his telephone number was. He said the one who telephoned and asked James McCallum to come to the hospital was Mrs. Spiers. W. W. McCallum testified that he never authorized Mrs. Spiers to solicit or otherwise attempt to obtain the contract from Puls.

It is apparent from the testimony in the record that the firm of McCallum & McCallum is a partnership purporting to engage in the practice of the law. It consists of the petitioner, W. W. McCallum, who is a lawyer, and James A. McCallum, his brother, who is not a lawyer. The latter testified that he was not admitted to the bar - "not yet", - although he had been engaged "in the law business, off and on, about twenty years." He also testified that he was connected with his brother "in the law business"; that "I have charge of the investigation of cases, charge of the help, and court calls and anything pertaining to the general business * * * I am the manager of the office"; that in the course of a week he would make out, sometimes one and sometimes fifteen or twenty such contracts as Puls had signed. In this contract, the partnership does not appear as a party but it purports to be a contract with W. W. McCallum, the member of the firm who has been admitted to the bar, and is witnessed by James A. McCallum, the other member. This witness further testified, "We have had a lot of business out of there"; referring to St. Luke's Hospital; that he signs up as many as twenty five or thirty contracts in that hospital in a year,- "maybe more - Men come from Wisconsin,- people from different states. People we have represented tell them to come to McCallum & McCallum. When they are in bed, they

can't come over to us and you have to go over and see them."
After this witness had refused to answer several questions
as to what salary or compensation he received for his services,
it was brought out that he was on a percentage basis; that he
had "a percentage of everything in the office," and that he
would be entitled (under his partnership arrangement with
his brother) to a percentage of this claim, on which the peti-
tioner was proceeding against the defendant railroad; that he
shared in all the profits of the firm and paid his share of
the expenses.

It thus very clearly appears from his own testi-
mony, that James A. McCallum is not a clerk nor employee of
his brother's, but a partner with him in the practice of the
law, with his share of responsibility for all the expenses
of the firm and his right to participate in all its profits.
He is thus practicing law within the meaning of chapter 14 of
the Statutes of Illinois, and in plain violation of the pro-
visions of that statute. Contracts between such alleged
partners have been repeatedly condemned. Langdon v. Conlin,
67 Neb. 243; Alpers v. Hunt, 86 Cal. 78.

But here we have a contract between that member of
the firm, who is licensed to practice law, and another, contempla-
ting attorney's services by the party to the contract, accord-
ing to its terms. But the other partner has just the same
interest in the contract as if it were with the partnership in
name, as well as in fact. That fact that the firm of McCallum
& McCallum is not named in the contract is not important. The
naming only of the partner who is the licensed member of the
bar, is merely a subterfuge. In reality, the contract is with

can't come over to me and put hand up at every one and see them.'
After this witness was refused to answer several questions
as to what salary or compensation he received for his services,
it was brought out that he was on a percentage basis; that he
had "a percentage of everything in the office," and that he
would be entitled (under his partnership arrangement with
the Barkleys) to a percentage of this claim, on which the peti-
tioner was proceeding against the Government; that he
shared in all the profits of the firm and paid his share of
the expenses.

It thus very clearly appears from his own testi-
mony, that Jesse A. Robinson is not a clerk nor employee of
the Barkleys, but a partner with them in the practice of the
law, with his share of responsibility for all the expenses
of the firm and the right to participate in all the profits.
He is thus practicing law within the meaning of Chapter 13 of
the Statutes of Illinois, and in plain violation of the pro-
visions of that statute. Contracts between such alleged
partners have been repeatedly condemned. Lanahan v. Seeley,
97 Kan. 863; Alexan v. Rush, 98 Cal. 79.

The fact of such a contract between this member of
the firm, who is licensed to practice law, and another, contempla-
ting attorney's services by one party to the contract, accord-
ing to its terms, let the other partner who just has some
interest in the contract as if it were with the partnership in
name, as well as in fact. That fact that the firm of Robinson
& Barkley is not named in the contract is not important. The
naming only of the partner who is the licensed member of the
bar, is merely a subterfuge. In reality, the contract is with

the partnership. This proceeding to enforce an attorney's lien is equitable in its nature. In our opinion, the petitioner is not in court with clean hands. He and his brother, who both have an interest in this alleged claim, are carrying on the practice of the law, improperly and unlawfully, according to the evidence in this record. That is sufficient reason, in itself, for a denial of the relief sought in the petition.

We are further of the opinion that the evidence shows just as clearly that Puls' claim against the railroad was solicited, in behalf of this unlawful partnership, by Mrs. Spiers, who appears to have been in the habit of soliciting litigation of this character, and who further appears to have received "presents" for her services. The evidence of her activities in behalf of this partnership, and her solicitation of the Puls' claim is such as to furnish another reason why the petitioner should not be given the benefit of an attorney's lien, quite apart from the question of whether he was discharged as the respondent claims, or when he was discharged, if at all. The manner in which this claim was solicited, is, in our opinion, inconsistent with and contrary to the ethics of the profession and the public policy of the State, and in such case attorney's fees may not be recovered. Ingersoll et al v. Coal Creek Coal Co., 117 Tenn. 263; The People v. Berezniak, 292 Ill. 305.

In his reply brief, counsel for petitioner asks, "Assume that there is an agreement between Wm. Wallace McCallum and his brother, which is against public policy, what interest has D. M. Tone in that fact, or in what manner does that fact become important in defending a suit by Wm. Wallace McCallum

the partnership. This prevailing in relation to attorney's lien to contribute to the return. In our opinion, the petitioner is not in court with clean hands. He and his brother, who both have an interest in this alleged claim, are carrying on the practice of the law, improperly and unlawfully, according to the evidence in this record. That is sufficient reason, in itself, for a denial of the relief sought in the petition.

We are further of the opinion that the evidence shows just as clearly that Yale' claim against the railroad was solicited, in behalf of this unlawful partnership, by Mrs. Enders, who appears to have been in the habit of soliciting litigation of this character, and who further appears to have received 'presents' for her services. The evidence of her activities in behalf of this partnership, and her solicitation of the Yale' claim is such as to furnish another reason why the petitioner should not be given the benefit of an attorney's lien, quite apart from the question of whether he was discharged as the respondent claims, or when he was discharged, if at all. The manner in which this claim was solicited, is, in our opinion, inconsistent with and contrary to the ethics of the profession and the public policy of the State, and in such case attorney's fees may not be recovered. Ingersoll et al v. Coal Creek Coal Co., 117 Tenn. 263; [illegible] v. [illegible], 269 Ill. [illegible]-120.

In his reply brief, counsel for petitioner asks, "Assume that there is an agreement between Mr. Wallace McMillan and his brother, which is against public policy, what interest has D. H. Yale in that fact, or in what manner does that fact become important in defeating a suit by Mr. Wallace McMillan

for fees?" It becomes most important indeed. In the last case cited, our Supreme Court said, in referring to the Tennessee case, that "no court should recognize for a moment their (the lawyers') right to recover fees under such circumstances." In our opinion the circumstances involved in the proceedings at bar, differ from those in the case referred to, only in degree. It is not important to determine what, if any, interest Mr. Tome, who finally represented Puls in his claim against the railroad, may have in the facts surrounding either the manner in which McCallum & McCallum conduct their business or the manner in which this claim was solicited in their behalf. In refusing to enforce such a contract or lien as that involved here, under all the circumstances disclosed by the evidence, the court does not act for the benefit of either respondent or counsel, "but in the maintenance of its own dignity, the public good and the laws of the State." Wright v. Cudahy, 168 Ill. 86; Critchfield v. Bermudez Paving Co., 174 Ill. 466; Pietsch v. Pietsch, 245 Ill. 454.

For the reasons stated, the order appealed from is affirmed.

ORDER AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

381 - 28116

DAVID FRIEDMAN, Administrator of the Estate of Minnie Friedman, Deceased,

Appellee,

v.

PHILIP BERLAND,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 62

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1000.00, recovered by the plaintiff, administrator, in the Circuit Court of Cook County. This action was brought by the plaintiff to recover damages occasioned by the death of Minnie Friedman, his mother, which was alleged to have been the result of injuries received when she was struck by a half ton truck operated by a young man, 18 years of age, in the defendant's employ. It is the plaintiff's contention that his mother was in the exercise of due care, at the time of the occurrence, and that the driver of the truck was guilty of negligence. The deceased was a woman 61 years of age, and in good health. Prior to her death she had been living with her son, the plaintiff, he meeting the expenses of the home and his mother acting as the housekeeper. At the time of her death she was in possession of a bank account amounting to $1200.00.

In support of his appeal the defendant contends that the verdict of the jury, finding the issues for the plaintiff, is against the manifest weight of the evidence, in that

Gen. No. 36118

MARIE PRUZINSKI, Administratrix of
the Estate of Agnes Pruzinski,
Deceased,

Appellee,

v.

PHILIP WEHLING,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

283 I.A. 632

Opinion filed Feb. 21, 1936.

MR. JUSTICE FRIEND delivered the opinion
of the court.

By this appeal the defendant seeks to reverse a
judgment for $5000.00, recovered by the plaintiff, administratrix, in the Circuit Court of Cook County. This action
was brought by the plaintiff to recover damages sustained
by the death of Agnes Pruzinski, the mother, which was
alleged to have been the result of injuries received when
she was struck by a half ton truck operated by a young man,
18 years of age, in the defendant's employ. It is the
plaintiff's contention that the mother was in the exercise
of due care, at the time of the occurrence, and that the
driver of the truck was guilty of negligence. The deceased
was a woman 61 years of age, and in good health. Prior
to her death she had been living with her son, the plaintiff, he meeting the expenses of the home and his mother
acting as the housekeeper. At the time of her death she
was in possession of a bank account amounting to $1400.00.

In support of his appeal the defendant contends
that the verdict of the jury, finding the issues for the plaintiff, is against the manifest weight of the evidence, in that

the evidence in the record (a) fails to show that the employee, Goodman, who was driving the truck, was authorized to do so or was acting within the scope of his authority in so doing; (b) shows that the deceased was not in the exercise of due care; (c) shows that Goodman was in the exercise of due care; and (d) shows that the truck wasnot being driven at such a rate of speed as to amount to negligence. Further, the defendant contends that the trial court erred in the giving of instructions, and that the damages are excessive.

The evidence in the record is exceedingly meager. It is ample, however, to prove clearly that Goodman was authorized to drive this truck on the occasion in question and also that in so doing he was acting within the scope of his authority. He testified that at the time in question he was on his way to get a stock of goods, which his employer, the defendant, had purchased. Upon being asked who directed him to do this, he first replied that he got his directions from the defendant himself, and later he testified that the defendant's wife was the one who told him to go and get these goods. The jury were entirely warranted, from the evidence in the record, in concluding that Goodman was engaged in an errand at the direction of the defendant. But beyond that, although the defendant testified that Goodman was a clerk and it was not a part of his duty to drive this truck, it is very apparent from the evidence in the record that such was not the case. Goodman testified that he had never driven an automobile or truck prior to his employment by the defendant, but that he, had driven this truck during the period of his employment, and he further testified that he was given instructions as to how to drive this very truck, by an employee of the defendant,

the evidence in the record (a) fails to show that the employee, Goodman, who was driving the truck, was authorized to do so or was acting within the scope of his authority in so doing; (b) shows that the deceased was not in the exercise of due care; (c) shows that Goodman was in the exercise of due care; and (d) shows that the truck was not being driven at such a rate of speed as to amount to negligence. Further, the defendant contends that the trial court erred in the giving of instructions, and that the damages are excessive.

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who preceded him there. By pleading only the general issue the defendant impliedly conceded that the truck in question was his and that the driver of the truck was his servant. *McNulta* v. *Lockridge*, 137 Ill. 270; *Pennsylvania Company* v. *Chapman*, 220 Ill. 428; *Chicago Union Traction Co.* v. *Jerka*, 227 Ill. 95.

Although there is not much evidence in the record on the question of the exercise of due care on the part of the deceased, we are of the opinion that there is sufficient to support this verdict and judgment. The deceased was struck at the intersection of Taylor street and Paulina street, in the City of Chicago. These streets intersect at right angles, Taylor street running east and west and Paulina street running north and south. Mrs. Friedman was walking north, on the west side of Paulina street. As she was passing over the cross-walk and was crossing the westbound track of the double track street railway, located in Taylor street, she was struck by the truck, which was being driven by Goodman, in a westerly direction in Taylor street. There were only two occurrence witnesses for the plaintiff,- the proprietor of a boot-black stand, located on the southwest corner of the intersection; and one of his employees. Their testimony was to the effect that they first saw the truck when it was a block or less to the east of Paulina street. One of the witnesses said it was coming "pretty fast." The other testified that it was coming at a speed of "25 miles an hour." However, the latter is shown to have known little or nothing about the question of speed. Goodman testified that he was going 10 or 12 miles an hour, and that he came to a full stop at the Taylor street

who preceded him there. By pleading only the general issue the defendant impliedly conceded that the truck in question was his and that the driver of the truck was his servant. [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible].

Although there is but scant evidence in the record as the question of the position of the boy on the part of the crosswalk, we are of the opinion that there is sufficient to support the verdict and judgment. The accident occurred at the intersection of Taylor street and Pauline Street, in the City of Pittsburgh. These streets intersect at right angles, Taylor street running east and west and Pauline street running north and south. The [illegible] was walking north, on the east side of Pauline street, and was struck while in the cross-walk and was crossing the southerly track of the [illegible] street railway, located in Taylor street, the car struck by the truck, which was being driven by [illegible], in a westerly direction in Taylor street. There were only two eyewitnesses for the plaintiff,— the proprietor of a lunch-stand, located on the southeast corner of the intersection; and one of his employees. Their testimony was to the effect that they first saw the truck when it was a block or less to the east of Pauline street. One of the witnesses said it was making "pretty fast;" the other testified that it was coming at a speed of "25 miles an hour." However, the latter is shown to have known little or nothing about the question of speed. [illegible] testified that he was going 10 or 12 miles an hour, and that he came to a full stop at the Taylor street

crossing andthen proceeded west, sounding his horn all the way over the crossing. Plaintiff's witnesses said that they heard no horn. There is no testimony in the record to indicate that there was any vehicle in the street, other than the truck in question. Goodman testified that he had a full view to the west. He also testified that the deceased "came to me all of a sudden." The evidence shows that the truck came to a full stop within a very few feet after the deceased was struck, and none of the wheels passed over her body. She was thrown to the street by the impact and suffered a skull fracture which resulted in her death. If Goodman came to a full stop at the Taylor street crossing, as he said he did, Mrs. Friedman doubtless thought she had ample time to pass over the west crosswalk on Paulina street, in safety, and it would be impossible to say from the evidence in this record, that she was not fully justified in such a belief. Even though it be assumed that Goodman was not proceeding over the intersection at a dangerous speed, it by no means follows that he was free from negligence. He testified that he had a full view to the west and he mentions nothing as obstructing that view in any way. Although he testified that the deceased came upon him "all of a sudden" he gives no explanation of his apparent failure to notice her or see her before he stuck her. The driver of a vehicle may of course be guilty of negligence, even to an excessive degree, without being shown to have been driving at an excessive rate of speed. There is no intimation in the record that this woman made an unexpected move or jumped back into the path of his truck, or anything of that kind. The jury found that Goodman was negligent in his driving of the truck and we are unable to say, from the evidence in the record, that their finding in that regard was against the mani-

[illegible] swiftly, [illegible] what, according [illegible] all the way over the crossing. [illegible]'s witnesses said that they heard no horn. There is no testimony in the record to the effect that there was any vehicle in the street, other than the truck in question. Defendant testified that he had a full view to the east. He also testified that the deceased "came [illegible] all of a sudden." The evidence shows that the truck came to a full stop within a very few feet after the deceased was struck, and none of the wheels passed over her body. She was thrown to the street by the impact and sustained a skull fracture which resulted in her death. It further must be held that, at the [illegible] street crossing, or [illegible], Mrs. [illegible] [illegible] thought she [illegible] in [illegible] upon the west crosswalk on [illegible] street, in safety, and it would be impossible to say from the evidence in this record, that she was not fully justified in such a belief. Even though it be assumed that defendant did not [illegible] over the intersection at a [illegible] speed, it by no means follows that he was free from negligence. He testified that he had a full view to the west and [illegible] nothing [illegible] obstructing that view in any way. Although he testified that the deceased came upon him "all of a sudden" he gives no explanation of his apparent failure to notice her [illegible] before he struck her. The driver of a vehicle may of course be guilty of negligence, even to an excessive degree, without being shown to have been driving at an excessive rate of speed. There is no indication in the record that [illegible] made an unexpected turn or jumped back into the path of the truck, or anything of that kind. The jury found that defendant was negligent in the driving of the truck and we are unable to say, from the evidence in the record, that their finding in that regard was [illegible]

fest weight of the evidence.

As to the instructions, the defendant contends that the trial court erred in referring to the provisions of the statute as to the rate of speed of a motor driven vehicle "where the same passes through a closely built up portion of an incorporated City, town or village", by reason of the fact that there was no evidence in the record to show that the place of this occurrence was located in Chicago or any other city. The evidence in the record is to the effect that for a block in each direction from the intersection involved, the area was a business area, and counsel for the defendant, himself, while questioning Goodman asked him if he "remembered this accident that happened, near the intersection of Taylor and Paulina streets, in Chicago." Further complaint is made of an instruction, because it was an abstract proposition of law and not based on any evidence in the record, inasmuch as the evidence failed to show that Goodman was the agent of the defendant, or his employee, or that he was in the pursuit of the business of his employer on the occasion in question. We have already indicated that in our opinion the evidence is sufficient to show both of these elements to have been present in this case. The defendant also complains of the refusal of the trial court to give two instructions that were submitted by him. As to this alleged error it is sufficient to say that other instructions which were submitted by the defendant and which were given, fully covered the subject-matter of the refused instructions.

The contention that the damages are excessive, is rather surprising, in view of all the circumstances. We are

that weight of the evidence.

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The contention that the damages are excessive, is rather surprising, in view of all the circumstances. We are

inclined to the opinion that the defendant should consider himself fortunate that they were not larger.

We find no error in the record and therefore the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

391 - 28126

JOHN LEVY, Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
U. S. FIDELITY & GUARANTY CO., a corp., Appellant.	OF CHICAGO.

23 [illegible]

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Levy brought this action to recover damages suffered as a result of two burglaries, which he claimed were covered by policies issued by the defendant company. At the close of all the evidence the court, on motion of the plaintiff, directed the jury to find the issues in his favor. A verdict was returned accordingly, following which, judgment was entered against the defendant for $1131.75, to reverse which the defendant has perfected this appeal.

The plaintiff was a druggist. The goods stolen on the occasion of these burglaries was whiskey. By its affidavit of merits the defendant interposed defenses to the effect (a) that there was no burglary, as alleged in the statement of claim; (b) that the plaintiff did not take all reasonable precautions as required by the policy; (c) that the plaintiff was guilty of an attempt to defraud the defendant; and (d) that the plaintiff did not suffer a loss to the extent alleged in the statement of claim.

The sole contention of the defendant in support of

its appeal has to do with the defenses urged, to the effect that there was no burglary and that the plaintiff was attempting to defraud the defendant. It is the contention that the evidence introduced by the defendant tended to cast suspicion on the plaintiff and that the inferences relied upon by the defendant in support of its contentions should have been weighed and passed upon by the jury and that it was therefore error for the trial court to instruct the jury to find the issues for the plaintiff.

As the defendant itself urges in its brief filed in this court, fraud is never assumed but must be affirmatively proven. The presumption, if any, is in favor of innocence and the burden falls on him who asserts fraud, whether he be the plaintiff or the defendant, to establish it by proving the fraud alleged, by a preponderance of the evidence. 20 Cyc. 108; Woodrow v. Quaid, 292 Ill. 87. Unless, therefore, it may be said that the defendant submitted some evidence, showing or tending to show that there had been no burglary and that the plaintiff was attempting to defraud the defendant, the action of the trial court, in directing the jury to find the issues for the plaintiff, was not error.

The plaintiff testified to the effect that the burglaries in question had taken place, and that the main burglary involved had occurred on May 11, 1930. In testifying, the plaintiff described the condition of his drug store, when he reached it that morning about eight o'clock. He described the window through which the entrance was apparently gained, stating that the screws which had fastened the win-

the appeal has to do with the defense urged, to the effect that there was no burglary and that the plaintiff was attempting to defraud the defendant. It is the contention that the evidence introduced by the defendant tended to cast suspicion on the plaintiff and that the inferences relied upon by the defendant in support of its contentions should have been weighed and passed upon by the jury and that it was therefore error for the trial court to instruct the jury to find the issues for the plaintiff.

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The plaintiff testified to the effect that the burglaries in question had taken place, and that the main burglary involved had occurred on May 11, 1920. In testifying, the plaintiff described the condition of his drug store, when he reached it that morning about eight o'clock. He described the window through which the entrance was apparently gained, stating that the screen which had fastened the view

dow lock had been pulled out and said that there was an impression of a jimmy on the sill under the window frame. In these matters, the plaintiff was corroborated by a man who lived in theneighborhood, and who came into the store that morning, shortly after the plaintiff's arrival, to make a purchase; and also by a boy who was in the plaintiff's employ about the store, and who entered the store with the plaintiff that morning.

For the defendant, a police officer testified that on the morning of May 11, 1920, the report came into the station of the burglary of the plaintiff's drug store, and the witness was sent over to investigate it. He testified that upon arriving at the store he found the plaintiff. He described the conditions present, in substance as the plaintiff had described in his testimony, including the presence of a mark of a jimmy under the window. This witness further testified that upon talking with the plaintiff, the latter told him that he suspected two men, whose names were Weinberg and Alburn, of committing the burglary; that they had been in the store recently to buy whiskey; that they worked with a brother of the plaintiff in the United States Brewery; that when these men had been in the store, seeking to buy whiskey from the plaintiff, they had suggested framing a burglary. He also testified that the plaintiff told him that another man, a drug salesman, had recently been in the drug store making the same sort of a proposition and that the plaintiff had refused to accept the suggestions. It further appears from the evidence of this witness that the plaintiff signed a complaint against Weinberg and Alburn, and the witness took them into custody and locked them up; that they were charged with this burglary and were afterwards tried on that charge.

door lock had been pointed out and said that there was an impression of a jimmy on the sill under the window frame. In these matters, the plaintiff was corroborated by a man who lives in Conshohocken, and who came into the store that morning, shortly after the plaintiff's arrival, to make a purchase, and also by a boy who was in the plaintiff's employ about the store, and who entered the store with the plaintiff that morning.

For the defendant, a police officer testified that on the morning of May 11, 1926, his report came into the station of the burglary of the plaintiff's drug store, and the witness was sent over to investigate it. He testified that upon arriving at the store he found the plaintiff. He described the conditions present, in substance as the plaintiff had described in his testimony, including the presence of a mark of a jimmy under the window. This witness further testified that upon talking with the plaintiff, the latter said that he suspected two men, whose names were Weinberg and Albert, of committing the burglary; that they had been in the store recently to buy whiskey; that they worked with a brother of the plaintiff in the United States Brewery; that when these men had been in the store, seeking to buy whiskey from the plaintiff, they had suggested framing a burglary. He also testified that the plaintiff told him that another man, a drug salesman, had recently been in the drug store making the same sort of a proposition and that the plaintiff had refused to accept the suggestions. It further appears from the evidence of this witness that the plaintiff signed a complaint against Weinberg and Albert, and the witness took them into custody and locked them up; that they were charged with this burglary and were afterwards held on that charge.

Weinberg, being called as a witness for the defendant, testified that he was in the wholesale flour business, but had previously been in the liquor business; that he had known the plaintiff about three years and that the witness had been in the plaintiff's store several times; that he was in there a week or so before the store was burglarized, in May 1930, with his brother-in-law, one Weissman; that they stopped in the drug store to buy a cigar; that on this occasion the plaintiff told them he had something like 50 cases of whiskey, and he asked the witness and his brother-in-law if they wanted to buy it, and the witness asked him his price and he said $100.00 a case, and that the witness replied to the effect that he was not interested; that the plaintiff suggested that the witness could take it out during the day and leave the rest to him; and that after it was gone he would report a burglary; that he and his brother-in-law did not "do any business" with the plaintiff, and the next time he saw the plaintiff was in the police station after the witness had been arrested. On cross-examination he testified that at the time he was working for the United States Brewery, peddling bottled beer. He denied he had brought up the subject of the whiskey with the plaintiff or offered to buy it.

Frank Levy, a brother of the plaintiff, testified for the defendant that he was formerly employed by the United States Brewery Company, delivering near beer; that he knew Alburn, who also worked for the brewery; that he had a talk with Alburn prior to May 10, 1930, "about selling whiskey for my brother"; that this talk did not take place in his brother's presence. From the evidence as it appears in the

record, it would seem that in this latter conversation Alburn was talking with Frank Levy rather than Frank Levy talking with Alburn, - that is, the moving spirit in the conversation was Alburn rather than Levy.

In rebuttal, the plaintiff took the stand and testified to the occasion when Weinberg and his brother-in-law visited the plaintiff's drug store. He testified that on this occasion Weinberg said he understood the plaintiff had 50 cases of liquor he wanted to sell and the plaintiff replied that he would like to sell the liquor, but could not do so unless prescriptions were presented; that Weinberg replied that this would not be necessary, that he would furnish barrels and take the whiskey out in barrels, with a truck which had no license number, and that the plaintiff replied, "Nothing doing. I have been in the drug business so many years with a clear record that I don't want to go to jail in my old days"; that this was all the conversation. On cross-examination he testified that after the burglary he told the police who he thought it was who was looking for the liquor; that in addition to Weinberg, Alburn and the drug salesman, whose name he could not recall, had attempted to buy it.

We are of the opinion that the defendant did not submit any evidence tending to establish the affirmative defense of fraud so as to warrant the court in submitting that issue to the jury. There was no direct testimony to the effect that the burglaries involved in the plaintiff's claims had not occurred or were fraudulent. The most that can be said to have been involved in the evidence submitted by the defendant, was a suspicion to the effect that they might have been

record, it would seem that in this latter conversation Albrecht was talking with Frank Levy rather than Frank Levy talking with Albrecht, - that is, the moving spirit in the conversation was Albrecht rather than Levy.

In rebuttal, the plaintiff took the stand and testified to the occasion when Weinberg and his brother-in-law visited the plaintiff's drug store; he testified that on this occasion Weinberg said he understood the plaintiff had 40 cases of liquor he wanted to sell; that the plaintiff replied that he would like to sell the liquor, but would not do so unless prescriptions were presented; that Weinberg replied that this would not be necessary, that he would furnish a truck and take the whiskey out in [illegible], with a truck which had no license number, and that the plaintiff replied, "Nothing doing. I have been in the drug business so many years with a clear record that I don't want to go to jail in my old days"; that this was all the conversation. On cross-examination he testified that after the burglary he told the police who he thought it was who was looking for the liquor; that in addition to Weinberg, Albrecht and the drug salesman, whose name he could not recall, had attempted to buy it.

We are of the opinion that the defendant did not submit any evidence tending to establish the affirmative defense of fraud so as to warrant the court in submitting that issue to the jury. There was no direct testimony to the effect that the burglaries involved in the plaintiff's claim had not occurred or were fraudulent. The most that can be said to have been implied in the evidence submitted by the defendant, was a suspicion to the effect that they might have been

fraudulent, and, in our opinion, mere suspicion is not enough to warrant submitting an issue to the jury.

We find no error in the record and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

301 - 28136

J. KAPLAN, ET AL doing business
as YOUNG KNITTING MILLS,

Appellees,

v.

L. H. RUEHL & CO., INC.,
a corp.,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

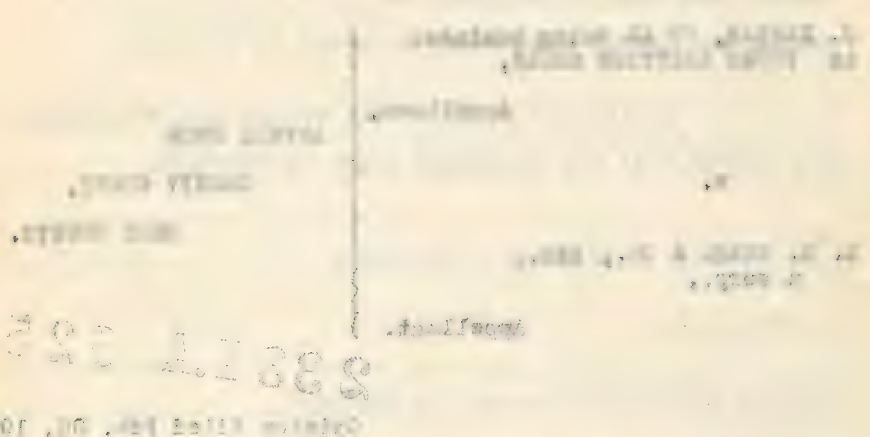
23

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

Plaintiffs brought this suit against the defendant to recover the purchase price of 7½ dozen sweaters at $90.00 a dozen, making the amount of the plaintiff's claim $675.00. The defendant filed a plea of the general issue, together with a special plea with an affidavit of defense, to the effect that the plaintiffs had agreed to deliver merchandise in assorted colors, and, at the time of the delivery of the goods in question, all the goods delivered were of one color, and that the defendant had refused to accept them because of the failure of the plaintiffs to send assorted colors, and that the goods had, therefore, been returned to the plaintiff. The evidence was submitted to a jury, after which a verdict was returned in favor of the plaintiffs in the sum of $759.35, to reverse which the defendant has perfected this appeal.

In support of the appeal the defendant contends that the verdict and judgment are against the manifest weight of the evidence, and also that the trial court erred in giving an instruction submitted by the plaintiffs.



The evidence submitted in behalf of the plaintiffs was to the effect that on January 28, 1920, one Freundlich, as a manufacturer's agent representing the plaintiffs, called at the defendant's place of business, in Chicago, and on that occasion the defendant gave him an order for sweaters of assorted colors and sizes; 8½ dozen maroon, 6¼ dozen seal brown; 7½ dozen peacock and 7½ dozen American Beauty, all at $90.00 a dozen. The order was made out in writing in duplicate, one copy being left with the defendant and the other being forwarded to the plaintiffs. The order read in part as follows: "Terms -- Shipping Date -- When Ready -- Ship via -- Freight." The 7½ dozen sweaters of the color known as American Beauty, were made up and shipped and invoice covering that shipment was forwarded to the defendant. A copy of the invoice is attached to the declaration and the date appearing thereon is March 11, 1920. Under date of March 13, 1920, the defendant wrote the plaintiff saying, "Please cancel the balance of our order for Lot No. 3927." The number appearing on the original order is 3937. Presumably the number appearing in the communication of March 13, is a typographical error. That communication was offered in evidence as referring to this order, without objection, and there is no intimation that it did not refer to the order of January 28, 1920. Under date of April 3, 1920, the defendant wrote the plaintiff saying, "We are today returning the sweaters #3937 -- 7½ dozen as per your invoice #334, which is enclosed." The number of the invoice, copy of which is attached to the plaintiff's declaration, is #334. The 7½ dozen sweaters of the color known as American Beauty were shipped by the defendant back to the plaintiffs in Brooklyn, where the latter declined to receive

The evidence submitted in behalf of the plaintiffs was to the effect that on January 23, 1920, one Greenblatt, as a manufacturer's agent representing the plaintiffs, called at the defendant's place of business, in Chicago, and on that occasion the defendant gave him an order for quantities of assorted colors and sizes 15 dozen sweaters, 7½ dozen green and 7½ dozen peacock and 7½ dozen American Beauty, all at $20.00 a dozen. The order was made out in writing in duplicate, one copy being left with the defendant and the other being forwarded to the plaintiffs. The order read in part as follows: "Terms -- Shipping date -- When Ready -- Ship via -- Freight." The 7½ dozen sweaters of the color known as American Beauty, were made up and shipped and invoice covering that shipment was forwarded to the defendant. A copy of the invoice is attached to the declaration and the date appearing thereon is March 11, 1920. Under date of March 13, 1920, the defendant wrote the plaintiff saying, "Please cancel the balance of our order for lot No. 2307." The number appearing on the original order is 2307. Presumably the number appearing in the communication of March 13, is a typographical error. That communication was offered in evidence as referring to this order, without objection, and there is no intimation that it did not refer to the order of January 23, 1920. Under date of April 7, 1920, the defendant wrote the plaintiff saying, "We are today returning the sweaters #2307 -- 7½ dozen as per your invoice #356, which is enclosed." The amount of the invoice, copy of which is attached to the plaintiff's declaration, is $150. The 7½ dozen sweaters of the color known as American Beauty were shipped by the defendant back to the plaintiffs in Brooklyn, where the latter declined to receive

them and they were placed in a warehouse by the transportation company and apparently are there yet. The testimony submitted in behalf of the plaintiffs was to the effect that no sweaters were shipped beyond the 7½ dozen American Beauty by reason of the defendant's cancellation of March 13. One of the plaintiffs testified that if they got an order for five or six different colors, they would manufacture the sweaters of one color first and then another and so on. Freundlich testified about getting the order from the defendant and on re-direct examination he was asked, "Where orders are given for different colors and shipments are to be made when ready, is it customary in the trade to assort the colors in each shipping installment, or is it customary to ship one color when it is ready and then another color?" He replied in part saying that "If he (the customer) wants the goods shipped when ready, the mills when they get one color or one size finished, will pack it up and ship it." On re-cross-examination he was asked whether it was not the fact in this case that he was told to have the goods shipped in assortment and he said it was not. Two witnesses testified for the defendant - L. H. Ruehl and Roy Ruehl. L. H. Ruehl testified that at the time the order was given to Freundlich, he told the latter that he must have them immediately and that they were to be used for spring business, therefore were for spring delivery, and that meant from March 1, on. He also testified, in effect, that the plaintiffs "agreed to deliver assorted colors and didn't deliver them."

Roy Ruehl testified to the effect that in buying sweaters the custom was always to buy in assorted colors and sizes. It is quite apparent that at the time the defendant sent its letter of March 13, concerning the "balance" of its

them and they were placed in a warehouse by the transportation company and apparently are there yet. The testimony submitted in behalf of the plaintiffs was to the effect that no sweaters were shipped beyond the 7½ dozen American Hosiery by reason of the defendant's cancellation of March 12. One of the plaintiffs testified that if they got an order for five or six different colors, they would manufacture the sweaters of one color first and then another and so on. Fremmilion testified that getting the order from the defendant and on re-direct examination he was asked, "Where orders are given for different colors and shipments are to be made when ready, is it customary in the trade to assort the colors in each shipping installment, or is it customary to ship one color when it is ready and then another color?" He replied in part saying that "If he (the customer) wants the goods shipped when ready, the mills when they get one color or one size finished, will pack it up and ship it." On re-cross-examination he was asked whether it was not the fact in this case that he was told to have the goods shipped in assortment and he said it was not. Two witnesses testified for the defendant - L. H. Nash and Roy Nash. L. H. Nash testified that at the time the order was given to Fremmilion, he told the latter that he must have them immediately and that they were to be used for spring business, therefore were for spring delivery, and that meant from March 1, on. He also testified, in effect, that the plaintiffs "agreed to deliver assorted colors and didn't deliver them."

Roy Nash testified to the effect that in buying sweaters the custom was always to buy in assorted colors and sizes. It is quite apparent that at the time the defendant sent its letter of March 13, concerning the "balance" of the

order, it had received the invoice of March 11, covering the 7½ dozen American Beauty sweaters. By the terms of that invoice the defendant was advised that the 7½ dozen were all of one color and yet when it sent a cancellation of the balance of the order, on March 13, no complaint was made of that nor was any indication given that the shipment covered by the invoice was not acceptable. In our opinion, there is sufficient evidence in the record to support the conclusion of the jury to the effect that there was no direction given to Freundlich at the time this order was delivered to him, to the effect that each shipment was to be in assorted colors, and that in the absence of such directions it was customary for the mills on receiving an order which was to be delivered "when ready" to ship each lot by color as it was turned out. At least the evidence as we find it in the record is not such as to warrant this court in saying that the finding of the jury on that issue is against the manifest weight of the evidence. When the defendant was advised by the invoice of March 11, of the shipment of 7½ dozen American Beauty sweaters, being the last one of four items of the order, and immediately it sent a cancellation of the "balance" of the order and made no complaint of the fact that the shipment was not of assorted colors, and when, upon receipt of that shipment about the first of April, they returned it, under date of April 5, giving no reason therefor, we are of the opinion that the jury was justified in concluding that the defense set forth in the defendant's affidavit of defense, was an after-thought.

The instruction complained of by the defendant was to the effect that if the jury believed from the evidence that there was a custom, among the manufacturers of knitted wool

order, it had received the invoice of March 11, covering the 7½ dozen American beauty sweaters. By the terms of this invoice the defendant was advised that the 7½ dozen were all of one color and yet when it sent a cancellation of the balance of the order, on March 12, no complaint was made of that nor was any indication given that the shipment as ordered by the defendant was not acceptable. In our opinion, there is sufficient evidence in the record to support the conclusion of the jury to the effect that there was no direction given to plaintiff at the time this order was delivered to him, to the effect that each shipment was to be in assorted colors, and that in the absence of such directions it was customary for the mills on receiving an order which was to be delivered "when ready" to ship each lot by color as it was turned out. At least the evidence as we find it in the record is not such as to warrant this court in saying that the finding of the jury on that issue is against the manifest weight of the evidence. When the defendant was advised by the invoice of March 11, of the shipment of 7½ dozen American beauty sweaters, being the last one of four items of the order, and immediately it sent a cancellation of the "balance" of the order and made no complaint of the fact that the shipment was not of assorted colors, and then upon receipt of that shipment about the first of April, they returned it, under date of April 8, giving no reason therefor, we are of the opinion that the jury was justified in concluding that the reasons set forth in the defendant's affidavit of defense, were an afterthought.

The instruction complained of by the defendant was to the effect that if the jury believed from the evidence that there was a custom, among the manufacturers of knitted wool

garments, manufacturing garments to be delivered, on receiving an order for assorted colors, to manufacture all the garments of one color in the order, and then all those of another color, that it would be presumed that the defendant entered into this contract with that custom in view, whether it actually knew of it or not. In our opinion, this instruction was wrong and it should not have been given, for it ignores the issue which was raised, on the question of whether, at the time the order was given it was agreed that the deliveries were to be made in assorted colors, as the defendant contends. While that issue could be raised under the common counts and the general issue, the evidence on it is very meagre. The plaintiff's witness, Freundlich, did testify flatly that nothing was said on this proposition at the time the order was given. The only evidence on this point submitted in behalf of the defendants was when L. H. Ruehl was asked the question already quoted, namely, "They agreed to deliver assorted colors and didn't deliver them?" The answer to that question was "No." While strictly speaking, that question and answer mean little or nothing, because the question really involves two questions, to both of which the answer of the witness could not consistently apply, we will assume that what the witness meant was an affirmative answer to the first part of the question, and a negative to the last part, namely that the plaintiffs did so agree but that they did not deliver assorted colors. However, we are further of the opinion that such error as there may have been in giving the instruction referred to, would not warrant this court in disturbing the judgment appealed from. There is no evidence whatever, in the record, showing or tending to show the period of time within which all deliveries should have been made under this contract. The defendant insists that the goods were in-

garments, manufacturing [illegible] to be delivered, in receiving an order for assorted colors, to manufacture all the garments of one color in the order, and then all those of another color, that it would be presumed that the defendant entered into this contract with that custom in view, whether it actually knew of it or not. In our opinion, this instruction was wrong and it should not have been given, for it ignores the issue which was raised, on the question of whether, at the time the order was given it was agreed that the deliveries were to be made in assorted colors, at the defendant's request. While that issue could be raised under the common counts and the general issue, the evidence on it is very meager. The plaintiff's witness, Tremellion, did testify flatly that nothing was said on this proposition at the time the order was given. The only evidence on this point submitted in behalf of the defendants was when L. T. Ruel was asked the question already quoted, namely, "They agreed to deliver assorted colors and didn't deliver them?" The answer to that question was 'Yes.' While strictly speaking, that question and answer mean little or nothing, because the question really involves two questions, to both of which the answer of the witness could not consistently apply, we will assume that what the witness meant was an affirmative answer to the first part of the question, and a negative to the last part, namely that the plaintiffs did so agree but that they did not deliver assorted colors. However, we are further of the opinion that such error as there may have been in giving the instruction referred to, would not warrant this court in disturbing the judgment appealed from. There is no evidence whatever, in the record, showing or tending to show the period of time within which all deliveries should have been made under this contract. The defendant insists that the goods were re-

tended for "spring business" and that this means "spring delivery" and that spring delivery means "from March the 1st on." But, the evidence does not state whether spring delivery means by April first or May first or just what the limit oftime is in the trade in question. Within two weeks after the period of spring delivery indicated began, the defendant received the invoice containing the advice that the entire quantity of the sweaters of one of the colors ordered was being shipped. Immediately, the defendant cancelled the balance of the order, and, as we have already pointed out, said nothing to indicate that the shipment, covered by this invoice, was not according to its understanding of the terms of the contract, nor that such shipment was unsatisfactory, nor that it would refuse to receive it.

After carefully considering the evidence in this record, of which there is, unfortunately, very little, we have come to the conclusion that the defendants have not shown sufficient reason to justify a reversal of the judgment of the County Court and, therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

manded for "spring shipment" and that this means "spring delivery" and that spring delivery means "from March the 1st on." But, the evidence does not show whether spring delivery means by April first or any first or just what the limit of time is in the trade in question. Within two weeks after the period of spring delivery indicated began, the defendant received the invoice particularly advising that the entire quantity of the possessions of any of the colors ordered was being shipped. Immediately, the defendant cancelled the balance of the order, and, as we have already pointed out, said nothing to indicate that the shipment, covered by this invoice, was not according to its understanding of the terms of the contract, nor that such shipment was unsatisfactory, nor that it would refuse to receive it.

After carefully considering the evidence in this record, of which there is, unfortunately, very little, we have come to the conclusion that the defendant have not shown sufficient reasons to justify a reversal of the judgment of the County Court and, therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

313 - 28148

WILLIAM RIPSTEIN, et al, Appellants,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
HELEN MAJOR, et al, Appellees.	)	COOK COUNTY.

233 I.A. 626

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the complainants, Ripstein and others, seek to reverse a decree of the Circuit Court of Cook County, dismissing their bill of complaint for want of equity.

The bill filed by complainants recited that the complainant Ripstein had been a saloon keeper and that his saloon was located in a building owned by one Anna C. Behrend. Before the filing of the bill in the suit at bar, Anna C. Behrend died, intestate. All the complainants herein, other than Ripstein, are her heirs at law. The bill recited further that the defendants Helen Major and Marion, her daughter, brought suit against Ripstein and another saloon keeper named Silver, under the Dram Shop Act, for injury to their means of support, basing the action on the alleged sale of intoxicating liquors by the defendants Ripstein and Silver, to Frank Major, the husband of Helen Major. Silver was later dismissed out of that case. The complainants further alleged in their bill that in the action at law referred to, summons was duly issued and returned to the effect that it had been served on

[illegible]

[illegible], et al.,

Appellants,

v.

[illegible], et al.,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Feb. 20, 1934.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

By this appeal the complainants, [illegible], seek to reverse a decree of the Circuit Court of Cook County, dismissing their bill of complaint for want of equity.

The bill filed by complainants charged that the complainant [illegible] had been a [illegible] and that his [illegible] was located in a building owned by one [illegible]. Before the filing of the bill in the suit at bar, [illegible] died, intestate. All the complainants herein, other than [illegible], are her heirs at law. The bill averred further that the defendants [illegible] and [illegible], her daughters, brought suit against [illegible] under the Dram Shop Act, for injury to their means of support, basing the action on the alleged sale of intoxicating liquors by the defendants [illegible] and [illegible], to Frank [illegible], the husband of [illegible]. [illegible] was later dismissed out of that case. The complainants further alleged in their bill that in the action at law, referred to, [illegible]

Ripstein, by the delivering of a copy thereof to him on June 20, 1917. This return was made by a deputy sheriff named Bauer. Ripstein failed to appear in the law suit and he was defaulted for want of an appearance, and when the case was reached for trial in due course the plaintiffs presented their evidence to a jury and a verdict was returned finding the issues for said plaintiffs and assessing their damages at $5000.00, and judgment was accordingly entered.

The bill of complaint alleged further that Ripstein was never served with summons in the law suit against him and knew nothing about any such suit until about six months after the judgment was entered, when he learned about it for the first time; that he knew no such person as Frank Major and did not know complainants; that Major was never served any intoxicating liquor in his saloon, and that he never received any notice or warning not to sell such liquor to Major.

It is further alleged in the bill of complaint, that in May 1919, the defendants herein, filed a bill seeking to make their judgment against Ripstein a lien upon the premises in which he had conducted his saloon, which were owned by Anna C. Behrend; that summons was issued in that equity suit and duly served on Mrs. Behrend and a decree was duly entered in that suit in June 1919, by which the judgment secured by the Majors against Ripstein was decreed to be a lien against Mrs. Behrend's property. It was alleged further that Mrs. Behrend was aged and feeble and "incapable of making any defense" to the equity suit, and that she was without knowledge of the fact that the judgment against Ripstein was void and unenforceable. A levy was duly made against the premises in question and proper record

thereof was made in the Recorder's Office of Cook County, pursuant to the terms of the decree of the Circuit Court in the equity suit brought against Mrs. Behrend.

By their bill, filed in the suit at bar, the complainants prayed that the judgment procured by the Majors against Ripstein in the action at law, might be vacated and set aside and that the decree procured by the Majors against Mrs. Behrend might likewise be vacated and set aside; that the Majors and their attorneys and agents might be restrained from making any further levy, either under the judgment or the decree which they had procured, and that they and the sheriff might be restrained from selling or taking any steps to sell the property referred to.

The issues involved were submitted to a Master in Chancery and after a hearing he submitted his report, finding, in part, that there had been no service of summons in the action at law against Ripstein and recommending that the prayer of the complainants as set forth in their bill of complaint, be granted.

Exceptions, which were filed by the defendants, Hel Major and Marion Major, to the report of the Master, were sustained by the chancellor and a decree was entered dismissing the bill of complainants for want of equity. As previously stated, the complainants seek to reverse that decree, by this appeal.

In support of their appeal, the complainants cont that the clear preponderance of the evidence shows that ther was no service of summons on Ripstein, in the action at law, and that the latter had a meritorious defense to that action

thereof was made in the Recorder's Office of Polk County,
pursuant to the terms of the decree of the district court
in the equity suit brought against Mrs. Schmidt.

By their bill, filed in the suit at law, the com-
plainants prayed that the judgment procured by the Majors
against Claypool in the action at law, might be vacated and
set aside and that the decree procured by the Majors against
him, Deborah might likewise, be vacated and set aside; that
the Majors and their attorneys and agents might be restrained
from making any further levy, either under the judgment or
the decree which they had procured, and that they and the
sheriff might be restrained from selling or taking any steps
to sell the property referred to.

The issues involved were submitted to a master in
Chancery and after a hearing he submitted his report, finding
in part, that there had been no service of summons in the
action at law against Claypool and recommending that the
prayer of the complainants as set forth in their bill of com-
plaint, be granted.

Exceptions, which were filed by the defendants, Ed
Major and Louise Major, to the report of the master, were sus-
tained by the chancellor and a decree was entered dismissing
the bill of complaint for want of equity. As previously
stated, the complainants seek to reverse that decree, by this
appeal.

In support of their appeal, the complainants contend
that the clear preponderance of the evidence shows that there
was no service of summons on Claypool, in the action at law,
and that the latter had a meritorious defense to such action.

as found by the Master. After a careful examination of the evidence in the record we are of the opinion that the chancellor was clearly right in sustaining defendants' exceptions to the Master's finding, that there had been no service of the summons on Ripstein. While due weight should be given to a Master's findings, where he has seen the witnesses and heard them testify, rather than merely read their testimony, exceptions to such findings should be sustained, if the evidence is such as to convince the chancellor, to whom the Master's report is submitted, that such findings are wrong.

The law is well settled that to justify a court of equity in setting aside a judgment, because of a finding of no service of summons, contrary to the return of the officer, the proof must be clear and convincing. Every presumption is in favor of the return of the process, and it will not be set aside solely upon the uncorroborated testimony of the party upon whom service is claimed to have been made. Kochinan v. O'Neill. 202 Ill. 110.

Ripstein testified that the summons in question was never served upon him; that on June 20, 1917, he left home about six o'clock in the morning with George Behrend, going to the Northwestern depot in Chicago, where he took a train leaving between seven and eight o'clock for Barrington, Illinois; that he went to visit one Freund, at Spring Lake; that upon arriving there he remained until the following afternoon, returning then to Chicago; that George Behrend left him on the morning of the 20th at the Northwestern depot in Chicago, as he had to go to an Army recruiting office. George Behrend testified that he had been on the Army retired

be found by the master. After a careful examination of the evidence in the record we are of the opinion that the chancellor was clearly right in overruling defendants' exceptions to the master's finding, that there had been no service of the summons on Vilnstein. While due weight should be given to a master's findings, where he has seen the witnesses and heard them testify, rather than merely read their testimony, exceptions to such findings should be sustained, if the evidence is such as to indicate the conclusion, as when the master's report is submitted, that such findings are wrong.

The law is well settled that to justify a court of equity in setting aside a judgment, because of a finding of no service of summons, contrary to the return of the officer, the proof must be clear and convincing. Every presumption is in favor of the return of the process, and it will not be set aside solely upon the uncorroborated testimony of the party upon whom service is claimed to have been made. Hawkins v. O'Neill, 209 Ill. 110.

Vilnstein testified that the summons in question was never served upon him; that on June 29, 1917, he left home about six o'clock in the morning with George Dubrovski, going to the Northwestern depot in Chicago, where he took a train leaving between seven and eight o'clock for Barrington, Illinois; that he went to visit one Wieczek, at Spring Lake; that upon arriving there he remained until the following afternoon, returning then to Chicago; that George Dubrovski left him on the morning of the 29th at the Northwestern depot in Chicago, as he had to go to an Army recruiting office; George Dubrovski testified that he had been at the Army recruiting

list and that he received an order to report to a recruiting station, in Chicago, for active service, on June 20, 1917; that he went to the recruiting office that day, reaching there at seven or seven thirty in the morning; that before going there he took Ripstein to the Northwestern depot and the latter took a train to Barrington, leaving about seven o'clock, and he next saw him in Chicago on the evening of the following day; that he (the witness) was supposed to go to Barrington that day also but that was "the day I was supposed to report back to the Army and I notified them I could not come." The order on which Behrend testified he reported back to the Army for service was introduced in evidence and Behrend testified he received it June 19; that he knew it arrived on the 19th and not on the 20th because he had to report on the 20th; that "it was passed by Congress, May 18th, I believe, and it had plenty of time to reach me. I decided from the way it reads that I must report thenext day. I went to report the 20th. It says the 20th day of June."

Freund testified that in 1917 he was living at Spring Lake; that Ripstein visited him a number of times, one of which was in June 1917; that on the latter occasion he was expecting George Behrend also but he did not come, and upon asking Ripstein why Behrend had not come he was told the latter "went to the Army." He testified he thought the date was June 20, and that Ripstein remained until the following day. On cross-examination he said the only way he knew this visit occurred on June 20, was that Ripstein told him Behrend had to go to the Army. Mrs. Freund testified that Ripstein visited her home in

June 1917; that he said George Behrend was leaving for the Army; that Ripstein returned to Chicago on the afternoon of the day following his arrival.

Complainant's Exhibit 1, was a copy of Special order 140 issued by the War Department, dated at Washington, June 18, 1917. It recited that under the provisions of an Act of Congress approved May 18, 1917, certain named, retired, enlisted men, including Behrend, "are assigned to active duty in their grades, to take effect June 20, 1917, and will report to the stations indicated for assignment to recruiting duty."

The defendants introduced an affidavit executed by George Behrend, in connection with a action to vacate the judgment in the action at law against Ripstein, in which he set forth the arrangements he made to take the trip to Spring Lake with Ripstein on June 20, but that he was prevented from doing so because of the order above referred to. In this affidavit no mention is made of the fact now claimed, that Behrend reported at the recruiting office on the 20th and got leave to report later because of his desire to arrange his affairs in preparation of an extended absence. This affidavit was executed in January 1920.

The defendants further introduced an exemplified copy of the record in the Adjutant General's Office in the War Department showing that Behrend "joined June 25, 1917." This exemplified copy of the War Department record was filed February 14, 1920, in connection with the hearing of the motion to vacate the judgment in the action at law. Under date of February 26, 1920, Behrend executed another affi-

June 1917; that he said George Schwend was leaving for the camp; that [illegible] is [illegible] as the [illegible] of the day following his arrival.

Complainant's Exhibit 1, was a copy of General order 140 issued by the War Department, dated at Washington, June 26, 1917. It recited that under the regulations of an act of Congress approved May 18, 1917, certain named, enlisted men, including Schwend, were assigned to active duty in their grades, to take effect June 26, 1917, and will report to the adjutant general for assignment to recruiting duty."

The defendants introduced an affidavit executed by George Schwend, in connection with a motion to vacate the judgment in the action at law against Schwend, in which he sets forth the circumstances he came to take the trip to Spring Lake with Kirstein on June 26, and that he was prevented from doing so because of the orders above referred to. In this affidavit no mention is made of the fact [illegible], that Schwend reported at the recruiting office on the 26th and got leave to report later because of his desire to arrange his affairs in preparation of an extended absence. This affidavit was executed in January 1920.

The defendants further introduced an exemplified copy of the record in the Adjutant General's Office in the War Department showing that Schwend "joined June 26, 1917." This exemplified copy of the War Department record was filed February 19, 1920, in connection with the hearing of the motion to vacate the judgment in the action at law. Under date of February 18, 1920, Schwend executed another affi-

davit again stating that he reported at the Army recruiting office on June 20, 1917, "as per the special order number 140" and then, apparently to explain the date of June 25, 1917, appearing in the exemplified record of the War Department, which had been filed since the filing of his first affidavit, he proceeded to set forth in this second affidavit, that upon reporting on June 20, 1917, he asked to be relieved for a few days in order that he might prepare his private affairs, and that he might not be assigned to active duty at once; that Captain Kenney, to whom this request was directed, granted it and that thereafter he was assigned to active duty on June 25, 1917. The record of the War Department, of which an exemplified copy was filed in connection with the motion to vacate the judgment in the action at law against Eipstein and which was introduced as an exhibit in the suit at bar, was a record of the Muster Roll of the Recruiting party of the Army, over which Captain Kenney was in command at the recruiting office in Chicago, to which Behrend reported. It is certified as correct by Captain Kenney. In our opinion, if the facts surrounding the reporting of Behrend were as testified to by him and set forth in the second affidavit filed in the action at law they would have been set down to the effect by his commanding officer on the Muster Roll. But the Muster Roll record reads, "assg. to active duty and detailed for general recruiting service this district per S.O. 140 W.D. June 18/17. Joined June 25/17." In our opinion, the testimony of Behrend is not consistent with that record.

When witnesses are called upon to give the

davit again stating that he reported at the army recruit-
ing office on June 26, 1917, the day his special order
number 1409 was [illegible], apparently to explain the date of
June 26, 1917, appearing in the unqualified report of the
War Department, which had been filed since the filing of
his first affidavit, he proceeded to set forth in this
second affidavit, that upon reporting on June 26, 1917,
he asked to be relieved for a few days in order that he
might arrange his private affairs, and that he might not
be assigned to active duty at once; that Captain Kennedy,
to whom this request was directed, granted it and that
thereafter he was assigned to active duty on June 29, 1917.
The report of the War Department, of which an exemplified
copy was filed in connection with the motion to vacate the
judgment in the action at law against [illegible] and which
was introduced as an exhibit in the suit at bar, was a
record of the muster roll of the recruiting party of the
Army, over which Captain Kennedy was in command at the re-
cruiting office in Raleigh, to which Hubbard reported. It
is certified as correct by Captain Kennedy. In our opinion,
if the facts surrounding the reporting of Hubbard were as
testified to by him and set forth in the second affidavit
filed in the motion at law they would have been set down
in the report by the commanding officer in the muster roll.
But the muster roll recites, "Ready for active duty and
detailed for general recruiting service this district per
S.O. 140 R.S. June 19/17, joined June 26/17." In our opin-
ion, the testimony of Hubbard is not consistent with this
record.

[illegible] was called upon to give the

date of some occurrence which took place long previously, it is difficult if not impossible to do so, except as they may relate the occurrence in question to some other event of which there may be a record, or to some other definitely known day or date, such as a holiday or the like. Here, no witness pretends to say that Ripstein took his trip to Spring Lake on June 20, 1917, the date appearing on the date of the summons, showing service on him in Cook County on that day, except by reference to the fact that Behrend reported to the Army on that day, and the latter event, so far as its date is concerned, is related in turn to the Army Order 140. But there is nothing about that order to support any such relation. It merely recited that certain men are assigned to active duty "to take effect June 20, 1917." Immediately following those words the order provides that themen named "will report at the stations indicated for assignment to recruiting duty" but it does not say they will report on June 20, or any other specified date.

The evidence shows further that the officer who made the return on the summons in question was dead. In addition to the return on the summons, the defendants introduced in evidence his daily report under date of June 20, 1917, indicating service of summons in the Major case, on Ripstein on that day at 1800 Belmont avenue, which was the admitted location of his saloon.

There was further, very material testimony by a witness, apparently entirely disinterested. This witness, one Watts, in 1917, was an adjuster for an insurance Company which made a business of insuring saloon keepers and owners

of saloon property against damage suffered as the result of such law suits as the one instituted by the Majors against Ripstein and Silver. Watts testified that in 1917, he made an investigation for his company, with reference to that case, the investigation having been made on behalf of Silver; that in connection with that investigation he had two conversations with Ripstein, both in his saloon at 1800 Belmont avenue; that he told Ripstein he had been sued and talked to him about getting a lawyer; that this first conversation occurred in the latter part of May; (the action at law by the Majors against Ripstein and Silver was begun on May 21, 1917); that Ripstein replied, "I don't want a lawyer. I don't know anything about it. You are one of them hot air guys, I think"; that the witness replied, "Well, you are sued", whereupon Ripstein said, "That is all bunk;" that the witness then produced the copy of the summons, which had been served on Silver and showed it to Ripstein. This witness testified that his second conversation with Ripstein occurred in July; that his object in seeing him again was an attempt to locate Major; that Ripstein said he knew who Major was and told him about where he lived; that in this conversation Ripstein said he had been served with summons and the witness told him he ought to get a lawyer, whereupon Ripstein replied, "No, I don't care a damn. I ain't got nothing anyhow and they can't get anything out of me."

Taking all the foregoing evidence into consideration as already stated, we are of the opinion that the chancellor was clearly right in sustaining the exceptions to the finding of the master to the effect that there had

been no service of summons on Ripstein. Such being our view of that part of the case, it becomes unnecessary to comment on the showing made by complainants on the question of a meritorious defense to the action at law. We might add, however, that we have examined that evidence and in our opinion the complainants failed to make out a *prima facie* case on that issue.

For the reasons stated the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

330 - 28165

VERA ZEMAN,
Appellant,

v.

WILLIAM TONSAR,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

233 I.A. 626

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Vera Zeman, brought this action on the case against the defendant, William Tonsar, seeking to recover damages due to an assault and battery, which she claimed the defendant had committed against her. The testimony was heard by a jury and they return a verdict, finding the issues for the defendant, to reverse which the plaintiff has perfected this appeal, and in support thereof, she contends that the verdict of the jury is against the manifest weight of the evidence.

The defendant was the proprietor of a small grocery store located on the southeast corner of Kildare avenue and 30th street in the City of Chicago. The plaintiff lived on the east side of Kildare avenue, in the same block with the defendant's store, and some distance south of it. A Mrs. Roeske was the plaintiff's next door neighbor. They apparently were not on good terms. The occurrence of which the plaintiff complains, is alleged to have occurred about half past nine on the evening of June 10, 1919. The defendant's store faced north, so that the west side of the store extended along the

east side of Kildare avenue from the corner of 30th street, south a distance of about 75 feet. There is a cement sidewalk immediately to the west of the store with some parkway space between the sidewalk and the Kildare avenue curb. This parkway space contained a number of trees, and surrounding the space was an iron railing. The entrance to the store was at the corner, and not far from that entrance, on the evening in question was a bench, apparently standing on the sidewalk, along side of the iron railing which surrounded the parkway. Mrs. Roeske was sitting on this bench, together with the wife and daughter of the defendant, and as they sat there they were facing east toward the grocery store.

Mrs. Zeman testified that she came along from the north on the east side of Kildare avenue, and that as she reached this corner, the three women referred to, were sitting on the bench and the defendant was standing beside the entrance to his store, and that as she passed him, the defendant hit her on the side, whereupon, she stopped and called, "Help", and then started to run, and he pushed her so as to throw her down, and she again called for help, whereupon, the defendant kicked her "a couple of times". She added that she did not know what happened after that "because I was taken to my home." There is an electric arc street light at the corner on which the defendant's store was located, which the plaintiff testified was lighted at the time she came along and she said that the lights in the store were also lighted. She testified that the next thing she knew she was in her kitchen; that her mouth was cut on the inside; that her face was black and blue, and that she was attended by a Dr. Rohde. On cross-examina-

west side of Hilders avenue from the corner of 40th street, with a distance of about 75 feet. There is a cement sidewalk immediately to the west of the grocer with some parking space between the sidewalk and the little corner walk. This parking [illegible] contains a number of trees, and surrounding the space was an iron railing. The entrance to the store was at the corner, and not far from that entrance, on the evening in question was a bench, apparently standing on the sidewalk, along side of the iron railing which surrounded the parkway. Mrs. Hanna was sitting on this bench, together with the wife and daughter of the defendant, and as they sat there they were facing east toward the grocery store.

Mrs. Hanna testified that she came along from the north on the west side of Hilders avenue, and that as she reached this corner, the three women referred to, were sitting on the bench and the defendant was standing beside the entrance to his store, and that as she passed him, the defendant hit her on the side, whereupon, she stopped and called, "Help", and then started to run, and he grabbed her so as to throw her down, and she again called for help, whereupon, the defendant kicked her "a couple of times". She added that she did not know what happened after that "because I was taken to my home." There is an electric arc street light at the corner on which the defendant's store was located, which the plaintiff testified was lighted at the time she came along and she said that the lights in the store were also lighted. She testified that the next thing she knew she was in her kitchen; that her mouth was cut on the inside; that her face was black and blue, and that she was attended by a Dr. [illegible]. The cross-examina-

tion she testifiedthat she did not see the defendant's son about at the time of the occurrence complained of; that as she passed the defendant she was about two paces away from him, and that he took about two paces following her up, before he struck her, and that she was then about six or seven feet away from the bench on which the women were sitting, and a little to the south of the bench. She also testified that she had had an argument with the defendant the day before this happened. Counsel for the defendant asked her what the argument was about, but objection to this line of inquiry was sustained.

A Mrs. Ydera testified that she kept a butcher shop on the northwest corner of Kildare avenue and 30th street, and at the time of the occurrence she was standing in the doorway of her shop; that she saw the defendant standing beside the doorway of his store at the time the plaintiff passed, and that when she passed by him "he knocked her down and shelfell and he kicker her"; that she saw the defendant's wife and daughter and Mrs. Roeske sitting on the bench; that when the defendant knocked the plaintiff down and kicked her "he ran in to close the door"; that the store had been lighted up to that time; that "then he closed the store and made the light out, and I saw Mrs. Zeman laying there, and she screamed; she didn't scream right away but a little after"; that her husband ran up from his house and helped her home, which was about three doors from the corner. On cross-examination this witness testified that she had put the lights out in her store; that she knew it was half past nine at the time of the occurrence complained of, because she was looking at the clock in the store. She also testified that the defend-

with the testimony; she did not see the defendant's son about at the time of the occurrence complained of; that as she passed the defendant she was about two doors away from him, and that he [illegible] her up, before he struck her, and that she was then about six or seven feet away from the bench in which the women were sitting, and a little to the south of the bench. She also testified that she had had an argument with the defendant the day before this happened. Counsel for the defendant asked her what the argument was about, but objection to this line of inquiry was sustained.

A Mrs. Dikre testified that she kept a rubber shop on the northwest corner of Kildare avenue and 26th street, and at the time of the occurrence she was standing in the doorway of her shop; that she saw the defendant standing beside the doorway of his store at the time the plaintiff passed, and that when she passed by him "he knocked her down and kicked her"; that she saw the defendant's wife and daughter and Mrs. Kemsis sitting on the bench; that when the defendant knocked the plaintiff down and kicked her "he went in to close the doors"; that the store had been lighted up to that time; that "when he closed the store and made the light out, and I saw Mrs. Kemsis laying there, and she screamed, she didn't scream right away but a little after"; that her husband came up from the corner and helped her home, while she stood there from the corner. On cross-examination this witness testified that she had put the lights out in her store; that she knew it was half past nine at the time of the occurrence complained of, because she was looking at the clock in the store. She also testified that the defend-

ant's son was not about at the time.

A Mrs. Kotwitz testified that she lived at 3009 Kildare avenue, which was on the same side of the street as the defendant's store, and a few doors south of it, the intervening property being vacant; that she was standing in the bay window of her home, which was about six feet back from the lot line; that her daughter was out and she was watching for her, after preparing to retire; that she saw a woman approaching and as she passed the defendant, who"was standing by the little door, by the window in the store", the defendant, "hit her and she laid down but I don't know whether it was the first time or the second time. Then I opened the window and I saw Mrs. Fonsar and a woman I didn't know; it was Mrs. Hoseke, and I heard this voice when she was screaming." This witness then testified that she then put on her stockings and her dress and ran down the stairs and "Mrs. Zeman was there, and then I heard the screaming"; and that she did not know who it was until she got down there. On cross-examination this witness testified that she saw the woman approaching the defendant's corner and that she saw her when she was on the opposite side of the street. The plaintiff had testified that she had walked down Kildare avenue from 36th street. Mrs. Kotwitz further testified on cross-examination that although she did not know who the woman was, when the defendant threw her down, she knew it was the defendant because she saw him push her, and she testified further that the door of the defendant's store was open.

A Mrs. Mary Klecka testified that she lived on the west side of Kildare avenue, several doors south of 30th street, and that she was standing in front of her house at the

man's arm was not struck by the fire.

A Mrs. Koprila testified that she lived at 3009 Gilmore avenue, which was on the same side of the street as the defendant's store, and a few doors south of it, the intervening property being vacant; that she was standing in the bay window of her home, which was about six feet back from the lot line; that her daughter was out and she was watching for her, after preparing to retire; that she saw a woman backing out as she passed the defendant, who was standing by the little door, by the window in the street, the defendant. "This boy and she laid down but I don't know whether it was the first time or the second time. Then I opened the window and I saw Mrs. Thomas and a woman I didn't know; it was Mrs. Hawkins, and I heard this voice when she was screaming." This witness then testified that she then put on her stockings and her dress and ran down the stairs and "Mrs. Thomas was there, and then I heard the screaming"; and that she did not know who it was until she got down there. On cross-examination this witness testified that she saw the woman approaching the defendant's corner and that she saw her when she was on the opposite side of the street. The plaintiff had testified that she had walked down Gilmore avenue from 30th street. Mrs. Koprila further testified on cross-examination that although she did not know who the woman was, when the defendant threw her down, she knew it was the defendant because she saw his work leg, and she testified further that the door of the defendant's store was open.

A Mrs. Mary Clarke testified that she lived on the west side of Gilmore avenue, several doors south of 30th street, and that she was standing in front of her house at the

time of the alleged occurrence; that she saw the defendant, "sitting in front of his house, and I think a couple of members of his family were there with him, and a young lady sitting there, I think she was sitting between them"; that she then saw the plaintiff across the street, and the latter walked over toward the defendant and when she got within two feet of him, the defendant "jumped up and struck her and she then yelled." Apparently this witness was testifying through an interpreter, and some question arose as to just what her answer had been and the interpreter said, "he jumped at her, struck her and knocked her down and she yelled." She then testified that the defendant then kicked the plaintiff and then "all of them who were outside there ran in the store and closed the door and put the lights out"; that she, the witness, ran across the street where the plaintiff was, and when she got there the plaintiff's husband arrived and picked her up and took her home. On cross-examination this witness testified that her home occupied the seventh lot from the corner; that she first noticed the plaintiff when she was on the north side of 30th street.

On behalf of the defendant, his daughter testified that the home of the witness, Mrs. Kotwitz, was located on the fourth lot south from the corner, and that she lived on the second floor; that the front of the building was some distance back from the lot line; that the lots between that property and the defendant's property were vacant and that they contained some cherry trees and poplar trees about 18 feet high, possibly 40; the branches coming down to within four feet of the ground. She also testified that the trees located in the parkway to the west of her father's store, cast a shadow

time of the alleged occurrence; that she saw the defendant, 'sitting in front of his house, and I think a couple of members of his family were there with him, and a young lady sitting there, I think she was sitting between them'; that she then saw the plaintiff across the street, and the latter walked over toward the defendant and when she got within two feet of him, the defendant 'jumped up and struck her and she then yelled.' Apparently this witness was testifying through an interpreter, and when counsel asked her to just what her answer had been and the interpreter said, 'He jumped at her, struck her and knocked her down and she yelled.' She also testified that the defendant then 'kicked the plaintiff [illegible] all of these who were outside there were in the [illegible] the fault was with the [illegible]'; that she, the witness, ran across the street where the plaintiff was, and when she got there the plaintiff's husband arrived and picked her up and took her home. On cross-examination this witness testified that she had been [illegible] the accused left from the company; that she first noticed the plaintiff when she was on the north side of 20th street.

On behalf of the defendant, his daughter testified that the home of the witness, Mrs. [illegible], was located in the fourth lot south from the corner, and that she lived on the second floor; that the front of the building was some distance back from the lot line; that the land between that property and the defendant's property was vacant and that they contained some cherry trees and maple trees about 15 feet high, possibly why the branches coming down to within four feet of the ground. She also testified that the trees located in the parkway in the rear of her father's store, cast a shadow

diagonally across the sidewalk, because of the electric street lamp, located at the corner; that this light made the front part of the store light, and beginning one or two feet south from the corner, it was shaded by the trees. She further testified that at the time of the alleged occurrence, she and her mother and Mr. Roeske were sitting on the bench and her brother was standing near it; that her father's store was closed at the time and that the lights were out. She testified that about 9 o'clock her father had come out from the store and bid them all good night and then went inside to go to bed. The defendant's store was a one story building, and the living quarters of the family were at the rear of the store. This witness testified that her father had bid them good night and gone into the living quarters, half an hour before the plaintiff appeared, and that so far as she knew, he was in bed and asleep at the time of the occurrence of which the plaintiff complains. She testified that she herself had put the lights out in the store, a few minutes before nine o'clock, and had then gone outside as she usually did, to get a breath of air before retiring; that her mother and Mrs. Roeske were sitting on the bench out on the sidewalk and that she also sat down; that shortly thereafter she noticed the plaintiff approaching, and she suggested to her mother that they go inside, but Mrs. Roeske said, "Stay with me outside until she passes, you are on your own property," whereupon they remained and kept silent "as she passed and she called several names"; that "she did not get any answer from us, and she turned around to see how we were taking it, then

diagonally across the sidewalk, because of the electric street lamp, located on the corner, that this light made the front part of the store light, and beginning one or two feet back from the window, it was shaded by the trees. She further testified that at the time of the alleged occurrence, she and her mother and Mrs. Hosmer were sitting on the bench and her brother was standing near it; that her father's store was closed at the time, and that the lights were out. She testified that about 8 o'clock her father had come out from the store and bid them all good night and then went inside going to bed. The defendant's store was a one story building, and the living quarters of the family were in the rear of the store. This witness testified that her father had bid them good night and gone into the living quarters, half an hour before the plaintiff appeared, and that so far as she knew, he was in bed and asleep at the time of the occurrence of which the plaintiff complains. She testified that she herself had put the lights out in the store, a few minutes before nine o'clock, and that they went outside as she usually did, to get a breath of air before retiring; that her mother and Mrs. Hosmer were sitting on the bench out on the sidewalk and that she also sat down; that shortly thereafter she noticed the plaintiff approaching, and she suggested to her mother that they go inside, but Mrs. Hosmer said, 'They will sit outside until she passes, you are on your own property;' whereupon they remained and kept silent "as she passed and she called several names"; that "she did not get any answer from us, and she turned around to see how we were taking it, then

she fell and hollered, 'Help, help, murder',- We got frightened and knew that she was looking for trouble, and we ran in and closed the door, and did not pay any attention to her." This witness further testified that the plaintiff fell to the sidewalk, and as she did so her chin hit the railing; that she did not know what happened after that, because they went right in; that she did not know where Mrs. Roeske went, but she thought she went home. On cross-examination this witness stated that the reason they went inside the store was that they were afraid of the plaintiff and that the reason they had not gone inside when she saw the plaintiff approaching was "because Mrs. Roeske said we were sitting on our own property, and it would be an insult to her to run and leave her alone, because she was afraid of her too."

The defendant's son, Joseph, about 20 years of age, testified about the physical surroundings immediately adjacent to the store, giving the location of the railing surrounding the parkway and the trees, and he stated that the building in which Mrs. Kotwitz lived was fifteen feet back from the lot line. He also testified that on the evening in question, his mother and sister and Mrs. Roeske were sitting on the bench andhe was on the sidewalk, skipping a rope; that his father had gone in about nine o'clock and that it was twenty or twenty-five minutes later that the plaintiff came along from the north and that as she passed the bench the witness stopped skipping rope, to get out of her way, stepping over toward the railing; that the plaintiff passed the women about two feet away from them and called them names,

"and looked around to see how they would take it, I guess, and as she looked around she slipped and fell down on the sidewalk, and the left side of her face hit the railing and she yelled, 'Help, help, murder'." He testified that he did not know what she did then because they went into the house. He also testified that the west side of the store and the vacant lots to the south were in a shadow cast by the trees along the parkway, which were in full bloom at this time. On cross-examination he was asked as to whether he paid any particular attention as to where his father was, he said all he knew was, his father said he was going to bed.

Mrs. Roeske testified that she lived next door to the plaintiff; that she was sitting on a bench outside of the defendant's store, with his wife and daughter on the evening in question, and that the defendant's son, was near by jumping a rope; that the defendant was not present when the plaintiff came along, but that 15 or 20 minutes prior thereto, at about nine o'clock, he had come out of the store and said he was very tired, and he bid them good night, and turned out the lights in the store and that was the last she saw of him; that the plaintiff approached them from the north and as she passed the witness and her friends and had proceeded several steps beyond them, "she turned and made a nasty remark to me. I didn't answer her. I thought she had white slippers on and high heels and her left shoe caved in and she fell * * * forward and hit the iron rail on the lawn and struck her on the shoulder or the neck and when she was lying down she hollered 'Help, help, murder'"; that she picked herself up and her husband came as she was partly standing and holding on to the iron rail, and her husband took hold of her and took

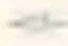
"Then looked around to see how they would take it, I guess, and as she looked around she slipped and fell down on the sidewalk, and the left side of her face hit the railing and she yelled, 'Help, help, murder'." He testified that he did not know what she did that because they were into the house. He also testified that the east side of the stoop was the closest side to the south side as a window next by the grass along the parkway, which went to fall there at this time. On cross-examination he was asked as to whether he gave any particular attention as to where his father was, he said all he knew was, his father said he was going to bed.

Mrs. Caselli testified that she lived next door to the plaintiff; that she was sitting on a porch outside of the defendant's store, with his wife and daughter on the evening in question. and that the defendant's son, was near by passing a paper; that the defendant was not present when the plaintiff came along, but about 15 or 20 minutes before thereto, at about nine o'clock, he had gone out of the store and said he was very tired, and he bid them good night, and turned out the lights in the store and that was the last she saw of him; that the plaintiff approached them from the north and as she passed the witness and her friends and had proceeded several steps beyond them, "she turned and made a nasty remark to me. I didn't answer her. I thought she had white slippers on and high heels and her left shoe caved in and she fell - - - forward and hit the iron rail on the lawn and struck her on the shoulder or the neck and when she was lying down she hollered 'Help, help, murder''; then she picked herself up and her husband came as she was partly standing and holding on to the iron rail, and her husband took hold of her and took

her to the home of a neighbor nearby, and that the witness then proceeded to her own home. Mrs. Roeske further testified that sometime in June, previous to the trial, which was about two years after the occurrence in question, the plaintiff had a conversation with the witness, in which she told the witness she ought to be ashamed of herself if she testified against her, and she asked the witness if she was going to testify, and the latter stated that she was going to the trial and would tell all she knew; that a few days later she called the witness out to the fence and said, "Mrs. Roeske, if you go with them, you ought to get kicked; I will give you $100 to stay home"; that "after that she run me off and accused me several times," saying, "she would break my neck." On cross-examination this witness testified that when the defendant came out ofthe store about nine o'clock, he said he had been up since four o'clock and was tired and was going to bed, and he bid them good night and disappeared; that the store had been lighted up previous to that time, and continued to be for several minutes after the defendant went in; that as the plaintiff approached, sometime later, the defendant's wife saw her, and said that she was going inside, whereupon, the witness told her she was sitting in front of her own property and that it would not be nice for her to go away and leave the witness sitting there all alone. At this point in her testimony the witness was asked if she was afraid of the plaintiff and she said she was not, "but it was very unpleasant". She was asked if she knew why the defendant' wife and daughter ran inside and she replied that they were afraid the plaintiff would get them into trouble.

The defendant testified that on the evening in question he retired at nine o'clock and that the store was open at that time and lighted; that he did not see Mrs. Zeman on that evening and first learned that there had been some commotion in front of his premises, on the following morning when his son told him about it. The only cross-examination of this witness had to do with his property, and apparently an effort was made by counsel for the plaintiff to show that he had put what he had in his wife's name presumably to avoid any judgment that might be entered against him in this case. He testified that he had transferred his property to his wife in 1916, which was three years before the alleged occurrence on which this action was based.

In rebuttal, one Josie McAurer testified that she lived at 3031 S. Kildare avenue and that she passed the defendant's premises on the evening in question. Upon being asked what time she passed, she replied, "I cannot say - about 9:30 - I don't remember just what time it was"; that as she passed she spoke to the defendant's daughter; that she saw the defendant there and his wife and Mrs. Koeske; that the defendant was standing in front of his store between the door and the window; that the witness and a friend who was with her, walked on beyond the defendant's store and "We just about got to the alley and she just passed." It does not appear who the witness meant by "she" but presumably it was the plaintiff. She then testified that when they got to the alley "I heard such screaming and I turned quickly and ran back and then I saw Mr. Zeman pick her up". She further testified that as she passed the store it was all lighted up and when she



The defendant testified that on the evening in question he noticed at some distance that the store was [illegible] and lighting; that he did not [illegible] [illegible] on that evening and first learned that there had been some commotion in front of his premises, on the following morning when his son told him about it. The only explanation of this witness was [illegible] with his property and apparently no effort was made by counsel for the plaintiff to show that he did [illegible] in the vicinity there presumably to avoid any judgment that might be entered against him in this case. He testified that he had transferred his property to his wife in [illegible], which was three years before the alleged occurrence on which this action was based.

In rebuttal, one [illegible] testified that she lived on [illegible] and that she passed the defendant's premises on the evening in question. When being asked what time she passed, she replied, "I cannot say – about 9:30 – I don't remember just what time it was"; that as she passed she spoke to the defendant's daughter; that she saw the defendant there and his wife out there, [illegible]; that the defendant was standing in front of his store between the door and the window; that the witness and a friend who was with her, walked on beyond the defendant's store and "he just stood out to the alley and the last ground." It does not appear who the witness meant by "him" but presumably it was the plaintiff. She then testified that when they got to the alley "I heard something and I turned quickly and the body was there I saw it, there like that". The witness testified that as she passed the store it was all lighted up and then she

came back after hearing the screaming, it was all dark. On cross-examination the witness testified that she was not sure when it was that she first talked with the defendant's daughter that evening; that she did not know exactly the hour and did not look at the time.

We have here two entirely different stories about what occurred in front of the defendant's store on the evening in question; one given by the plaintiff and her witnesses and the other given by the defendant and his witnesses. It is difficult, if not impossible to understand how the witness, Mrs. Kotwitz, could possibly have seen all she testified to, as it would seem from the testimony in the record that the place where the plaintiff fell to the sidewalk, or was knocked down as she claims, by the defendant, must have been outside of the range of vision of this witness. Certainly the witness could have been in no position to testify as she did, that at the time in question the door of the defendant's store was open. There are other minor inconsistencies in the testimony of the plaintiff's witnesses.

Quite apart from any inconsistencies that may have been in the testimony given by either side, the witnesses all appeared before the jury and told their totally different stories of what occurred. The jury had every opportunity to observe these witnesses on the stand and come to a conclusion as to their bias or lack of bias; their respective opportunities for seeing what they claimed to have seen, and especially valuable was the opportunity the jury had of seeing the plaintiff and the defendant as they told their stories. If such an un-

were here either letting the screaming, it was all over. On cross-examination the witness admitted that she was not sure when it was that she first talked with the defendant's daughter that evening; that she did not know exactly how long and did not look at the time.

We have here two entirely different stories about what occurred in front of the defendant's store on the evening in question; one given by the plaintiff and her witnesses and the other given by the defendant and his witnesses. It is difficult, if not impossible to understand how the witness, Mrs. Kotwitz, could possibly have seen all she testified to, as it would seem from the testimony in the record that the place where the plaintiff fell to the sidewalk, or was knocked down as she claims, by the defendant, must have been outside of the range of vision of this witness. Certainly the witness would have been in no position to testify as she did, that at the time in question the door of the defendant's store was open. There are other minor inconsistencies in the testimony of the plaintiff's witnesses.

Quite apart from any inconsistencies that may have been in the testimony given by either side, the witnesses all appeared before the jury and told their totally different stories of what occurred. The jury had every opportunity to observe these witnesses on the stand and come to a conclusion as to their bias or lack of bias; their respective opportunities for seeing what they claimed to have seen, and especially valuable was the opportunity the jury had of seeing the plaintiff and the defendant as they told their stories. If each of the

provoked assault, as the plaintiff described, took place, the defendant must have possessed the sort of a character and nature which would be rather difficult to hide from the scrutinizing gaze of the jury. In other words, a man of the character who would make such a vicious and uncalled for assault upon a woman, would, in our opinion, have a rather difficult time taking the witness stand and fooling twelve jurors into believing that he was in bed and asleep at the time. The jury having found, after listening to his testimony, as well as the plaintiff's, and to the testimony of the other witnesses, that he was in bed, we are of the opinion that he must have made such an impression on the jury as to convince them he was not the type of man to deliberately knock a woman down and then proceed to kick her about. Certainly, from a reading of the testimony in the record, it would be impossible for this court to say that the verdict of the jury was contrary to the manifest weight of the evidence, and, therefore, we would not be justified in disturbing it.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

339 - 28174

P. H. REED, et al,
Appellees,

v.

ALBERT F. WERNER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A. 626

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1500.00, recovered in the Municipal Court of Chicago by the plaintiffs. The latter brought suit against the defendant, alleging that he owed them $1500.00 as a commission, which they alleged he had promised to pay in case the plaintiffs brought about the sale of the Valkyrie Hotel, in the city of Chicago, of which the defendant was the owner and proprietor. The plaintiffs alleged that after having made the agreement referred to, with the defendant, they procured a Mrs. Curry, who was ready, able and willing to buy the property, on the defendant's terms, but that the defendant refused to carry out the sale. The issues were submitted to a jury resulting in a verdict for the plaintiffs, finding their damages at the amount claimed.

The plaintiff, Reed, testified that in March 1918, the defendant gave him all the details involved in his hotel property, so that they might be submitted to prospective purchasers; that from time to time thereafter the plaintiffs

sent people to look at the hotel and at different times the witness discussed these people with the defendant. He further testified that the deal in question involved the sale of the furniture of the hotel, on which the defendant put a price of $14,000, and subsequently increased it to $15,000, net to him; and it also involved a ten year lease on the hotel property, at a rental of $550.00 a month. In October 1919, the plaintiffs procured Mrs. Curry as a prospective purchaser and at their request she went out to look the property over. On this visit to the hotel she saw the defendant, who showed her about. Reed testified that Mrs. Curry returned to his office and made an offer which was less than that which the defendant had named, and he submitted the figure to the defendant, but the latter refused it, saying that he would not take less than $15,000.00 net cash to him on the furniture and a lease for ten years at $550.00 a month. Apparently negotiations were carried on with Mrs. Curry for several days, following her visit to the hotel. Reed testified that at or about the time Mrs. Curry looked the property over, he got some further data from the defendant, saying that he wanted the information so he could draw a contract which he would try to have Mrs. Curry sign, and also that he would endeavor to get her to make a deposit. The next day Mrs. Curry called at the office of the plaintiffs, and she was told by Reed that the best proposition they could make was one involving a consideration of $16,500.00, for the hotel furnishings, of which she would have to pay $13,500, Reed saying that he would put up the difference and take a mortgage to secure himself. They finally closed the deal on that basis and drew up the contract, which Mrs. Curry signed, making a deposit of $1,000. The plaintiffs executed

the contract in behalf of the defendant.

The evidence shows that on the following Monday morning the defendant called up Mr. Reed and made some inquiry about the amount of commission they were charging, saying that he understood it would be five per cent and not $1500.00. Reed testified that the defendant had agreed that the plaintiffs were to have, as their commission, whatever amount they were able to secure from a purchaser, above $15,000.00. He further testified that he explained the situation to the defendant during the telephone conversation above referred to, and that the defendant said that "it was absolutely satisfactory to him." Mrs. Curry had left several references with the plaintiffs, from whom the latter made inquiry, and the replies to these inquiries in writing, were taken out to the defendant, according to the testimony of Reed, and the defendant was satisfied with them and said they were fine. Shortly thereafter the defendant told the plaintiffs that if he was to go ahead and complete the deal he would have to have $600.00 a month rent as he understood the taxes were going to be higher. The plaintiffs explained that the deal had been closed on a basis of $550.00 a month and that the contract could not be changed. Defendant thereupon refused to carry out the contract on that basis insisting on $600.00 a month, on account of the increase in taxes, and he also said his wife did not want to give up her home. The defendant and his wife occupied an apartment in the hotel.

On cross-examination Reed testified that during the negotiations with Mrs. Curry, he told the defendant that she would probably not be able to pay all cash and that he, Reed,

would probably have to advance some money and carry a mortgage, which the defendant said would be all right.

Mrs. Curry testified, in corroboration of the testimony given by Reed, stating that the defendant and his wife showed her over the hotel on the occasion of her visit there, and the defendant explained the conditions of the deal, telling her that the rental was to be $550.00 per month, and a ten year lease with the privilege of an extension of five years. She further testified that she was willing and ready to carry out the contract which she entered into; that she had about $18,000.00 in cash in the bank but that she did not want to use it all, by paying the full contract price in cash, as she wished to retain some money as working capital. She testified she was worth approximately $27,600.00 at the time she made the contract.

The defendant testified (by deposition) that in October 1919, he told Reed that he would sell his hotel, if he secured a tenant that was satisfactory to him; that his terms were $15,000 net to him for the furniture, and a ten year lease at a rental of $550.00 a month and that if a tenant could be procured on those terms, who was satisfactory to him, he would make a lease. He testified that after this conversation Reed sent Mrs. Curry and her husband to the hotel to look it over, but that he did not lease the property to them because they were not satisfactory to him. The defendant further testified that Mrs. Curry afterwards came out to the hotel alone and stated that she and her husband were having some trouble about money matters

would probably have to advance some money and carry a mortgage, which the defendant said would be all right.

Mrs. Curry testified, in corroboration of the testimony given by Reed, stating that the defendant and his wife showed her over the hotel on the occasion of her first visit there, and the defendant explained the conditions of the deal, telling her that the rental was to be $250.00 per month, and a ten year lease with the privilege of an extension of five years. She further testified that she was willing and ready to carry out the contract which she entered into; that she had about $18,000.00 in cash in the bank but that she did not want to use it all, by paying the full contract price in cash, as she wished to retain some money as working capital. She testified she was worth approximately $27,000.00 at the time she made the contract.

The defendant testified [illegible] that in October 1919, he told Reed that he would sell his hotel, if he secured a tenant that was satisfactory to him; that the terms were $25,000 net to him for the furniture, and a ten year lease at a rental of $250.00 a month and that if a tenant would be procured on these terms, who was satisfactory to him, he would make a lease. He testified that after this conversation Reed sent Mrs. Curry and her brother out to the hotel to look it over, but that he did not lease the property to them because they were not satisfactory to him. The defendant further testified that Mrs. Curry's people came out to the hotel alone and stated that she and her husband were having some trouble about money matters

and that he had withdrawn from the deal; that Reed called up and he told him that he did not care to lease the property to Mrs. Curry alone. He testified that Mr. and Mrs. Curry were satisfactory to him as tenants, but that he would not rent to a woman alone. He also testified that Reed wanted to have a mortgage on the personal property and he refused to agree to that. The defendant denied telling Reed that the plaintiffs' commission was to be any amount they might procure from a purchaser, over $15,000. He also denied telling Reed that he would not rent to Mrs. Curry at $550.00 but would rent it for $600.00; that he refused to make the deal with the Currys because he found that Mr. Curry had withdrawn from the deal on account of financial trouble. There were no witnesses for the defendant other than the defendant himself.

While testifying on the direct case, Mrs. Curry stated on cross-examination that her husband was not planning to go into this deal with her; that there were no financial difficulties in which either she or her husband were involved; that there was no disagreement with reference to the purchase of the furniture and lease of the hotel; that on the occasion of her visit to the hotel the defendant seemed perfectly satisfied with her as a tenant and did not state that he did not wish to rent to a woman alone. Mrs. Curry was also called in rebuttal and testified again about the defendant showing her over the hotel and introducing her to different tenants. She again testified that on this occasion the defendant said he was perfectly satisfied with her; and told her about additional charges to be made, for coal, linen, and some books, and also about the feature of the prospective deal, which involved an extension of five years beyond the

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While testifying on the direct case, Mrs. Curry stated on cross-examination that her husband was not unwilling to go into this deal with her; that there were no financial difficulties in which either she or her husband were involved; that there was no disagreement with reference to the purchase of the furniture and lease of the hotel; that on the occasion of her visits to the hotel the defendant seemed perfectly satisfied with her as a tenant and did not state that he did not wish to rent to a woman alone. Mrs. Curry was also called in rebuttal and testified again about the defendant showing her over the hotel and introducing her to different people. She again testified that on this occasion the defendant said he was perfectly satisfied with her, and told her about additional changes to be made, for music, linen, and more rooms, and also about the details of the prospective deal, which involved an extension of five years beyond the

term of ten years. Reed was also called in rebuttal, and testified that no one had ever mentioned any financial trouble between Mr. and Mrs. Curry; that he had eight or ten conversations with the defendant and the latter never said or even intimated that Mrs. Curry was not satisfactory; that after the contract with Mrs. Curry was executed and she made her deposit of $1,000.00, he turned one copy of the contract over to her and took two other copies out to the defendant; that the defendant looked over one of them while the witness read the other aloud, and that the defendant said it was satisfactory. He further testified that at the time the defendant gave him the data, to use in drawing up the contract, he authorized the witness to accept a deposit. The contract as it was executed by Mrs. Curry called for a consideration of $16,500, of which $13,500 was to be paid in cash, and the balance of $3,000 in monthly payments, to be secured by a chattel mortgage. After the contract was executed and when Reed submitted it to the defendant, he testified that he told the defendant that he, personally was carrying the mortgage, and that in the event of a foreclosure, he would want to transfer the lease to one Ida M. Stebbins, and that the defendant said that would be all right as he knew Mrs. Stebbins as a woman in the hotel business in whom he had confidence.

The plaintiffs offered one Moran as a witness, by whom they offered to show that the defendant had subsequently executed a lease of the hotel on a basis of a monthly rental of $800.00. Objection was sustained to this testimony, however, and it was not admitted.

In support of his appeal the defendant contends that he was justified in refusing to lease his hotel to Mrs. Curry, because, under his agreement with the plaintiffs he was to be the sole judge of whether any prospective tenant and purchaser of the hotel property was satisfactory to him, and Mrs. Curry was not. The testimony as to the latter point is flatly contradicted by both Reed and Mrs. Curry. If the jury believed their testimony, and there is nothing in the record to indicate why they should not do so, they were entirely justified in concluding that Mrs. Curry was satisfactory to the defendant, but that the real reason why he concluded not to carry out the deal with her, was that he had found out he was going to have some increase in his taxes and, therefore, he wanted a higher rental. The defendant further apparently contends that the plaintiffs failed to make out that they had procured a purchaser who was ready, willing and able to close the deal for the hotel, at the defendant's terms. In our opinion, the evidence, the substance of which we have set forth above, would warrant the jury in believing the contrary. It is also contended that the authority from the defendant to the plaintiffs was to sell the furniture for cash, while the contract they concluded with Mrs. Curry was for part cash and a chattel mortgage to secure the balance. The evidence in our opinion, is sufficient to show, and to warrant the jury in believing, that the terms put upon the deal by the defendant were that he was to receive $15,000 net, in cash for the furniture, and the plaintiffs were to receive whatever they could get over that amount, as their commission. Reed testified that he told the defendant, in discussing the prospective deal with Mrs.

In support of his appeal the defendant contends that he was justified in refusing to lease his hotel to Mrs. Curry, because, under his agreement with the plaintiffs he was to be the sole judge of whether any prospective tenant and purchaser of the hotel property was satisfactory to him, and Mrs. Curry was not. The testimony as to the latter point is flatly contradicted by both Reed and Mrs. Curry. If the jury believed their testimony, and there is nothing in the record to indicate why they should not do so, they were entirely justified in concluding that Mrs. Curry was satisfactory to the defendant, but that the real reason why he concluded not to carry out the deal with her, was that he had found out he was going to have some increase in his [illegible] and, therefore, he wanted a higher rental. The defendant further apparently contends that the plaintiffs failed to make out that they had procured a purchaser who was ready, willing and able to close the deal for the hotel, at the defendant's terms. In our opinion, the evidence, the substance of which we have set forth above, would warrant the jury in believing the contrary. It is also contended that the authority from the defendant to the plaintiffs was to sell the furniture for cash, while the contract they concluded with Mrs. Curry was for part cash and a chattel mortgage to secure the balance. The evidence in our opinion, is sufficient to show, and to warrant the jury in believing, that the terms put upon the deal by the defendant were that he was to receive $15,000 net, in cash for the furniture, and the plaintiffs were to receive whatever they could get over that amount, as their commission. Reed testified that he told the defendant, in discussing the prospective deal with him,

Curry, that if she could not put up enough money so that the defendant would get $15,000 net cash, he would advance the amount necessary to make that payment to the defendant, and would secure himself by a chattel mortgage, and that the defendant said that the arrangement was satisfactory. He further testified that after he had concluded the contract with Mrs. Curry and when he talked it over with the defendant he explained to the latter that in advancing the money necessary to make a payment of $15,000, to the defendant, he, Reed, was not getting any cash out of the deal as he was carrying the mortgage, and he then asked the defendant whether he would consent to the transfer of the lease to Mrs. Stebbins, if there should be a foreclosure, and he replied, "certainly, we have known her a good many years; we would be protected in every way."

We are unable to say that in concluding that the defendant had authorized the making of such terms as were included in this contract, the jury decided the issues against the manifest weight of the evidence.

The defendant complains of the offer of the plaintiffs to prove by the witness Moran that the defendant had leased his hotel property on a basis of $800.00 a month, the complaint being that although the court sustained the defendant's objection, the damage was, nevertheless, done, because the jury heard the statement of counsel for the plaintiffs as to what he offered to prove by this witness. In our opinion, the evidence was competent and should have been admitted, as tending to corroborate the testimony of Reed to the effect that when the defendant refused to go on with the deal with Mrs. Curry he gave as his reason that he wanted

Curry, that if she would not put up enough money so that the defendant would get $18,000 net cash, he would arrange the amount necessary to make that payment to the defendant, and would secure himself by a chattel mortgage, and that the defendant said that the arrangement was satisfactory. He further testified that after he had completed his business with Mrs. Curry and when he talked it over with the defendant he explained to the latter that in advancing the money necessary to make a payment of $18,000, to the defendant, he, Marsh, was not getting any cash out of the deal as he was carrying the mortgage, and he then asked the defendant whether he would consent to the transfer of the lease to Mrs. Curry, if there should be a foreclosure, and he replied, "Certainly, it does not make a good many years, he would be satisfied in every way."

It is manifest in any event in concluding that the defendant had authorized the making of such terms as were included in this contract, the jury decided the issues against the manifest weight of the evidence.

Complainant complains of the offer of the plaintiffs to prove by the witness Dunn that the defendant had leased his hotel property on a basis of $500.00 a month, the complaint being that although the court sustained the defendant's objection, the damage was, nevertheless, done, because the jury heard the statement of counsel for the plaintiffs as to what he offered to prove by this witness. In our opinion, the evidence was competent and should have been admitted, as tending to corroborate the testimony of Marsh to the effect that when the defendant refused to go on with the deal with Mrs. Curry he gave as his reason that he wanted

$600.00 a month rent and also that his wife did not want to give up her home, and that he said at the time that he could get $600.00 a month.

We find no error in the record and, therefore, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. and O'CONNOR, J. CONCUR.

348 - 28183

WILLIAM PICKTORMAN, Appellee, v. SUBSCRIBERS TO AUTOMOBILE UNDERWRITERS OF AMERICA, an Unincorporated Interinsurance Exchange, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 636

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Pictorman brought this action against the defendants, seeking to recover the value of his automobile which had been stolen. The action was based on a policy of insurance issued by the defendants to the plaintiff, covering loss of the automobile by theft. The defendants failed to file their appearance by reason of which they were defaulted. In due time the matter was submitted to a jury, resulting in a verdict and judgment for the plaintiff in the sum of $2,000. Thereafter, on motion of the defendants, the judgment was vacated and the defendants were given leave to plead. At the time this was done the parties entered into a stipulation to the effect that, the judgment being vacated, the defendants were to be permitted to contest only the value of the property involved, and also to interpose the defense that the property was lost or stolen with the knowledge and connivance of the plaintiff. The defendants interposed appropriate pleas, pursuant to the terms of the stipulation, and on the issues thus made up there was a hearing and a verdict

for the plaintiff, and his damages were assessed at the sum of $1749.50. On that verdict judgment was duly entered for the plaintiff, to reverse which the defendants have prosecuted this appeal.

In support of their appeal, the defendants contend that the declaration fails to state a cause of action, in that it fails to state what the defendants promised, in and by the policy of insurance declared on. The declaration did not set the policy forth in haec verba, nor did it state the substance of the policy. A copy of the policy is attached to the declaration and it is stated that the defendants had promised the plaintiff, in the terms of said policy, "as will more fully appear from said policy when produced in court and a true and correct copy of the same which is hereto annexed and marked "Exhibit A" and incorporated with and made a part of this declaration." A copy of a writing upon which a suit is brought, is no part of a declaration. Flew v. Board, 274 Ill. 332. However, the defendants are not in a position to make any such contention in this case. When they submitted their motion in the trial court, to vacate the judgment which had been entered by default, they submitted an affidavit to the effect that a suit had been brought against them "on an insurance policy issued by the defendants to the plaintiff, insuring plaintiff against loss of his automobile by theft." When the default judgment was vacated, the defendants stipulated that they were to contest not the insufficiency of the pleadings but merely the value of the automobile and the question of whether it had really been stolen as the plaintiff contended. Furthermore, in the pleas filed by the defendants after the

for the plaintiff, and his damages were assessed at the sum of $[illegible]. On that verdict judgment was duly entered for the plaintiff, to reverse which the defendants have prosecuted this appeal.

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default judgment had been set aside, the defendants pleaded "that the plaintiff ought not to have his aforesaid action against them because they say that in and by said policy of insurance it is provided that the defendants shall only be liable to the extent of the value of the property insured thereby, at the time of loss." The defendants may not now be heard to say that the declaration failed to properly plead the substance of the contract of insurance, both because they waived any defects there may have been in the pleadings by their stipulation (Whitehouse v. Halsted, 90 Ill. 95) and because, by the pleas filed, the defendants themselves supplied the substance of the contract sued upon. Rubens v. Hill, 213 Ill. 523).

The defendants further urge that the verdict and judgment are contrary to the evidence, in that no policy of insurance as described in the declaration was introduced in evidence. The declaration alleged that the defendants had executed and delivered their policy of insurance to the plaintiff "heretofore, to wit: on the 13th day of October, A. D. 1921," and that the automobile insured had been stolen on September 27, 1921. The policy of insurance introduced in evidence by the plaintiff was dated October 13, 1920, and covered the period from that date to September 30, 1921. When this policy was offered in evidence no point of variance was made by counsel for the defendants, but, on the contrary, he stated that there was no objection to the offering of the policy in evidence. In that state of the record, the defendants may not now argue the point, and they may not do so for the further reason that no such defense is included by the defendants in the stipulation above referred to.

default judgment had been set aside, the defendants pleaded 'that the plaintiff ought not to have his aforesaid action against them because they say that in and by said policy of insurance it is provided that the defendants shall only be liable to the extent of the value of the property insured thereby, at the time of loss.' The defendants may not now be heard to say that the stipulation failed to properly plead the substance of the contract of insurance, both because they waived any defects there may have been in the pleadings by their stipulation ([illegible] v. [illegible], [illegible] Ill. [illegible]) and because, by the plea filed, the defendants themselves supplied the substance of the contract sued upon. [illegible] v. [illegible], [illegible] Ill. [illegible].

The defendants further urge that the verdict and judgment are contrary to the evidence, in that no policy of insurance as described in the declaration was introduced in evidence. The declaration alleged that the defendants had executed and delivered their policy of insurance to the plaintiff 'heretofore, to wit: on the [illegible] day of October, A. D. [illegible],' and that the automobile insured had been stolen on September [illegible], [illegible]. The policy of insurance introduced in evidence by the plaintiff was dated October [illegible], [illegible], and covered the period from that date to September [illegible], [illegible]. When this policy was offered in evidence no point of variance was made by counsel for the defendants, but, on the contrary, he stated that there was no objection to the offering of the policy in evidence. In that state of the record, the defendants may not now urge the point, and they may not do so for the further reason that no such defense is included by the defendants in the stipulation above referred to.

Finally, the defendants contend that the amount of the judgment appealed from is excessive, and contrary to the weight of the evidence, as to the value of plaintiff's automobile, at the time it was stolen. Shortly before the plaintiff lost his automobile, and in contemplation of the early expiration of the policy under which this suit was brought, the plaintiff had procured another policy, from the same defendants, covering a period beginning at the time of the expiration of the first policy. By the terms of the policy last taken out, the automobile was insured for theft up to the extent of $1,500. In the policy sued on, it was insured for theft up to $2200.00. In both policies the cost of the automobile to the plaintiff was given as $2500.00. In the policy sued on its "present value" was given as $2500.00 and in the new policy taken out just prior to the theft, nothing was stated as to its present value. Witnesses for the plaintiff, who, from their testimony, were well qualified to testify on the subject of values, stated that in their opinion such a car as the plaintiff had lost would have a value of $2,000.00. On the other hand, one witness for the defendants said he thought its fair cash value would be $900.00; another said it would be from $750.00 to $950.00; and another put it at $650.00. The company which manufactured the car in question had discontinued the model but were manufacturing another, which one witness described as "practically the same car, only different size body, same motor, rear axel and construction all the way through." It was selling for $3985.00. This was in 1921 and the plaintiff's car was a 1919 model. The plaintiff's car was a Haynes touring car. It contained five wire wheels with Diamond Cord tires. The four tires in use on the plaintiff's car when it was stolen had been

Finally, the defendants contend that the amount of the judgment appealed from is excessive, and contrary to the weight of the evidence, as to the value of plaintiff's automobile, at the time it was stolen. Shortly before the plaintiff lost his automobile, and in contemplation of the early expiration of the policy under which this suit was brought, the plaintiff had procured another policy, from the same defendants, covering a period beginning at the close of the expiration of the first policy. By the terms of the policy last taken out, the automobile was insured for theft up to the amount of $1,500. In the policy sued on, it was insured for theft up to $2000.00. In both policies the cost of the automobile to the plaintiff was given as $2250.00. In the policy sued on its "present value" was given as $1500.00 and in the new policy taken out just prior to the theft, nothing was stated as to its present value. Witnesses for the plaintiff, who, from their testimony, were well qualified to testify on the subject of values, stated that in their opinion such a car as the plaintiff had lost would have a value of $2,000.00. On the other hand, one witness for the defendants said he thought its fair cash value would be $650.00; another said it would be from $750.00 to $800.00; and another put it at $600.00. The company which manufactured the car in question had discontinued the model but was manufacturing another, which one witness described as "practically the same car, only different wire body, same motor, rear end and construction all the way through." It was selling for $1885.00. This was in 1923 and the plaintiff's car was a 1919 model. The plaintiff's car was a 7-passenger touring car. It was equipped with five wire wheels with Silvertown cord tires. The four tires in use on the plaintiff's car when it was stolen had been

run about 4000 miles. It appears from the testimony of one of the plaintiff's witnesses, who was a mechinist and automobile repairer of some twenty years's experience, that he had overhauled the plaintiff's car, which was of the seven passenger, six cylinder type, in April 1921, and that at that time "the engine, mechanism and chassis were all in good condition."

While the verdict and judgment appealed from would seem to be liberal, we are not in a position to say, from all the evidence in the record, on the issue of damages, that they are excessive.

For the foregoing reasons the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

360 - 28195

GEORGE J. HABERER, doing business as The George J. Haberer & Company,

Appellee,

v.

GEORGE E. LENZ,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 627

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1945.00, recovered against him by the plaintiff, Haberer, in the Municipal Court of Chicago. The action was brought against the defendant by the plaintiff to recover $1500.00 which he claimed he was entitled to as a commission on the sale of a piece of property for the defendant. The issues were submitted to the court without a jury. The court found theissues for the plaintiff and, in assessing damages, included interest on the amount claimed, under the allegation in the plaintiff's amended statement of claim, to the effect that there had been unreasonable and vexatious delay, on the part of the defendant, in the matter of the payment of his account.

The period of the Statute of Limitations on this claim expired shortly after plaintiff began this action. The plaintiff's first statement of claim was based on the sale of a certain piece of property, which had belonged to the defendant, to a party who was named "Hisch", in the statement of

claim, but it developed, in the taking of the testimony, that the name of the party in question was "Misch". Thereupon, over defendant's objection, leave was given to the appellant to amend his statement of claim on its face. The point was then, and is now made that the statement of claim, as so amended, set up a new cause of action and was subject to the plea of the Statute of Limitations, which the defendant subsequently filed. In our opinion, there is no merit to that contention.

The defendant further contends that the original statement of claim did not set forth a cause of action, in that it did not include allegations, as to certain facts essential to a cause of action based on a claim for real estate commissions, resulting from a sale of the defendant's property by the plaintiff, as a real estate agent. An amended statement of claim, which was filed by the plaintiff in the course of the trial, included these allegations which the defendant contends were a necessary part of the original statement of claim, in order to have it set forth a good cause of action. The defendant pleaded the Statute of Limitations to the amended statement of claim and contends that the trial court erred in not sustaining it. In our opinion, it may not be said that the original statement of claim was based on an express agreement, while the amended statement of claim is on the theory of quantum meruit. Both statements of claim are clearly based on the latter theory. In the affidavit of merits interposed by the defendant, to the original statement of claim, as well as in the affidavit which he interposed to the amended statement of claim, the defendant made direct denial of the existence of those elements which he now

claim, but is insistent, in its brief, at the hearing, that the mere of the party to question the "right". Thereupon, over defendant's objection, leave was given to the applicant to amend his statement of claim on its face. The point was then, and is now made that the statement of claim, as so amended, set up a new cause of action and was subject to the plea of the Statute of Limitations, which the defendant subsequently filed. In our opinion, there is no merit in that contention.

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claims the plaintiff should have included in his original statement of claim, and for the lack of which, the defendant now contends the original statement of claim was defective. Even if it be assumed that the plaintiff's original statement of claim was defective, for want of some essential allegations (a question which we do not here decide) the defendant may not file an affidavit of merits, basing his defense specifically upon an express denial of the very elements, which the plaintiff may have failed to allege, and proceed to trial of the case on its merits, on the issues thus joined, and thereafter be heard to contend that the plaintiff's original statement of claim did not set up a cause of action. Lyons v. Kanter, 285 Ill. 336.

In our opinion, after a defendant, by an affidavit of merits, has thus joined issue on the original statement of claim, if the plaintiff, after the period of the Statute of Limitations has run, files an amended statement of claim, making essential specific allegations of fact, which were wanting in his original statement of claim, a plea of the statute of limitations interposed by the defendant, to the amended statement of claim, should not be sustained,- the defendant in his original affidavit of merits, having denied the existence of the facts which, in support of his plea of the Statute of Limitations, he contends the plaintiff failed to allege in his original statement of claim, thus making the latter defective.

In other words, assuming the plaintiff omits what may be held to be essential elements of a statement of a good cause of action, the defendant may not join issue on such a pleading of the plaintiff's and deny the elements not specifically

alleged by the plaintiff by appropriate allegations in his pleading, and later successfully plead the Statute of Limitations to an amended pleading filed by the plaintiff after the period of the Statute has run, in which amended pleading, the plaintiff includes the elements in question.

In the trial of the case at bar, after both sides had closed their proofs, the defendant made the point that no showing had been made as to the usual and customary commission, in the City of Chicago, on such sales as the one involved, and the trial court permitted the plaintiff to reopen his case and submit such proof. Such a course was within the sound discretion of the court, and, in our opinion, it was properly exercised, to permit the plaintiff to submit the proof in question. Moreover, it is our opinion that the evidence which was submitted was sufficient to show not merely that the Chicago Real Estate Board rate of commission on such sales was 2½%, as the defendant contends, but that such was the usual and customary rate chafged by real estate brokers in Chicago, which was the proof necessary to make out the plaintiff's case. In order to make out his case, it was incumbent upon the plaintiff to introduce evidence of such facts as would show or tend to show, an employment by the defendant to sell his property, or a promise on the part of the defendant to pay a commission in case a sale was made, and also that such a sale was consummated and that the plaintiff was the procuring cause of the sale.

The defendant was the proprietor of a shoe store, located on property in the City of Chicago which he owned, and it is a sale of this property which is involved here. In submitting his proof the plaintiff called the defendant

alleged by the plaintiff by appropriate allegations in his pleading, the latter substantially filed his bill of complaint to an amended pleading filed by the plaintiff after the period of the statute had run, in which amended pleading, the plaintiff includes the elements in question.

At the close of the case at law, after both sides had rested their proofs, the defendant made the point that no showing had been made as to the usual and customary commission, in the city of Chicago, on such sales as the one involved, and the trial court permitted the plaintiff to reopen his case and submit such proof. Such a course was within the sound discretion of the court, and, in our opinion, it was properly exercised, in permitting the plaintiff to submit the proof in question. Moreover, it is our opinion that the evidence which was submitted was sufficient to prove not merely that the Chicago real estate board rate of commission on such sales was 2½, as the defendant contends, but that such was the usual and customary rate charged by real estate brokers in Chicago, which was the proof necessary to make out the plaintiff's case. In order to make out his case, it was incumbent upon the plaintiff to introduce evidence of such facts as would show at least in the first instance, an employment by the defendant to sell his property, or a promise on the part of the defendant to pay a commission in case a sale was made, and also that such a sale was consummated and that the plaintiff was the procuring cause of the sale.

The defendant was the proprietor of a shoe store, located on property in the City of Chicago which he owned, and it is a sale of this property which is involved here. In submitting his proof the plaintiff called the defendant

to the stand, under Section 33 of the Municipal Court Act, and the defendant testified that the property in question was sold on April 17, 1916, to one Weil; that about a year prior to that time the plaintiff first talked with him about selling this property; that the plaintiff "used to come in the store" and talk to the defendant about the property and the defendant told the plaintiff that if he brought him a buyer who would pay $60,000, he would sell the property,- that $60,000 was his price for the property; that the sale which was effected to Weil was on the basis of $60,000 and a six month's lease on the store, rent free. He further testified that his sale to Weil was closed in the office of a lawyer named, Pritzker; that on the following morning he noted an item referring to his transfer to Weil, in one of the newspapers, and at that time saw another item noting a transfer of the property from Weil to Herman E. Misch; that at that time he had never met Misch, but that he met him, for the first time, some six weeks after the sale to Weil was made. At this point plaintiff introduced in evidence, over defendant's objection to the effect that it was not the best evidence, a certified copy of the deed to the property in question, from the defendant to Weil. In our opinion, the objection by the defendant was a valid one and it should have been sustained. No showing was made to account for the absence of the original deed, such as is provided for in Sections 36, 37 and 38 of Ch. 34 of the Illinois Statutes. Some statement was made to the effect that the defendant had been notified to produce the original of the deed but later counsel for the plaintiff said he withdrew the notice. Of course, any such notice, if given, would not bring the plaintiff within the provisions of the chapter of our Statutes on Conveyances, above referred to.

to the block, under Section 18 of the Municipal Court Act, and the defendant testified that the property in question was sold on April 15, 1921, to one Hall; that [illegible] real estate at that time [illegible] with the block [illegible] telling this plaintiff that the plaintiff "would be sued as the agent" and that to the reference about the property was the defendant told the plaintiff that if he brought him a buyer who would pay $22,000, he would sell the property; that $22,000 was the price for the property; that the sale which was effected to Hall was in the [illegible] of $22,000 and a six month's lease on the store, rent free. He further testified that his sale to Hall was closed in the office of a lawyer named, Tuchbandy; that on the following morning he noticed an item, referring to his transfer to Hall, in one of the newspapers, and at that time saw another item noting a transfer of the property from Hall to Herman S. Block; that at that time he had never met Block, and that he met him, for the first time, some six weeks after the sale to Hall was made. At this point plaintiff introduced in evidence, over defendant's objection to the effect that it was not the best evidence, a certified copy of the deed to the property in question, from the defendant to Hall. In our opinion, the objection by the defendant was a valid one and it should have been sustained. No showing was made to account for the absence of the original deed, such as is provided for in Sections 36, 37 and 38 of Ch. 30 of the Illinois Statutes. Some statement was made to the effect that the defendant had been notified to produce the original of the deed but later counsel for the plaintiff said he withdrew his notice. Of course, any such notice, if given, would not bring the plaintiff within the provisions of the chapter of our Statutes on Conveyances, above referred to.

It would not be expected that the original of the deed would be in the defendant's possession.

The plaintiff testified that he first met the defendant in 1913 and at that time he asked the defendant what he would take for the property in question, and he said he ought to have $35,000 for it; that some months later he saw the defendant at his store and called his attention to some changes that had taken place in the neighborhood and asked him what he was then asking for his property, and he said he ought to get $50,000, and the plaintiff said he would see what he could do on a sale; that he submitted the property to several parties, but did not get a buyer at that time. He testified that again in the fall of 1915 he talked with the defendant at his store and told him he thought a sale could be made at $50,000, and the defendant then said he would not sell for that amount but wanted $60,000; that he asked the defendant if he would pay the regular Real Estate Board commission if the sale was effected, and he said he would and the plaintiff said he would see what he could do with it; that he offered the property to different parties and every few days would stop in and see the defendant. He testified that he first talked with Misch about the property early in March 1916; that he talked with the defendant at his store and told him he had talked with Misch, who was the owner of property adjoining that of the defendant, and that Misch wanted the defendant's corner, and said he would buy it if the defendant would make his price right, and the defendant repeated that his price was $60,000; that the plaintiff told the defendant at this time, that the best offer Misch would make was $52,000, and the

It would not be expected that the original of the deed would be in the defendant's possession.

The plaintiff testified that he first met the defendant in 1918 and at that time he asked the defendant what he would take for the property in question, and he said he would be ready to take $75,000 for it; that about a month later he saw the defendant at his store and called his attention to some changes that had taken place in the neighborhood and asked him what he was then asking for his property, and he said he ought to get $80,000, and the plaintiff said he would see what he could do as a sale; that he submitted the property to several parties, but did not get a buyer at that time. He testified that again in the fall of 1919 he talked with the defendant at his store and told him he thought a sale could be made at $80,000, and the defendant then said he would not sell for that amount but wanted $85,000; that he asked the defendant if he would pay the regular real estate commission if the sale was effected, and he said he would and the plaintiff said he would see what he could do with it; that he offered the property to different parties and among the ones which among he did see was the defendant. He testified that he first talked with Clark about the property early in March 1920; that he talked with the defendant at his store and told him he had talked with Clark, who was the owner of property adjoining that of the defendant, and that Clark wanted the defendant's address, and said he would buy it if the defendant would make his price right, and the defendant reported that his price was $85,000; that the plaintiff told the defendant at this time, that the best offer Clark would make was $80,000, and the

defendant said that Misch could not have it for that price, but would have to pay $60,000; that the defendant told the plaintiff to be patient with Misch and he would probably buy; that the plaintiff asked the defendant whether he would be protected on his commission if the sale was made to Misch and the defendant said that if Misch bought the property the plaintiff would get the regular commission; that the plaintiff told the defendant that he would go and see Misch and tell him that his offer of $52,000 was not acceptable; that he saw the defendant three or four days later and told him he had again seen Misch and that the latter had refused to raise his offer and stated that the plaintiff was working too much for the defendant's interests; that on the 6th of April the plaintiff saw the defendant again and told him he had seen Misch twice in the meantime but had been unable to get him to increase his offer. The plaintiff introduced in evidence a letter which he wrote the defendant under date of April 10, 1916, saying he was writing to let the defendant know he had not forgotten his property; that he had not heard definitely "from Mr. Koch nor Mr. Misch, but have told him that his offer of $52,000 would not be accepted and that he had best make an offer that will come nearer to your $60,000 price. Undoubtedly you will find somebody in the near future that can see the real value of your property. Hoping to make a deal for you, I am," and so on. The plaintiff further testified that he again called on the defendant on the 13th of April, and reported that he had seen Misch again and also another man named Steinenthal, and he asked the defendant whether he would consider anything under $60,000, and he said he would not and told the plaintiff to keep on going and he would get that price, and the plain-

defendant said that Klock would not take it for that price, and would have to pay $65,000; that the defendant told the plaintiff to go and see Klock and he would probably buy; that the plaintiff asked the defendant whether he would be protected on his commission if the sale was made to Klock and the defendant said that if Klock bought the property the plaintiff would get the regular commission; that the plaintiff told the defendant that he would go and see Klock and told him that his offer of $60,000 was not acceptable; that he saw the defendant three or four days later and told him he had again seen Klock and that the latter had refused to raise his offer and stated that the plaintiff was working too much for the defendant's interests; that on the 6th of April the plaintiff saw the defendant again and told him he had seen Klock twice in the meantime but had been unable to get him to increase his offer. The plaintiff introduced in evidence a letter which he wrote the defendant under date of April 10, 1916, saying he was willing to let the defendant know he had not forgotten his property; that he had not heard definitely "from Mr. [illegible] and Mr. Klock, but have told him that his offer of $60,000 would not be accepted and that he had been made an offer that will come nearer to your $65,000 price. Undoubtedly you will find somebody in the near future that can see the real value of your property. Hoping to make a deal for you, I am," and so on. The plaintiff further testified that he again called on the defendant on the 15th of April, and reported that he had seen Klock again and also another man named "Rosenthal", and he asked the defendant whether he would consider anything under $65,000, and he said he would not and told the plaintiff to keep on going and he would get that price, and the plain-

tiff replied, "All right, I will do the best I can"; that the next thing he knew about the property was that he saw the newspaper item referring to the transfers of the property from the defendant to Weil and from Weil to Misch, after which, he sent the defendant a bill for his commission, and that thereafter he had no conversations with the defendant. The plaintiff then introduced in evidence, over the defendant's objection, a certified copy of the deed from Weil to Misch. In our opinion, this deed was material but the copy was incompetent, in the absence of a proper showing, for the same reason we have given above with reference to the other deed introduced by the plaintiff. On cross-examination the plaintiff testified that he talked with the defendant about this property "on and off, every week or two" during the two years prior to the sale; that he talked with Misch about the property as early as 1914; that the defendant raised his price to $60,000 in the fall of 1915 and told the plaintiff to try to find a buyer for it. He was then asked whether he ever produced a buyer, for $60,000, and he answered, "I procured Mr. Misch as a buyer, whatever he paid for it." He was then asked whether he ever did procure a buyer for $60,000 and he said he did. He denied that he had told the defendant that he could not get a purchaser at that price and that the defendant might as well forget it, and he further denied that after he sent the defendant his letter of April 10, he dropped the sale of the property. On redirect examination he testified that in the fall of 1915, the defendant wanted to know who he was figuring with and he gave him the names of a number of people, one of which was Misch, and that the defendant observed that Misch was "a likely buyer"; that during the time he was working with Misch regarding this pro-

tiff replied, "All right, I will do the best I can"; that the next thing he knew about the property was when he saw the newspaper item referring to the transfers of the property from the defendant to Kell and from Kell to Black, after which, he sent the defendant a bill for his commission; and that thereafter he had no conversations with the defendant. The plaintiff then introduced in evidence, over the defendant's objection, a certified copy of the deed from Kell to Black. In our opinion, this deed was material but the error was inconsequential, in the absence of a proper showing, for the same proved to have been [illegible] with reference to the other deed introduced by the plaintiff. On cross-examination the plaintiff testified that he talked with the defendant about this property "on and off, every week or two" during the two years prior to the sale; that he talked with Black about the property as early as 1914; that the defendant raised the price to $90,000 in the fall of 1915 and told the plaintiff to try to find a buyer for it. He was then asked whether he ever produced a buyer, for $90,000, and he answered "I produced Mr. Black as a buyer, whatever he paid for it." He was then asked whether he ever did produce a buyer for $90,000 and he said he did. He denied that he had told the defendant that he could not get a purchaser at that price and that the defendant might as well forget it, and he further denied that after he sent the defendant his letter of April 1st, he discussed the sale of the property. On redirect examination he testified that in the fall of 1915, the defendant wanted to know who he was figuring with and he gave him the names of a number of people, one of which was Black, and that the defendant observed that Black was "a likely buyer"; that during the time he was working with Black regarding this prop-

perty, he had at least fifty conversations with the defendant.

Mr. Pritzker, the lawyer, called by the plaintiff, testified that he had been the attorney for Misch for many years; that the sale from the defendant to Weil was closed, and the deed passed from the defendant to Weil, and the purchase price from Weil to the defendant, on April 17, 1916, in the office of the witness; that the meeting between the defendant and Weil, at his office, was arranged at the request of Misch, and that it was at the latter's request that the witness had examined the abstract. The witness was asked whether he knew of any offer for this property by Misch to the plaintiff, and he said he thought Misch told him of his offer of $52,000. The witness stated that he thought the abstract had been left with him by one Stanley, probably a week or ten days prior to April 17; that the name of Mr. Misch was not mentioned at the time of the consummation of the sale, on the latter date; that Misch had told the witness not to mention his name; that Weil paid the defendant the purchase price of the property, which was an amount equal to $60,000 less the mortgage, and that Misch gave Weil the money to make the purchase; that he examined the abstract at the direction of Misch.

On cross-examination this witness testified that on the day this transaction was completed in his office, Misch was present in another room of the suite of offices occupied by the witness. He was asked whether there was any reason "for Mr. Misch not wanting to see Mr. Lenz", and he answered, "Yes, the reason was stated." He was then asked to state the reason but objection was made and sustained, apparently on the ground that it would not be binding on the plain-

party, he had at least $3,000 transactions with the defendant.

Mr. Robinson, the lawyer, called by the plain-tiff, testified that he had been the attorney for Black for many years; that the sale from the defendant to Bell was closed, and the land passed from the defendant to Bell, and the pur-chase price paid to the defendant, on April 17, 1920, in the office of the witness; that the meeting between the defendant and Bell, at his office, was arranged at the re-quest of Black, and that it was at the latter's request that the witness had examined the abstract. The witness was asked whether he knew of any offer for this property by Black to the plaintiff, and he said he thought Black told him of his offer of $50,000. The witness stated that he thought the abstract had been left with him by the attorney, probably a week or ten days prior to April 17; that the name of Mr. Black was not mentioned at the time of the consummation of the sale, as the latter party that Black had told the witness not to mention his name; that Bell paid the defendant the purchase price of the property, which was an amount equal to $50,000 less the mortgage, and that Black gave Bell the money to make the purchase; that he examined the abstract at the direction of Black.

On cross-examination this witness testified that on the day this transaction was completed in his office, Black was present in another room of the suite of offices occu-pied by the witness. He was asked whether there was any reason "for Mr. Black not wanting to see Mr. Lane", and he answered, "Yes, his reason was stated." He was then asked to state the reason but objection was made and sustained, appar-ently on the ground that it would not be binding on the plain-

tiff. In our opinion, this ruling was error. Of course, in cross-examination or in putting in his proof, the defendant is not limited as to the materiality of his evidence, to such as will necessarily be binding on the plaintiff. The question objected to was proper cross-examination. The plaintiff's case here was to the effect that the defendant had sold his property, in fact, to Misch, and, as he put it in his statement of claim, that the defendant had "by circumvention endeavored to conceal his said sale of said property to said Misch, and consummated and closed said sale in fraud of the rights of the plaintiff and the customs of the real estate business." The testimony submitted by the plaintiff disclosed a situation tending to support that theory, although even theplaintiff's evidence does not show directly, but only by inference, that Lenz knew when he was transferring his property to Weil that the sale was, in fact, a sale to Misch. There may have been, in fact, no knowkedge on the part of the defendant that such was the case, and he may not have known of the presence of Misch in the offices referred to, on the day of the sale. There may have been a proper reason why Misch did not want to have the defendant knownthat he was in the transaction, and if the fact was that such a reason did exist, we are of the opinion that it was material and that evidence on that question was competent and, therefore, should have been admitted. Mr. Pritzker further testified on cross-examination that the defendant never saw the deed from Weil to Misch.

Called in his own behalf, the defendant gave the substance of the testimony he had previously given as a witness for the plaintiff, under Section 33. He testified that he was

tiff. In our opinion, this ruling was error. Either,
in cross-examination or in putting in his proof, the defend-
ant is not limited as to the materiality of his evidence, to
such as will necessarily be binding on the plaintiff. The
questions objected to was proper cross-examination. The plain-
tiff's case here was to the effect that the defendant had sold
his property, in fact, to Blach, and, as he put it in his state-
ment of claim, that the defendant had "by circumvention endeavor-
ed to conceal his said sale of said property to said Blach, and
consummated and closed said sale in fraud of the rights of the
plaintiff and the success of the real estate business." The
testimony submitted by the plaintiff disclosed a situation tend-
ing to support that theory, although even the plaintiff's evi-
dence does not show directly, but only by inference, that Lenz
knew when he was transferring his property to Bell that the
sale was, in fact, a sale to Blach. There may have been, in
fact, no knowledge on the part of the defendant that such was
the case, and he may not have known of the presence of Blach
in the offices referred to, on the day of the sale. There may
have been a proper reason why Blach did not want to have the
defendant understand he was in the transaction, and if the fact
was that such a reason did exist, we are of the opinion that it
was material and that evidence on that question was competent
and, therefore, should have been admitted. Mr. Feltman fur-
ther testified on cross-examination that the defendant never saw
the deed from Bell to Blach.

Called in his own behalf, the defendant gave the sub-
stance of the testimony he had previously given as a witness
for the plaintiff, under section 33. He testified that he was

not anxious to sell his property and that the plaintiff kept after him, and he finally put a price on it. He denied the testimony of the plaintiff, to the effect that he said he would pay the latter a commission if Misch bought the property. The defendant identified the contract which had been executed between him and Weil on the sale of this property, and also a lease of the same property, from Weil to the defendant, for a period of six months, and a certain memorandum of agreement, having to do with the contract of sale and the lease. The defendant testified that the plaintiff had never presented Misch as a prospective buyer, "except in that one letter that I got," - apparently referring to plaintiff's letter of April 10, 1917. The defendant was asked if he paid anyone any commission on the sale of this property. Objection to this question was sustained. In our opinion this ruling was error. If he did as he alleges he did, in his affidavit of merits, it was a fact at least tending to show that someone other than the plaintiff was the procuring cause of the sale which the defendant consummated. The defendant testified that he did not see Misch in Pritzker's office on the day of the sale, and he was asked whether he knew Misch had any connection with that deal. Objection to the latter question was also sustained. This objection should have been overruled. Without regard to the weight of the testimony or to its probability, or the lack of it, the subject-matter of this question was material and competent and the defendant should have been permitted to answer it. On cross-examination the defendant testified that he had the abstract of the property and he thought he turned it over to Stanley, or the man who had the mortgage on the property, telling them to have it brought down to

not anxious to sell his property and that the plaintiff kept after him, and he finally put a price on it. He denied the testimony of the plaintiff, to the effect that he said he would pay the latter a commission if Misch bought the property. The defendant identified the contract which had been executed between him and Weil on the sale of this property, and also a lease of the same property, from Weil to the defendant, for a period of six months, and a certain memorandum of agreement, having to do with the contract of sale and the lease. The defendant testified that the plaintiff had never presented Misch as a prospective buyer, "except in that one letter that I got," - apparently referring to plaintiff's letter of April 10, 1917. The defendant was asked if he paid anyone any commission on the sale of this property. Objection to this question was sustained. In our opinion this ruling was error. If he did as he alleges he did, in his affidavit of merits, it was a fact at least tending to show that someone other than the plaintiff was the procuring cause of the sale which the defendant consummated. The defendant testified that he did not see Misch in Pritzker's office on the day of the sale, and he was asked whether he knew Misch had any connection with that deal. Objection to the latter question was also sustained. This objection should have been overruled. Without regard to the weight of the testimony or to its probability, or the lack of it, the subject-matter of this question was material and competent and the defendant should have been permitted to answer it. On cross-examination the defendant testified that he had the abstract of the property and he thought he turned it over to Stanley, or the man who had the mortgage on the property, telling them to have it brought down to

date because the property had been sold to Weil for $60,000. He also testified that Weil agreed to buy the property at that price, about the first of April, 1917. He was asked whether he said anything to the plaintiff, about having closed a deal with Weil, at the time the plaintiff wrote him as he did on April 10, 1917, and he answered, "Why should I?" and added that if the plaintiff had talked with him after the date of the letter he would have told him the property had been sold.

Misch testified for the defendant to the effect that he never met him until two or three months after this deal was made; that the plaintiff had submitted various pieces of property to the witness, and among them the property of the defendant, and that he gave the witness a price on that property and the witness made a counter offer and "his answer was, there was nothing doing, and he says, you can't get it, and we dropped it." The witness then proceeded to state that the real estate man, Stanley had come to see him; and, at this point he was interrupted with an objection and the objection was sustained. He was asked whether the visit of Stanley had to do with the property involved and he said it had not. He was further asked whether he was in the suite of offices occupied by Pritzker at the time of the defendant's deal with Weil was consummated, and he said he was. He was then asked what he was doing there. Objection to this was sustained. This, in our opinion, was also error, for the reasons we have already stated. On cross-examination Misch testified that Weil was the father-in-law of his son, and that Weil had purchased the property at the request of Misch, and he had him go to Pritzker's office on April 17, to close the

deal, giving him the money to make the purchase, and he added, "If you ask me the reason why, I'll answer." Counsel for plaintiff, who was cross-examining, did not ask him to state the reason but on re-direct examination counsel for the defendant asked him why he had Weil buy this property for him; to which objection was made and sustained. For the reasons stated above, in connection with what we have said on a similar ruling, we are of the opinion that the witness should have been permitted to answer.

Mr. Stanley, a real estate man, was called as a witness by the defendant and he was asked whether the defendant had ever placed the property in question with him for sale. Objection to this question was also sustained. This evidence was material and competent and the objection should have been overruled. The witness was asked what, if anything, he had done toward making a sale of this property for the defendant, and he said he talked with Misch about the property. He was then asked if he had received a commission from the defendant, as a result of the sale to Weil. Objection to the question was sustained. In our opinion, it should have been overruled. He testified that he offered the property to Misch.

The defendant then offered in evidence his contract of sale with Weil and an accompanying memorandum of agreement and the lease of the premises from Weil to the defendant, for a period of six months. Objection to these documents was sustained. In our opinion, they were all competent and should have been admitted. The contract refers to Stanley & Company and provides that the contract and earnest money called for by its terms, are to be held by Stanley & Company for the benefit of the parties to the contract.

The evidence submitted by the plaintiff made out a *prima facie* case. According to his testimony, the plaintiff was entitled to a commission on this sale, which was a sale, in fact, to Misch and not to Weil, provided the plaintiff was the procuring cause of bringing that sale about. From all the testimony submitted by the plaintiff, a court or a jury might reasonably conclude that the plaintiff was, in fact, the procuring cause of the sale. The circumstances involved in the testimony submitted by the plaintiff were sufficient to justify such a conclusion.

But, the plaintiff does not claim to have had an exclusive agency on this property. If the defendant had placed the property in the hands of some other real estate agent, such as Stanley, he had a right to show it. And even if the defendant had known that his sale to Weil was, in fact, a sale to Misch, he would not be liable to pay a commission to the plaintiff if, as a matter of fact, Stanley and not the plaintiff, was the one who really brought about the sale. It is not the broker who first refers property to a purchaser, but it is the one who is the procuring cause of the sale who is entitled to a commission. *Bergman* v. *The First Swedish Building & Loan Assn. of Chicago*, 168 Ill. App. 329. The defendant should have been permitted to introduce any competent evidence, showing or tending to show that his sale to Weil, even though, in fact, it was a sale to Misch, was not consummated by reason of any efforts of the plaintiff, although he had apparently been working on Misch for some time; but that it had been brought about through the efforts of Stanley. As already stated, the defendant made a number of offers of testimony of that character and in our opinion the trial court erred in

sustaining the plaintiff's objections to the offers of that testimony.

We find no evidence in the record, even assuming that the plaintiff was entitled to the commission claimed, which would warrant the trial court in awarding the plaintiff any interest on the amount of his commission;- though such might have been the case if the defendant had been permitted to put in all the competent and material evidence he submitted, and the evidence then taken as a whole was sufficient to justify a finding that the sale of the defendant's property was not, in fact, brought about by Stanley but by the efforts of the plaintiff, and that the defendant had endeavored to conceal the facts surrounding the sale of his property, so as to beat the plaintiff's efforts to collect his commission. But, before any such conclusion is reached in this case, the defendant must have an opportunity to submit all the proper evidence he has, and, therefore, for the reasons we have stated, the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

379 - 28314

B. F. J. ODELL, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MICHIGAN CENTRAL RAILROAD COMPANY, a corp., Appellant.	)	OF CHICAGO.

233 I.A. 627

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Odell brought this action against the defendant Railroad Company to recover damages alleged to have been caused by the negligence of the servants of the defendant, in connection with a shipment of grapes, at Decatur, Michigan, destined for the Chicago market. In compliance with directions from the plaintiff, the defendant had placed a refrigerator car, for loading, on the side track at Decatur. In shipping these grapes, they were brought into town by trucks and were loaded on the cars by plaintiff's servants. The loading of the shipment involved here began on the afternoon of September 9, which was Friday. There was some further loading done on Saturday, but the car was not completed. On the following Monday, September 12, the loading was resumed, but before it was completed, and apparently in the absence of the plaintiff and his employees, some additional cars were switched in on the side track, and to make room for them, the car which the plaintiff was loading was moved on down the side track several hundred feet. It is claimed by the plaintiff

that at this time the movement of the car, by the employees of the defendant Railroad Company, upset or knocked over the baskets of grapes that were in the car, resulting in the damage sued for. The issues presented were submitted to a jury, resulting in a finding for the plaintiff and fixing his damages at the amount claimed, which was $118.50. Judgment for that amount was entered on the verdict, to reverse which the defendant has perfected this appeal.

As already stated the loading of this car was being done by the plaintiff through his employees. Apparently the movement of the car or switching operation, which was alleged to have been negligent, took place during the noon hour, when neither the plaintiff nor his employees were present. The loading of the car had not been completed. One of the witnesses for the defendant testified that the door of the car was shut but he did not remember whether it was locked. He testified further that it was the plaintiff's custom to keep his cars locked with a padlock. This testimony was not contradicted. Under the circumstances we are of the opinion that the defendant's liability may not extend beyond that of a warehouseman, - the loading being an operation by the plaintiff, and not having been completed, and there being no complete delivery to the defendant as a carrier. Elliott on Railroads, 3rd Ed. Vol.4 , sections 3115 - 3121 inclusive; Ill. Cent. Ry. Co. v. Smyser & Co., 38 Ill. 354; The St. L.A. & T.H. R.R. Co. v. Montgomery, 39 Ill. 335; Fuller v. Ill. Cent. R.R. Co., 164 Ill. App. 284.

We have come to the conclusion that the judgment in this case cannot stand. Although the evidence on the

that at this time the ownership of the car, by the employees of the defendant railroad company, [illegible] the contents of [illegible] in the car, [illegible] the [illegible]. [illegible] by a jury, resulting in a finding for the plaintiff [illegible] the [illegible], [illegible] the defendant [illegible] to this court, [illegible] entered [illegible] the defendant [illegible].

[illegible] the loading of this car was being done by the plaintiff through its employees. [illegible] the [illegible] of the car [illegible] was [illegible] to have been [illegible], [illegible] the plaintiff for its employees were present. The loading of the car had not been completed. One of the witnesses for the defendant testified that the door of the car was [illegible] by [illegible] was loading. He testified further that it was the plaintiff's custom to lock the cars loaded with a padlock. This testimony was not contradicted. Under the circumstances we are of the opinion that the defendant's liability may not extend beyond that of a warehouseman, - the loading being in operation by the plaintiff, and not having been completed, and there being no complete delivery to the defendant as a carrier. Elliott on Railroads, 2nd Ed. Vol.4, sections 1416 - 1421 inclusive; Ill. Cent. R. R. Co. v. [illegible] & Co., [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible] R. R. Co., [illegible] Ill. [illegible].

We have come to the conclusion that the judgment in this case cannot stand. Although the evidence on the

point is not clear, it would seem that all the damage involved in the plaintiff's claim was alleged to have occurred at Decatur. The damages recovered were based on the claim that the plaintiff suffered a total loss of 25 baskets of grapes and a partial loss, with respect to 100 other baskets. But we are unable to find any satisfactory proof in the record showing that the switching operation complained of resulted in knocking down and damaging 125 baskets of grapes. The only witness for the plaintiff, in his case in chief, was the plaintiff, himself. He first testified that "5 or 6 or 10 baskets, I do not remember which now, were damaged there," (Decatur). He then testified that when the car reached Chicago and was unpacked, there were 25 baskets completely destroyed and 100 baskets so badly damaged that they had to be salvaged. On cross-examination, the plaintiff was asked upon what he based his knowledge of his statement to the effect that a certain number of baskets were damaged when they reached Chicago and he answered, "Well, I saw them damaged before they left Decatur * * *". He was asked further on cross-examination, whether he knew anything of his own knowledge, as to the condition of the grapes when they were unloaded in Chicago, and he answered, that there was nothing "except the report they made to me and my own inspection. I saw them, however, before they left Decatur and I saw the condition they were in. It looked to me as if the whole car had been smashed, from the observation I made at the time." We find no testimony, either given by the plaintiff or his only other witness, Smith, who testified in rebuttal, warranting the conclusion that 125 baskets were disturbed and damaged by the switching operation.

points in each claim, it would seem that all the damage in-
volved in the plaintiff's claim was alleged to have occurred
at Seattle. The damages claimed were based on the claim
that the plaintiff suffered a total loss of 94 baskets of
grapes and a partial loss, with respect to 120 other baskets.
But we are unable to find any satisfactory proof in the
record showing that the switching operation complained of
resulted in tearing down and damaging 102 baskets of grapes.
The only witness for the plaintiff, in his case in-chief,
was the plaintiff, himself. He first testified that "8 or
9 or 10 baskets, I do not remember which now, were damaged
there," (Seattle). He then testified that when the car
reached Chicago and was unpacked, there were 18 baskets
completely destroyed and 120 baskets so badly damaged that
they had to be salvaged. On cross-examination, the plain-
tiff was asked upon what he based his knowledge of his state-
ment to the effect that a certain number of baskets were
damaged when they reached Chicago and he answered, "Well,
I saw them damaged before they left Seattle * * *". He
was asked further on cross-examination, whether he knew
anything of his own knowledge, as to the condition of the
grapes when they were unloaded in Chicago, and he answered,
that that was nothing "except the report they made to me
and my own inspection. I saw them, however, before they left
Seattle and I saw the condition they were in. It looked
to me as if the whole car had been smashed, from the ob-
servation I made at the time." We find no testimony, either
given by the plaintiff or his only other witness, Smith, who
testified in rebuttal, warranting the conclusion that 102
baskets were destroyed and damaged by the switching operation.

If the plaintiff's claim, either in whole or in part, was based on damage alleged to have been caused to his shipment of grapes while in course of transportation from Decatur to Chicago, his recovery would be properly based on terms of the bill of lading, which the record shows was issued on this shipment. But, the plaintiff apparently did not base his claim on the bill of lading, nor attempt to make any showing under it. If the plaintiff's claim is for damages caused to this shipment of grapes, at Decatur, as seems to be the case, and the liability of the defendant was that of a warehouseman, it was incumbent upon the plaintiff to show, by a preponderance of the evidence, not only that the switching operation caused the damage to his grapes, but that such operation was performed in a negligent manner. Applying the theory of res ipsa loquitur to this case, it might be concluded that the upsetting of the baskets of grapes, during the loading operation at Decatur, was caused by the movement of the car, in the absence of the plaintiff or his employees. The question of whether or not these grapes were properly loaded, so as to prevent any upsetting in the case of a switching operation before the loading was completed, was the subject of conflicting testimony. The jury apparently concluded that the grapes were properly loaded. We would not be disposed to question that finding. Applying the doctrine of res ipsa loquitur again, we would conclude from the fact that the grapes were properly loaded, and that after the car had been moved some of them were knocked over, that this was caused by the movement of the car, and that the movement was not carefully done. The only evidence to

If the plaintiff's claim, either in whole or in part, was based on damage alleged to have been caused to the shipment of grapes while in course of transportation from Stockton to Pittsburg, his recovery would be properly based on terms of the bill of lading, since the record shows one issued on this shipment. But, the plaintiff apparently did not base his claim on the bill of lading, and without he made any recovery under it. If the plaintiff's claim is for damages caused to this shipment of grapes, at Stockton, as found it by the court, and the liability of the defendant was that of a warehouseman, it was incumbent upon the plaintiff to show, by a preponderance of the evidence, not only that the switching operation, caused the damage to his grapes, but that such operation was performed in a negligent manner. Applying the theory of res ipsa loquitur to this case, it might be concluded that the upsetting of the baskets of grapes, during the loading operation at Stockton, was caused by the movement of the car, in the absence of the plaintiff or his employees. The question of whether or not these grapes were properly loaded, so as to prevent any upsetting in the case of a switching operation before the loading was completed, was the subject of conflicting testimony. The jury apparently concluded that the grapes were properly loaded. We would not be disposed to question that finding. Applying the doctrine of res ipsa loquitur here, we would conclude from the fact that the grapes were properly loaded, and that after the car had been moved some of them were knocked over, that this was caused by the movement of the car, and that the movement was not carefully made. The only evidence in

the contrary was that given by a witness for the defendant, who was the only eye witness of the switching, and that testimony was to the effect that the switching was a usual operation, and if that description was correct, the defendant was not negligent. On this issue also we would not be disposed to disturb the conclusion reached by the jury. But, as already stated, we are of the opinion that there is not sufficient satisfactory evidence in the record to support a recovery by the plaintiff, based on damages to 125 baskets of grapes, as a result of that switching operation.

The judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

390 - 28325

JULIA OFSRAEK, Appellee, v. PAUL TULUPAN, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 627

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Julia Ofsraek, brought an action in the Municipal Court of Chicago alleging that she had loaned the defendant money to the extent of $700.00, which he had promised to repay, and had failed to do so. The evidence was heard by the court without a jury, resulting in a finding for the plaintiff, and judgment for the amount claimed, to reverse which the defendant has perfected this appeal. The only ground for the reversal of the judgment, which is urged, is that the judgment is against the manifest weight of the evidence.

The plaintiff testified that she had been employed by the defendant, who was the proprietor of a restaurant from sometime in 1917, to the summer of 1921,- first as a dishwasher, then as an assistant cook, and later as cook; that during the summer of 1920 she loaned him $300.00, at his request, which amount she had saved out of her weekly earnings as his employee, and that sometime during the summer of 1921, she loaned him $400.00 more, all of which he promised to repay with 6% inter-

est; that she had not taken any note or other memorandum, because she relied on his promise; that "he was like a brother to me or a father to me and he said, 'You don't need to be afraid, I will give you back.'" In her original statement of claim she alleged that the loan was in 1917. During her cross-examination it developed that this allegation was an error, and she stated that she had advanced $300.00 in 1920 and $400.00 in 1921, whereupon the statement of claim was amended on its face to conform with the proof, without objection.

One Louis Gordon, called by the plaintiff, testified that he was a salesman; that he knew both the parties to this action and that during the summer preceding the trial of the case, he was in the defendant's place of business and heard a conversation between the plaintiff and the defendant, and on that occasion he heard the defendant say to the plaintiff, "The money that I owe you, I will give you in thirty or sixty days"; that the only person present at that time was a girl named Lillian, who was then employed by the defendant.

The defendant admitted that the plaintiff had been employed by him, in the capacities already referred to, but he denied that he had ever received any money from her, or that she had ever loaned him any money. He testified that the plaintiff had been friendly with his younger brother, and on several occasions she had told the defendant that she had made loans to this brother and that he, the defendant, had repeatedly told her not to do so, warning her that she would have a hard time getting it back, whereupon she referred to the fact that he was the defendant's brother, and the defendant reminded her that he had told her before, that he would not repay anything

only that she had the money and gave it to their business, because she relied on his promise; that "he was like a brother to me and I relied on him and he said, 'You don't need to be afraid, I will give you money.'" In her original statement of claim she alleged that the loan was in 1927. During her examination-in-chief it developed that this allegation was in error, and she stated that she had advanced $300.00 in 1920 and $500.00 in 1921, whereupon the statement of claim was amended in its form to conform with the proof, without objection.

Max Lewis Cohen, called by the plaintiff, testified that he was a salesman; that he knew both the parties to this action and that during the summer preceding the trial of the case, he was in the defendant's place of business and heard a conversation between the plaintiff and the defendant, and on that occasion he heard the defendant say to the plaintiff, "The money that I owe you, I will give you in thirty or sixty days"; that the only person present at that time was a girl named Lillian, who was then employed by the defendant.

The defendant admitted that the plaintiff had been employed by him, in the capacities already referred to, but he denied that he had ever received any money from her, or that she had ever loaned him any money. He testified that the plaintiff had been friendly with the younger brother, who on several occasions had told the defendant that she had made loans to this brother and that he, the defendant, had repeatedly told her not to do so, warning her that she would have a hard time getting it back, whereupon she referred to the fact that he was the defendant's brother, and the defendant reminded her that he had told her before, that he would not repay anything

she gave his brother as he was not responsible for him, and she replied, "He is your brother anyway," and he said that if his brother owed the plaintiff anything she ought to sue him for it. The defendant further testified that he knew Gordon, who used to come into his restaurant to see the girl Lillian; and that he had never had any talk with the plaintiff, in his place of business when Gordon was present, and that he had never seen Gordon in his place of business with the plaintiff. He denied that he had ever told the plaintiff that he would pay her the $700.00, in thirty or sixty days, or make any remark to that effect.

One, May Brady, said that she knew both the parties and had worked in the defendant's restaurant with the plaintiff; that previous to the time the plaintiff left the defendant's employ, she had talked with her "in regards to money that had been owing to her, and I asked her, was it Paul, and she answered that his brother owed her the money." This witness further said that she asked the plaintiff what "he" had to say about it and she said that the only thing he had to say was that she was foolish to give him any money, because she would never get it back. The witness further stated that the plaintiff had never said that the defendant owed her any money; that they had never conversed about the defendant at all, and she testified that she had never seen Gordon in the defendant's place of business.

Peter Tulupan, the defendant's brother, heretofore referred to, testified that he and the plaintiff used to be friends and that she had never claimed that Paul owed her any money; that he never had any talk with her about Paul.

One Karlas, testified that in 1921, he was employed by the defendant, - working nights - and that during the summer of 1921, he was there every night; that during that period he had seen the plaintiff in the store but he had never seen Gordon with her; that he had never seen them there together.

This court is not in a positionto say, on the foregoing evidence, that the manifest weight is contrary to the finding of the trial court. There were more witnesses for the defendant than for the plaintiff. Some of their testimony was purely negative in character. The testimony of the parties directly in interest, was flatly contradictory. The evidence they gave, as well as that submitted by the other witnesses, amounted to something more than we can get in this court by reading the typewritten pages of the record. If the trial court, after observing the manner in which the witnesses testified, and their apparent truthfulness or lack of it, as they gave their testimony on the witness stand, came to the conclusion that the plaintiff was telling the truth and that the defendant was not, we are not in a position to say, from a reading of the record, that he was not justified in so doing. Certainly, this court could not say that the judgment of the trial court is against the manifest weight of the evidence.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

404 - 28844

ELSIE K. PULSEN,

Appellee,

v.

PAUL P. BARNETT and SEARLE S. BARNETT,

Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 627

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a bill in equity filed by the complainant, Elsie K. Poulsen, asking the court to decree that a certain warranty deed, which had been executed and delivered by her and her husband to the defendants, was, in fact, a mortgage, and that they be directed to reconvey the property to her upon her payment of such sum as might be found to be equitably due on a proper accounting.

The bill alleged that on December 16, 1918, the complainant was indebted on notes aggregating $1280.00, some of them then past due, which were secured by a second mortgage on the property in question, and that on that date the property was conveyed to the defendants by warranty deed; that the defendants were then engaged as co-partners in the real estate business and that they then entered into an agreement with her, in writing, which was signed by the defendant, Paul P. Barnett, in which they acknowledged receipt of the warranty deed above referred to and set forth that it was understood that they were to hold title to the premises until all the

indebtedness due thereon was paid, and that in the event they did not receive the money that might be due, "on account of holding title to said property, on or before June 1, 1917" then they were to have the right to sell the property without notice of any kind, or obligation of any kind to the plaintiff and her husband. The complainant further alleged in her bill that the defendants had paid out approximately $1280.00 on account of this second mortgage and that they had paid the taxes and special assessments since the execution of the warranty deed and had been in possession of the property and collected the rents therefrom, the amount of which she did not know. She further alleged that she had demanded an accounting from the defendants, offering to reimburse them for such expenditures as they had made on account of the property, and they had refused an accounting, claiming the property as their own, when the fact was that the warranty deed had been given as a security for a then existing indebtedness, and that there had never been any other or further agreement, between the parties, with regard to the property. It was further alleged that one Amerman and wife were in possession of the property, claiming some interest in it, but that whatever interest they might have was subject to the interest of the complainant.

By their answers, the defendants, Paul P. and Searle S. Barnett admitted the making, executing and delivering of the warranty deed in question and the payment by them of the second mortgage taxes and assessments, payable since the giving of the deed. They further admitted that a memorandum of agreement was made and executed subsequently, as set forth in the bill of complaint, but they denied that the warranty deed was deliver-

ed in accordance with the terms of their agreement, and they alleged that the agreement was later abandoned and was not in effect at the time the warranty deed was delivered. And they further claimed that the deed was actually delivered under a different understanding or agreement, which made it, in fact, an absolute conveyance to them, and not a conveyance in the nature of a mortgage.

After hearing the evidence and arguments of counsel, the chancellor entered a decree granting the prayer of the complainant, and ordering an accounting. To reverse that decree the defendants have perfected this appeal, and as the only ground for such reversal, they urge that, the evidence not having been preserved by a bill of exceptions, the decree should be reversed because it does not contain a sufficient finding of facts to support it.

By the decree entered, the chancellor found that on the date above referred to, the Barnetts were co-partners in the real estate and loan business and that, as such, they held notes, secured by second mortgage, upon the real estate described in the bill of complaint; that on that date the complainant was the owner of the equity of redemption in said property that she was in arrears in the payments due under the second mortgage and that being so in arrears, and in order to better secure the Barnetts, she and her husband on said date conveyed the property by warranty deed to the defendant Paul P. Barnett, and that the defendants entered into possession of the property and have so managed the same, collecting the rents, paying the taxes and interest on the incumbrance, until they, in turn, on March 15, 1920, conveyed

ed in accordance with the terms of their agreement, and they alleged that the agreement was later abandoned and was not in effect at the time the warranty deed was delivered. And they further claimed that the deed was actually delivered under a different understanding or agreement, which made it, in fact, an absolute conveyance to them, and not a conveyance in the nature of a mortgage.

After hearing the evidence and arguments of counsel, the chancellor entered a decree granting the prayer of the complainant, and adjudging accordingly. To reverse that decree the defendants have prosecuted this appeal, and as the main ground for such reversal, they urge that, the evidence not having been preserved by a bill of exceptions, the decree should be reversed because it does not contain a sufficient finding of facts to support it.

By the decree entered, the chancellor found that at the date above referred to, the defendants were co-partners in the real estate and loan business and that, as such, they held notes, secured by second mortgages, upon the real estate described in the bill of complaint; that at that date the complainant was the owner of the equity of redemption in said property; that she was in arrears in the payments due under the second mortgage and that being so in arrears, and in order to better secure the defendants, she and her husband on said date conveyed the property by warranty deed to the defendant [illegible], and that the defendants entered into possession of the property and have so managed the same, collecting the rents, paying the taxes and interest on the incumbrances, until they, in turn, on March 18, 1926, conveyed

the property to Amerman and wife. By the decree entered, the chancellor further found that the warranty deed executed by the complainant and her husband, was, in fact, a conveyance in the nature of a mortgage and that the Amermans had notice that such was the fact and that the latter were, therefore, not innocent purchasers of the property. No contention is made in the brief filed by the defendants, that complainant had lost any rights, by reason of the lapse of time. We are of the opinion that the decree appealed from contains sufficient findings of fact to bring it within the requirements of the rule laid down in French v. French, 302 Ill. 152 and the other cases to which defendants have called our attention, and that such findings are ample and sufficient to support the decree, without the preservation of the evidence.

For the reasons stated, the decree appealed from is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

150 - 28802

JOSEPH H. MILLER, Appellee, v. M. RETTA TISDELLE and A. C. TISDELLE, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 627

Opinion filed Feb. 20, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Miller, brought this action of forcible entry and detainer against the defendants in a Justice Court in the Village of Wilmette, County of Cook, where he secured a judgment for possession. The defendants perfected an appeal to the Circuit Court of Cook County, where judgment in favor of the plaintiff, for possession, was again entered. To reverse the latter judgment, the defendants have perfected the present appeal.

In support of their appeal the defendants contend that the summons served on them was cancelled by order of the justice of the peace and presumably thereafter the justice was without jurisdiction to try the case. It is further contended that no showing was made to the effect that A. B. Sharp, who signed the original complaint before the justice of the peace was the duly authorized agent of the plaintiff, and finally the defendants contend that the plaintiff failed to prove that he had made written demand for possession, and because of this failure, the court erred in refusing to dismiss

the proceedings and enter judgment in favor of the defendants.

We have nothing before us but the common law record. Whether proof was made that Sharp was the plaintiff's duly qualified agent or that the notice referred to was given could only appear by bill of exceptions and there is no bill of exceptions in the record.

We will observe further however, that in the transcript of the proceedings before the justice of the peace, it is recited that the complaint was filed by A. M. Sharp, "duly authorized agent of J. R. Miller, plaintiff." It further appears from this transcript that the summons which was issued by the justice of the peace was duly served, returnable December 23, 1932, at eight o'clock in the morning. The next item appearing in the transcript is under date of "December 23, 1932, eight A.M." the time at which the summons was returnable. The next words in the transcript are, "cancelled by adj, continued to January 2, 1933, 8 A.M." Under the latter date, it appears that the case was continued to January 13, at the same hour, and under that date there appears to have been another continuance to January 20, the same hour, and under the latter date it appears there was another continuance to January 25, at the same hour. We would not conclude from this state of the record that the summons was cancelled, as contended. As the record appears, there is nothing whatever to indicate what "cancelled" refers to. Even if we assume the summons was cancelled, the defendants waived it, for it appears that on the last date mentioned the case was called and the plaintiff was represented by A. M.

sharp, and the transcript is to the effect that both defendants appeared, the defendant A. O. Tisdelle appearing in person, witnesses were presented and sworn and the case proceeded to a hearing. The defendants having thus submitted the merits of the case to the court, must be held to have waived defects in the service of the summons, if there were any such defects. The only other point urged has to do with a claim that the plaintiff failed to make an essential element of proof. Without the bill of exceptions we must assume the contrary.

An examination of the record would seem to demonstrate that the defense in this case has been carried on with the view that an ultimate decision could not be reached for some appreciable period of time and that the defendants might at least retain possession of the premises involved throughout that period. Having received that impression, from our examination of the record, we were moved to allow the motion which was submitted to this court by the plaintiff, asking that the cause be advanced for an early hearing.

The judgment of the Circuit Court, appealed from, is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

damages, and the transcript is to the effect that upon defend-
ants appeared, the defendant L. E. Daniels appearing in per-
son, witnesses were presented and sworn and the cause proceed-
ed to a hearing. The defendants having thus submitted the
merits of the case to the court, must be held to have waived
defects in the service of the summons, if there were any such
defects. The only other point urged has to do with a claim
that the plaintiff failed to make an essential element of
proof. Without the bill of exceptions we must assume the
contrary.

In consideration of the reasons which [illegible] [illegible]
it [illegible] that the defense in this case has been carried on
with the view that no ultimate decision could not be reached
for some considerable period of time and that the defendants
might in [illegible] retain possession of the premises involved
throughout that period. Having reviewed that [illegible],
from our examination of the record, we were moved to allow
the motion which was submitted to this court by the plain-
tiff, asking that the cause be advanced for an early hearing.

The judgment of the Circuit Court, appealed from,
is affirmed.

JUDGMENT AFFIRMED.

[illegible], P.J., and [illegible], J., concur.

404-28238

GEORGE J. COOKE COMPANY, a Corporation, Appellee,

vs.

FRED MILLER BREWING COMPANY, Appellant.

APPEAL FROM SUPERIOR COURT COOK COUNTY.

233 I.A. 628

Opinion filed Feb. 27, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in the Superior Court in favor of the plaintiff, George J. Cooke Company against the defendant Fred Miller Brewing Company in the sum of $6,374.00.

The declaration contained three special counts. The first charged that the defendant bought of the plaintiff on June 12, 1919, 1500 barrels of beer at $14.00 a barrel, to be delivered at the plaintiff's plant and to be paid for weekly on delivery, that the defendant agreed to supply the necessary cooperage in which to place the beer; that the plaintiff was ready and willing to furnish and tendered, from June 12, 1919, to and including June 30, 1919, said beer, and requested that defendant accept and pay for it; that the defendant accepted all of it, save 742½ barrels for which the defendant refused to pay, to the damage of the plaintiff in the sum of $20,000.00.

The second count was similar to the first, save that it charged that after July 1, 1919, owing to the enactment of a public statute and a presidential

proclamation prohibiting the sale of beer on and after July 1, 1919, the beer had no value.

The third count was a substantial amalgamation of the charges in the first and second counts, but set up in addition the written contract. The plaintiff filed, also, the consolidated common counts, a copy of the account sued upon, and an affidavit, which latter set up that the defendant owed for beer sold and delivered and by it accepted, and for beer sold and not taken, making allowances for government taxes, a net balance of $6,444.00. The defendant filed a plea of the general issue, and an affidavit of defense. By the latter it charged that the plaintiff failed to comply with the terms of the contract in failing to deliver beer of a merchantable quality.

There was offered in evidence the following contract, "Fred Miller Brewing Company: Confirming conversation with your Mr. Smith and later with your Mr. Volbert, we agree to sell you 1,500 barrels of beer for your Chicago market. Said beer is to be at the price of $14.00 per barrel at our plant. It is also agreed and understood that you are to furnish us with the necessary cooperage and that the entire amount of beer is to be taken out before July 1, 1919. Payments for said beer are to be made weekly." That document was signed by the plaintiff, and was signed by the defendant as follows: "Accepted this 12th day of June, 1919. Fred Miller Brewing Company, by Emil F. Miller, President."

In the defendant's statement of the case the following is set forth: "Before this agreement was made 15 sample barrels

of beer were delivered to appellant as representing the quality of the 1,500 barrels. The samples were satisfactory. The beer was in vats at appellee's plant. Appellant furnished necessary cooperage and delivered it at appellee's brewery to be filled. Appellee undertook to wash and clean the barrels. Appellant sent its driver, Tony Mass, with its horses and wagon, to appellee's plant, and he took the filled barrels and delivered them to appellant's customers. 757½ barrels were delivered in this manner. Appellant refused to accept the remaining 742½ barrels because the beer was not merchantable."

The substantial question, as to the general merits of the case, is whether or not the beer which was refused was merchantable? On that subject six witnesses testified for the plaintiff and nine for the defendant, and the defendant contends that the verdict for the plaintiff, the cause having been tried before court and jury, is against the manifest weight of the evidence.

The evidence shows that all the beer in question was brewed and in vats prior to December 1, 1918, at which time, Cooke, the president of the plaintiff, testified, brewing was stopped by order of the President. It, also, shows that before the contract was signed, the defendant sent a man to test the beer, and that he reported it was all right, and that, at the request of the defendant, 25 barrels were then sent by the plaintiff to the defendant to be sampled, and that the defendant received and sanctioned the beer as of satisfactory quality; and shortly thereafter, the contract here sued upon was made. It was stipulated that the defendant took beer from the plaintiff

as follows: June 9, 1919, 25 bbls; June 12, 1919, 34 bbls. and 16 half bbls; June 14, 1919, 50 bbls. and 13 half bbls; June 1 1919, 87 bbls. and 40 half bbls; June 17, 1919, 103 bbls. and 23 half bbls; June 18, 1919, 55 bbls. and 31 half bbls; June 1 1919, 19 bbls. and 6 half bbls; June 20, 1919, 43 bbls. and 36 half bbls; June 21, 1919, 31 bbls. and 5 half bbls; June 23, 1919, 70 bbls. and 18 half bbls; June 24, 1919, 30 bbls. and 4 half bbls; June 25, 1919, 25 bbls and 10 half bbls; June 26, 1 30 bbls; June 27, 1919, 18 bbls. and 20 half bbls. It was, als agreed that the plaintiff received checks from the defendant as follows: June 13, $938 for shipments of June 7 and June 12; June 24, $5,096 for shipments from June 14 to 19, less $76; June 28, $3,038 for shipments from June 20 to 26.

The evidence concerning the quality of the beer offered after about June 13, is quite voluminous. It would serve no useful purpose to set forth a resume of it. It is sufficient to say that the evidence shows a direct conflict concerning whethe it was merchantable, and that many witnesses, saloon-keepers an others, testified, purporting to give their experience with it. It precipitated just such a conflict as generally hangs upon th determination of credibility. Cooke's story as to the brewing of the beer, its condition, the way in which it was preserved, the history of the condition of the brewery during the time in question, is straightforward and plausible, and was evidently believed by the jury. Of course, it is hard to reconcile the testimony of Volbert, the defendant's Chicago manager, and the other witnesses who supported his charge as to the unmerchantability of the beer, with that of Cooke and his witnesses. But in such a case, where fourteen witnesses testify, quite obviou we, in a court of review, cannot reasonably consider that we h

as good an opportunity to determine whom to believe as the jury. Counsel for the defendant in a very able brief have analyzed the evidence, but it all goes in the end to show that on the trial, it was a situation where the dominant element was the credence to be given the various witnesses. There are some discrepancies here and there, that may give rise to suspicions, and argument may be made on both sides, but, on the whole, after carefully studying all the evidence, we do not feel justified in holding that the verdict was manifestly against the weight of the evidence.

It is contended that the trial judge erred in admitting in evidence a letter of the plaintiff, dated June 23, 1913, and which was sent to the defendant. It is claimed that it was inadmissible as being self-serving. The plaintiff offered in evidence a letter of the defendant to it, dated June 20, 1913, which contained the following, "We visited some of our Chicago trade again yesterday who have received Cooke's beer recently, because complaints came stronger than before about bad beer. We had three men call at different places and the report they are making about the beer is very discouraging. We have notified you before that your beer is not merchantable and we herewith serve notice that we cannot continue using your goods unless the quality of your beer becomes saleable. We did not stop at one or two investigations. We have sufficient evidence of our claim." Three days later the plaintiff answered that letter of the defendant as follows: "In reply to yours of the 20th inst., the beer we are selling you is the same beer we sold you from the very beginning. In fact, it is all from last November, as we have not brewed any kind of beer since that time. Your men complained because it was not sweet enough, and you, in your

previous letter, informed us it was flat. Any flatness was due to bad cooperage, and not to the fault of the beer itself, and the character of our beer we cannot change. When your Mr. Smith was here he tasted the beer, and your Company took out 25 bbls. to try it before signing the contract. It was the same beer then as it is now, and there is nothing we can do about it. However, if there is any method your brewmaster could suggest to sweeten the beer we are filling into your cooperage, we will gladly follow his instructions for your beer, but we could not do this to the beer we are delivering to our trade, who, we assure you, are thoroughly satisfied, we having received no complaints whatever." These two letters were written while the controversy was on as to the merchantability of the beer, and while the defendant still continued to accept beer and pay for it - under the contract. On June 24, the defendant wrote a letter to the plaintiff in which it was stated, "The cooperage is not at fault," and on June 26 the defendant wired the plaintiff, "Our trade refuses to take any more of your product by reason of same not being merchantable. Please make other disposition of what is left before July 1st." And then on June 26 wired further, "Will prove to you product not merchantable so you better dispose of balance." Thus, it will be seen all these letters and telegrams, taken together, constituted expressions of the actual attitude each was taking towards the other, while beer was being received by the defendant. They were much the same as though the parties had met while the contract was being fulfilled, and in dialogue form had uttered to each other the very words of the letters and telegrams. Certainly, if those words had been offered as having taken place in the form of conversations while the contract

was in force, there would be no justifiable legal reason against their admission - Ferris v. Jamieson, 205 Ill. 87 - a fortiori, therefore, being written, and, so, being concrete, indisputable evidence of the actual words used, and being pertinent to the controversy, and written while the contract was being performed, they were competent. Victor Mfg. Co. and Gasket Co. v. Rosenberg and Rosenberg, App. Ct. Gen. No. 27964, Schwarzschild & Sulzberger Co. v. Pfaetzer, 133 Ill. App. 346; Fearing v. Kimble, 4 Allen 125; Lester v. Lutter, 7 Mich. 328. Further, a close analysis of the letter, bearing in mind the defendant's letter of June 30, shows that it did not add, practically, to anything that was not testified to by Cooke himself. It stated some claims, but in such a way that they would not, if submitted to the jury, tend to mislead it. The claims stated did not purport to be evidence of facts. The letter in question did state one definite fact, and that was, it was the same beer as that from which the 25 barrels were taken, which were used as a sample. But that fact was testified to by Cooke, and is not specifically contradicted.

It is contended that the verdict was inconsistent with the evidence; that the plaintiff was entitled either to its full claim or nothing. It is true that the evidence shows that the defendant failed to pay for 742½ barrels, which, at $8.00 per barrel, being $14.00 less than the government tax of $6.00, would be $5,940, which added to the amount that was delivered and unpaid for, being $504, makes a total of $6,444.00, whereas, the verdict was $6,274. As the verdict was slightly less than the amount due, assuming that the beer was merchantable, we do not think that the defendant is entitled to complain. The difference

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was [illegible] [illegible] [illegible] could be [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] v. [illegible], [illegible] [illegible], [illegible]
[illegible], [illegible] [illegible], [illegible], [illegible] [illegible] [illegible]
[illegible] of the actual [illegible] [illegible] [illegible] [illegible] by the
[illegible], [illegible] [illegible] [illegible] the contract [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]. [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible], [illegible]
[illegible] v. [illegible], [illegible]; [illegible]
[illegible] [illegible] v. [illegible], [illegible]. Further,
a close analysis of the letter, [illegible] [illegible] the defendant's
letter of June [illegible], shows that it did not [illegible], [illegible]
[illegible] that [illegible] not [illegible] [illegible] [illegible]. It
[illegible] [illegible] [illegible], but in such a way that [illegible] [illegible], if
[illegible] [illegible] the [illegible], [illegible] [illegible] it. [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]. The letter [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible], and [illegible], it was the
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible],
[illegible] [illegible] [illegible] [illegible]. [illegible] [illegible] [illegible] [illegible] [illegible] by
[illegible], [illegible] [illegible] [illegible] [illegible].

It is contended that the [illegible] was [illegible]
with the evidence: that the plaintiff was entitled [illegible]
[illegible] [illegible] [illegible] [illegible]. It is true that the evidence
shows that the defendant [illegible] to pay [illegible] [illegible] [illegible],
[illegible], at [illegible] per barrel, being [illegible] less than the
[illegible] [illegible] [illegible], [illegible] [illegible] [illegible], [illegible] [illegible] [illegible]
the [illegible] that was delivered and [illegible], [illegible] [illegible],
[illegible] [illegible] [illegible] [illegible], [illegible], the [illegible] [illegible] [illegible],
in the [illegible] was slightly less than the [illegible] [illegible],
[illegible] that the [illegible] [illegible] [illegible], [illegible] [illegible] [illegible]
that the [illegible] is entitled to [illegible]. The difference

is only a shade over 1%. That, we think, comes within the rule _de minimis non curat lex_. In each of the cases cited by counsel for the defendant, the difference between the verdict and the amount which the evidence purported to show is considerable. This contention of the defendant we think is untenable.

It is contended that it was error not to permit defendant to show how much of the capital stock of the plaintiff company Cooke owned, that it bore on the question of his interest and therefore his credibility. Cooke had already testified that he had been in the brewing business since 1905; that he was the second generation of his family that was in that business, and that he was president of the plaintiff corporation. From his testimony, there was no doubt about his interest, and although, it might have been proper to show the amount of stock he held, we do not think the court's refusal a substantial error. He was the plaintiff's chief witness and the jury must have realized his interest.

It is contended that the verdict was improper because no credit was given to the defendant for sums which may have been received for dealcoholized beer, but as the witness Cooke testified that it cost "three or four times as much money to attempt to dealcoholize the beer and sell it" as was gotten out of it, the contention, we think, is untenable.

It is contended that the plaintiff failed to produce its records from which it could have been accurately determined whether a profit was made on beer that was dealcoholized and sold. But the record shows that the books were produced.

Cooke testified, on cross-examination, that he had with him there the ledger and journal, and the record shows he was examined about them. The contention made is untenable.

After the verdict, counsel for the defendant presented six affidavits in support of its motion for a new trial. In the brief for the defendant no substantial argument is made on the point, although it is mentioned in conjunction with the contention that the verdict is clearly against the weight of the evidence. We have examined the affidavits and are of the opinion that they did not make such a showing as would justify concluding that the trial judge erred in refusing to grant a new trial.

The record shows that there was a fair trial and that no substantial error was committed. The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

227 - 28063

MILES F. LISKA, Guardian of the Estate of John Liska, a minor,
Appellee,

v.

CHICAGO RAILWAYS COMPANY, et al,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 628

Opinion filed Feb. 27, 1924

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Shortly after noon on November 20, 1920, John Liska, a child 3 years and 5 months of age was struck and severely injured by a northbound street car in Kedzie avenue between 25th and 26th street. Suit was brought by his guardian against the Street Railway Companies to recover damages for the injuries sustained. There was a trial before the court and a jury, and a verdict in favor of plaintiff for $25,000.00. A remittitur of $8,000.00 was required and judgment entered on the verdict for $17,000.00.

Plaintiff's theory of the case was that as the child was crossing Kedzie avenue, a north and south street in Chicago at a point between 25th and 26th streets, the motorman negligently operated the street car, as a result of which the child was injured. On the other hand, the contention of the defendants is that there was no negligence in the operation of the street car, but that the child was injured because he ran from the curb toward the car so

suddenly that the motorman was unable to prevent the car striking him.

The declaration was in four counts. The first charged that the defendants negligently operated the street car. The second that the motorman in charge of the car failed to keep a proper look-out. The third and fourth counts, charged a failure to ring a bell or to give any other warning. To the declaration the defendants filed the general issue.

The evidence tends to show that the child lived with his parents on the north side of 35th street, about 100 feet west of Kedzie avenue; that about ten minutes before he was injured he left his home, unknown to his mother, and went to a candy store located on the east side of Kedzie avenue, 75 feet south of 35th street; that after leaving the store he walked north and was seen near the curb north of the store and south of 35th street opposite a vacant lot, which extended from the store to 35th street; that he then ran in a westerly or northwesterly direction toward the northbound street car track. Plaintiff's witnesses testified that he reached a point between the two rails or near the west rail of the northbound track, stopped and then turned around, and was struck by the car when he was near the east rail. The motorman testified for the defendant to the effect that the child never reached the east rail of the track, but that he ran into the northeast corner of the street car. The car was traveling about 12 miles per hour when the child left the curb. There is no charge of excessive speed. Seven witnesses testified in reference to

the occurrence, three of them were passengers riding on the front platform of the street car; two were riding in an automobile, which was being driven south in Kedzie avenue on the west side of the street; and the other two were the conductor and motorman of the car. The three passengers and the two in the automobile were called by the plaintiff; and the motorman and conductor by the defendant.

Henry Hathman, an electrician, testified that he witnessed the accident; that he was driving home from his work in his automobile south in Kedzie avenue; that when he was about 150 feet north of 35th street, he noticed the little boy standing at the east curbstone of Kedzie avenue about 35 feet north of the candy store; that the boy then started across Kedzie avenue and that at that time the street was about 125 feet south of the boy; that he saw the boy "kind of mope along across the street, just a little gait across the street * * * that he would call his gait a toddle, a little bit of a stride, a little faster than a walk. That he was going mostly west, kind of northwest and was alone." That when the boy reached about the west rail of the northbound track, he stopped for a second; that at that time the witness was about crossing 35th street and he blew his horn, to put on his brakes to stop; that the little boy turned around and started back toward the east curb stone, and when he got as far as the east rail of the northbound track, the car hit him on the front of his head and knocked him down and he rolled under the car; that the witness stopped his car ran around the rear end of the street car and found the little fellow had just crawled from underneath the street car. He picked

him up and took him to the hospital. That he did not hear a bell at any time; that he did not notice whether the fender on the street car dropped; that he was looking right at the front end of the street car when it struck the little boy; that when the street car stopped it was 15 or 20 feet south of 25th street; that the sun was shining and the street was dry; that there was no other traffic in the street. He further testified that the boy was about 35 feet south of 25th street when he was struck and the street car went about 15 feet after striking the boy; that when the boy stopped between the rails of the northbound track, the front end of the street car was about 20 to 25 feet from him.

William Sloan testified for the plaintiff; that he was riding with Nathman in the latter's automobile south in Kedzie avenue; that when he first saw the little boy he was coming out of the candy store on the east side of Kedzie avenue; that the boy stopped at the curb for a second and then started to cross the street. At that time the boy was about the center of the vacant lot, north of the store, and the street car was about 135 or 150 feet south of the boy; that the little boy in crossing the street "walked, toddled, like a youngster would walk"; that when he got about the center of the northbound track, the boy stopped, turned and saw the street car coming. At that time the street car was about 35 or 40 feet from him and he turned and started back and just as he got to the east rail the car struck him and knocked him "sort of northeast"; that when the car struck the boy, the automobile was within two or three feet north of the front end of the street car; that

him up and took him to the hospital. That he did not hear a bell or any thing that he did not notice whether the [illegible] at the street was [illegible]; that he was looking right at the front end of the street car when it struck the little boy; that when the street car stopped it was 15 or 20 feet south of Tenth street; that the sun was shining and the street was dry; that there was no other traffic in the street. He further testified that the boy was about 12 feet south of Tenth street when he was struck and the street car went about 15 feet after striking the boy; that when the boy stopped between the rails of the southbound track, the front end of the street car was about 10 to 15 feet from him.

William Glenn testified for the plaintiff that he was riding with Barbour in the latter's automobile south on Canal avenue; that when he first saw the little boy he was coming out of the candy store on the east side of Canal avenue; that the boy stopped at the curb for a second and then started to cross the street. At that time the boy was about the center of the vacant lot, north of the store, and the street car was about 120 or 125 feet north of the boy; that the little boy in crossing the street "walked, walked, like a youngster would walk"; that when he got about the center of the northbound track, the boy stopped, turned and ran and struck car running. At that time the street car was about 15 or 20 feet from him and he turned and started back and just as he got to the east rail the car struck him and knocked him "sort of northeast"; that when the car struck the boy, the automobile was within two or three feet north of the front end of the street car; that

Rathman blew the automobile horn; that after the boy was struck the automobile was stopped and Rathman went to him around the rear of the car, to the east side, picked the child up and they took him to the hospital in the automobile; that they picked the boy up about the center of the side of the street car; that the automobile was being driven at about 15 to 20 miles per hour just prior to the accident; on cross-examination he testified that when the little boy left the candy store, the street car was about 75 to 100 feet south of the store; that the boy traveled northwest from the store; that he went about 40 feet on the sidewalk, walking "a little toddle." He was just walking like a little child would run, sort of toddle"; that he was not very much of a judge of speed in miles per hour, but that he thought the little boy was going from 6 to 8 miles per hour, which approximately was half the speed of the street car; that when the little boy reached the curb he hesitated a fraction of a second, just to step down off the curb stone; that when he got down from the curb stone into the street, the street car was about 35 feet south of him; that the car did not slow down until it was about 10 or 15 feet from the boy; that when the car struck him it knocked him back northeast; that when the boy was knocked down, the witness could see him laying east of the rail; that the automobile was stopped and he and Rathman jumped out, ran around the rear end of the street car and when they got there the boy was standing on one leg with the other leg hanging; that the boy was three-quarters back from the front bumper on the east side of the car. He further testified that when the boy got to the west rail and turned around, the car was about 50 feet south of him.

Edward Anderson for the plaintiff testified that he was a chauffeur and was riding on the front platform of the street car; that he was standing a little behind and to the left of the motorman; that when he first saw the boy, he was between the first rail and the curb stone, crossing the street "He was a little toddling - little fellow; that at that time the street car was about opposite the center of the candy store and the boy about the opposite the center of the vacant lot - about 45 feet from the street car;" that the boy then ran out and stood in the center of the two rails and stopped that the witness then saw an automobile coming south; that after the boy stopped between the two rails the motorman shut off the power and when the street car was about 10 or 15 feet from the boy he started to put on the brakes; that after the accident the witness got out of the car and the little boy was taken away; that he did not see him; that he noticed the fender was up; that when he got out of the car, the front end was about 40 feet from the south side of 25th street. On cross-examination he testified that he estimated that the candy store was about 75 feet south of 25th street; that when he first saw the boy he was about 40 to 45 feet from the candy store, going in a westerly direction toward the street car track; at that time the front end of the street car was from 50 to 55 feet from the boy who was then about the center of the east roadway, between the curb and the rail toddling along "going faster than a child's walk, kind of a trot;" that the motorman stood up in front and so far as the witness could see, he appeared to be looking out of the window. He was then asked by counsel for defendants, if he appeared to be attending to his business, so far as you could see. He answered that he did not notice the

motorman talking to anybody or doing anything that he should not do; that when the boy stepped into the track, the motorman turned off the power; that he could feel the motorman apply the air when he was about 10 or 15 feet from the boy and sounded his gong; that the car ran 15 to 20 feet after striking the boy; that when it stopped the front of the car was about 40 feet south of 25th street.

Frank Chison called on behalf of the plaintiff testified that he worked in a machine shop of an electrical company; that when he was sitting on the left hand side of the front platform of the car; that two other men were sitting with him on the seat; that when he first saw the little boy, he was standing still, facing northwest in the middle of the northbound track; that the car was then about 10 or 15 feet from the boy; that he just happened to look up at the time he saw the child; he felt the application of the brakes; that at about the time the car hit the child the motorman gave a scream and then stopped the car in about the car's length; that the witness got off the car and the front end of it was then about 10 feet south of 25th street. On cross-examination he testified that he could not see the child hit on account of the dashboard obstructing his view.

Andrew Chison testified for the plaintiff that he was sitting with his brother, Frank Chison, on the seat extending along the west side of the vestibule of the street car; that the first thing he noticed was when the motorman hollered and tried to stop the car; that he did not see the little boy before he was struck; that when the car stopped he got off and the front end of the street car was then about 10 feet

motorman failing to [illegible] or [illegible] or doing anything that he [illegible] and say that when the boy stepped onto the track, the motorman knocked off the power; that he could feel the [illegible] apply the air when he was about 15 or 18 feet from the boy and [illegible] that the car ran 15 to 20 feet after striking the boy; that when it stopped the front of the car was about 40 feet south of 12th street.

Frank [illegible] called on behalf of the plaintiff testified that he worked in a machine shop of an electrical company; that when he was sitting on the left hand side of the front platform of the car; that the motorman was [illegible] with him on the car; that when he first saw the little boy, he was standing still, facing [illegible] in the middle of the northbound track; that the car was then about 15 or 18 feet from the boy; that he just happened to look up at the time he saw the child; he felt the application of the brakes; that he [illegible] the [illegible] the motorman gave a warning and then stopped the car in about two car lengths; that the witness got off the car and the front end of it was then about 10 feet south of 12th street. On cross-examination he testified that he could not see the child hit on account of the dashboard obstructing his view.

Andrew [illegible] testified for the plaintiff that he was sitting with his brother, Frank [illegible], on the east sidewalk along the [illegible] side of the vestibule of the street car; that the first thing he noticed was when the motorman hollered and tried to stop the car; that he did not see the little boy before he was struck; that when the car stopped he got out and the front end of the street car was then about 15 feet

south of 25th street. On cross-examination, he stated that he did not hear the ringing of any gong by the motorman.

Mrs. Anna Liska, the child's mother, testified that she lived in the rear house of No. 3448 W. 25th street, which was about 80 feet from Kedzie avenue; that on the day in question she was scrubbing and that about ten minutes before the little boy was injured, she saw him in the house playing around, and the next thing she knew about the boy, was when some one told her that he had been injured. On cross-examination she said that the house was about 100 feet west of Kedzie avenue; that she did not give the child a penny to buy candy over at the store; that her husband was not at home at the time; that he was working, driving a truck.

John F. Regan testified for the defendants; that he was the motorman of the car in question and had a regular run on Kedzie avenue and was familiar with the street and had been for a good while; that the street car was 46 to 50 feet long, a regular pay-as-you-enter car, weighing about 18 to 20 tons; that the accident happened at 12:08 noon. The last stop he made prior to the accident was on the south side of 26th street; that the distance from the east curb of Kedzie avenue to the east rail was about 12 or 13 feet; that the street was paved; that the block from 25th to 26th streets was from 800 to 900 feet long; that after leaving 26th street he went about 4 miles per hour and then fed a little more power, and increased the speed. There was three windows in front of the vestibule and he was opposite the center one; that the day was clear and bright; that he was going about 12 miles per hour when he was about the center of the block; that

he knew the location of the candy store; that it was about 90 feet south of 25th street; that he was facing north and doing nothing but watching the street; that he did not turn around; that he had a clear view ahead of him; that there was no traffic in the street; that when he first saw the little boy he was in the gutter at the east curbstone "hunched down" playing with something on the east curbstone; about 5 feet north of the north wall of the candy store; that the boy was facing the sidewalk; that at that time the street car was about the middle of the block; that all of a sudden the little boy got "up off his fours and cut across, turned around, shot right across" west about 8 miles per hour; that when the boy straightened up and started to run west the front end of the car was about 35 feet from him; and at that time he was about 5 feet south of the south wall of the candy store; that when the boy started to cross the street he sounded the gong, threw off the power, and put on the air brake and sand; that he had a good rail; that the little boy "just bumped up against the front post on the right hand front corner of the car - the northeast corner." Thatbhe never got as far as the rail at all; that the fender dropped; that just as the boy was struck the car was going about 8 miles per hour; that after hitting the boy, he stopped the car in about 25 feet; that from the time he started to stop the car until it was stopped, it ran about 40 feet; that all of the car appliances were in good working order; that after the car stopped, he got off the front platform; that he did not know where the boy was; they then told him someone picked him up and took him away in an automobile; that before the accident he saw the automobile coming south on Kedzie avenue;

that the driver blew a horn; that he rang his gong when the boy started to run across the street; that the boy did not at any time get between the rails and stop, or turn around and start to go back to the east. On cross-examination he testified that when the boy started from the curb across the street, the street car was about 5 feet south of the candy store and the boy 5 feet north of it; that after he hit the boy, the car ran about 25 feet; that he was in about the middle of the block when he first saw the boy, about 200 feet south of the candy store, he was going about 12 miles per hour; that the curbstone where the boy was, was about nine inches high; that he did not see the boy get down from the sidewalk; that he did not think that the boy might run out and did not slow up and throw off the power when he first saw him; that he had been a motorman 1 year and 4 months before the accident and had been running on Kedzie avenue six or seven months; that he did not throw off his power or sound a gong until he was about 5 feet south of the candy store, and this was when the little boy started toward the track; that the boy run straight west when he left the curb.

The conductor, Fred Langner testified that the last stop made by the car before the accident was on the south side of 26th street, which was a crosstown line; that he thought the block between 25th and 26th streets was 800 feet long; that he was on the rear platform; that it was a nice day; that the car was going about 12 or 13 miles per hour when it reached the center of the block. The first thing he knew, the car made a sudden stop; from the time he felt the air brakes the car ran about 50 feet. The candy store is about 90 feet south of 25th street; that when the

car stopped the rear end of it was right even with the door of the candy store; that the rear platform was crowded with passengers, and as soon as the car stopped, he looked out, saw somebody picking the child up and taking him away in an automobile; that the street was paved and the rail dry; that he took some names and gave them to the police officer. The evidence shows that it was about 12 feet from the curb to the east rail of the northbound track.

The evidence further shows that the little boy's right leg was crushed between the knee and the ankle by being run over by the wheels of the street car, so that it was necessary to amputate the leg about midway between the ankle and the knee. A surgeon testified that the stump was not padded, but merely covered with skin and the muscles had retracted so that the end of the bone protruded; that about 1½ inches of the bone was unprotected; that this should be removed in order to permit the use of an artificial leg; that if this were done, there would be enough stump to permit the use of a well made artificial foot. The boy's father testified that from the time the child was injured the stump had never healed; that there was a hole there now from which there was a discharge at the time of the trial; and that there had been a discharge from the wound for nine or ten months.

A plat was introduced in evidence showing that the distance from 25th to 26th street was 594 feet.

The defendant contends that the evidence is insufficient to warrant a finding of liability; that on one version of the evidence, it appeared that the boy ran from the

curb to the track and was immediately struck - that the peril arose so suddenly that the motorman had no opportunity to avoid the accident. Counsel further contend that on the other version, which the evidence tended to show, the boy started to run across the track when the car was 100 to 125 feet away; that the boy would have crossed the track long before the car would reach his line of travel; that it was not until the boy turned around and re-entered the course of the car when it was 20 to 25 feet away that the emergency arose, and that then it was too late to avoid the accident. The question whether a defendant in a personal injury case is guilty of negligence is ordinarily a question of fact for the jury and only becomes a question of law where from the facts admitted or conclusively proven "there is no reasonable chance of different reasonable minds reaching different conclusions. I.C. R. R. Co. v. Anderson, 184 Ill. 304.

In the instant case, we are of the opinion that all reasonable minds would not reach the conclusion that there was no negligence in the operation of the street car. The motorman testified that when he first saw the little boy at the curb, the street car was about 200 feet south of the candy store, and that the boy was then about 5 feet north of the candy store. The store was more than 20 feet wide. It, therefore, appears that when the motorman first saw the boy, he was about 225 feet south of the boy, and that he saw the boy from that time until the car struck him. All of the occurrence witnesses, except the motorman, testified that the boy left the curb at a point from 20 to 30 feet further north than that testified to by the motorman; that when the boy left the curb, he toddled out in a westerly direction

cars in the track and was immediately struck — that the would appear so suddenly that the motorman had no opportunity to avoid the accident. Counsel further contend that on the other evidence, while the evidence tends to show, the boy started to run across the track when the car was 100 to 150 feet away; that the boy would have crossed the track long before the car would reach his line of travel; that it was not until the boy turned around and re-entered the course of the car when it was 20 to 25 feet away that the emergency arose, and that then it was too late to avoid the accident. The question whether a defendant in a personal injury case is guilty of negligence is ordinarily a question of fact for the jury and only becomes a question of law where from the facts admitted or conclusively proved "there is no reasonable chance of different reasonable minds reaching different conclusions. Ill. C. R. Co. v. Anderson, 184 Ill. 294.

In the instant case, we are of the opinion that all reasonable minds would not reach the conclusion that there was no negligence in the operation of the street car. The motorman testified that when he first saw the little boy in the road, the street car was about 200 feet south of the candy store, and that the boy was then about 3 feet north of the candy store. The street was more than 60 feet wide. It, therefore, appears that when the motorman first saw the boy, he was about 200 feet south of the boy, and that he saw the boy from that time until the car struck him. All of the occurrence witnesses, except the motorman, testified that the boy left the curb at a point from 40 to 50 feet further north than that testified to by the motorman; that when the boy left the curb, he darted out in a westerly direction

to a point between the rails of the northbound track, then momentarily stopped, turned around and started toward the east. The child was but 3 years and 5 months old and "toddled" across the street a little faster than he could walk. And while one witness estimated that the child was traveling at from 6 to 8 miles per hour, it is obvious that this is incorrect for it is common knowledge that a man traveling at a brisk walk can make but 4 miles per hour and, of course, the child could not go so fast. If their version is to be taken as true, and there were four such witnesses, then we think it cannot be said, as a matter of law, that all reasonable minds would reach the conclusion that there was no negligence in the operation of the street car. Nor can we say that the finding of the jury to the effect that the car was negligently operated is against the manifest weight of the evidence. In Perryman v. C. C. Ry. Co., 242 Ill. 275, the street car company was held liable for an injury to a boy 4 years of age, who was struck by one of its cars while he was attempting to cross the street. In that case the court said (p.276) "In the Touhy case supra, it was said (p.415): "When a young child is discovered approaching the car track with the apparent intention of crossing in front of a moving car, or is discovered on the track, it is certainly the duty of the gripman or motorman to exercise a high degree of diligence in order to prevent injury to the child.' And in the Ryan case, (p.479) the following extract from Shearman and Redfield on the Law of Negligence (Vol. 1, sec. 99, 4th ed.) was quoted with approval: 'It is not necessary that the defendant should actually know of the danger to which plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert and he does take such

to a point between the rails of the southbound track, then momentarily stopped, turned around and started toward the east. The child was but 2 years and [illegible] months old and "bolted" across the street a little faster than he would walk. And while one witness estimated that the child was traveling at from 6 to 8 miles per hour, it is evident that this is improbable for it is common knowledge that a man traveling on a brisk walk can make but 4 miles per hour and, of course, the child could not go so fast. If their version is to be taken as true, and there they [illegible] each wit- nesses, then we think it cannot be said, as a matter of law, that all reasonable minds would reach the conclusion that there was no negligence in the operation of the street car. [illegible] may we not [illegible] the finding of the jury to the effect that the car was negligently operated is against the manifest weight of the evidence. In [illegible] v. [illegible] [illegible], the street car company was held liable for an injury to a boy 4 [illegible] of age, who was struck by one of its cars while he was attempting to cross the street. In that case the court said (p. [illegible]): "As was said in [illegible] (p. [illegible]), 'When a young child is discovered approaching the car track with the apparent intention of crossing in front of a moving car, as it approached on the track, it is certainly the duty of the motorman or conductor to exercise a high degree of dili- gence to check or prevent injury to the child.' And in the same case (p. [illegible]) the following language from [illegible] [illegible] on the Law of Negligence (Vol. 1, sec. [illegible]) was quoted with approval: 'It is not necessary that the de- fendant should actually know of the danger to which plain- tiff is exposed. It is enough if he has sufficient notice to [illegible] [illegible] [illegible]

precautions as a prudent man would take under similar notice or belief'." Of course, as was said in the Perryman case, if the child suddenly started to cross the tracks in front of the car at such a short distance that the motorman was unable to avoid striking him, no recovery could be had, but we think this question under the evidence was one to be determined by the jury.

2. The defendant also contends that the court erred in giving plaintiff's instructions No. 5 and 4. The fifth instruction was as follows:

> "The court instructs the jury that the plaintiff has alleged in the second count of his declaration that at the time and place in question, the defendants, by their motorman, in charge and control thereof, were propelling, operating and maintaining one of their street cars upon and along Kedzie avenue, at and near to the intersection of Twenty-fifth street; that the plaintiff's ward, who was a minor of the age of three years, was then and there passing upon, across and over Kedzie avenue, and that as said street car approached the place aforesaid, it was the duty of the motorman, in charge and control thereof, to exercise ordinary care to keep a proper lookout for the safety of persons, including children who might lawfully attempt to cross the track upon and along which said street car was approaching, and that the defendants, by their motorman, aforesaid, then and there failed to exercise such care, and that his failure to do so was negligence and that as a proximate result of such negligence, said street car then and there ran upon, against and over plaintiff's ward, whereby plaintiff's ward was injured and sustained damages.
>
> "And if you find from a preponderance of the evidence, under the instructions of the court, that plaintiff has proven his case, as alleged in this court, then you should find the defendants guilty."

Instruction four was substantially to the same effect, but set up the allegations of the first count in the declaration, which charged general negligence in the operation of the car and the defendants argue that these instructions were wrong

because the jury would probably infer that the court was giving his opinion as to what the facts were and not that he was merely stating the allegations of the declaration. In _Central Ry. Co._ v. _Bannister_, 195 Ill. 48, the court criticised an instruction to the effect that if the jury believes from the evidence the defendant was guilty as alleged in the declaration, they should find for the plaintiff, but there said - "Had the instructions copied the allegations no objection could have been urged to them." In the instant case no complaint is made that the counts were in any way defective and the instructions simply copied the allegations and to which no objection can be made, as stated in the _Bannister case_. Each of these instructions told the jury that the plaintiff had made certain allegations, setting them forth, and it then told the jury that if they found from a preponderance of the evidence under the instructions of the court, that plaintiff had proven his case as thus alleged, the defendant should be found guilty. We think the instructions are not subject to the objection made, and that they stated the law correctly. See _Pienta_ v. _Chicago City Ry. Co._, 284 Ill. 248; _Chicago City Ry. Co._ v. _O'Donnell_, 208 Ill. 268.

Complaint is also made of these instructions because they told the jury that if the motorman by the exercise of ordinary care, _could_ have known that the child was about to cross the street, etc. and by instruction five that it was the duty of the motorman to exercise ordinary care and keep a look-out for children who _might_ lawfully attempt to cross the track. The argument is as to the improper use of the words "_could_" and "_might_". These instructions were on the same pos-

because the jury would probably infer that the court was giving his opinion as to what the facts were and not that he was merely stating the allegations of the declaration. In [illegible] Co. v. [illegible], 185 Ill.App. [illegible], the court criticised an instruction to the effect that if the jury believe from the evidence the defendant was guilty of neglect in the particulars, they should find for the plaintiff, but there said that the instructions styled the allegations or objections would have been urged as counts. In the instant case we consider it such that the [illegible] [illegible] [illegible] [illegible] and the instructions simply recited the allegations and in which no charge thus was so made, as stated in the [illegible] case. Each of these instructions told the jury that the plaintiff had made certain allegations, setting them forth, and it then told the jury that if they found from a preponderance of the evidence under the instructions of the court, that plaintiff had proven his case as thus alleged, the defendant should be found guilty. We think the instructions are not subject to the objection made, and that they stated the law correctly. See [illegible] v. [illegible] [illegible] Co., [illegible] Ill. [illegible]; [illegible] [illegible] [illegible] v. [illegible], [illegible] Ill. [illegible].

Plaintiff is also [illegible] of three instructions because they told the jury that if the evidence in the exercise of ordinary care, [illegible] [illegible] [illegible] [illegible] [illegible] and [illegible] [illegible] the [illegible], etc., and by instruction [illegible] that it was the duty of the defendant to exercise ordinary care and keep a lookout for children who [illegible] lawfully attempt to cross the street. The argument is as to the improper use of the words "[illegible] and [illegible]". These instructions were in the very [illegible]-

ibility of the motorman avoiding the accident by use of his faculties. We think the criticism made is too refined. The jury in our opinion would not be misled. A somewhat similar objection was held untenable by another division of this court in the case of Miller v. Chicago Rys. Co., 226 Ill. App. 468.

A similar criticism is made to instructions 8 and 11 given on behalf of plaintiff. Instruction 8 told the jury that a motorman who is operating a street car along a public highway is required to exercise ordinary care for the safety of persons, including children, who might lawfully attempt to cross the street along which the car was approaching, and it then defined ordinary care. By instruction 11 the jury were told that if they believed from a preponderance of the evidence and under the instruction of the court that the motorman by using his faculties with ordinary and reasonable care, in looking out for danger, could have avoided the accident, and that he negligently failed to do so, and that such negligence on his part, if any, as shown by the evidence, was the proximate cause of the injury, then the defendants should be found guilty, provided such negligence was alleged in the declaration or some count thereof as explained in the instructions and proven by a preponderance of the evidence. What we have said concerning the objection made to instructions 4 and 5, we think is sufficient to show that the defendant was not prejudiced by the giving of these instructions.

3. Complaint is also made that the court erred in refusing to give defendants' instruction one and the giving of plaintiff's instruction No. 9. Instruction 9, given on behalfof the plaintiff, told the jury that if they found from a

bility of its witnesses regarding the condition by use of its facilities. We think the criticism made in the brief, the jury in the opinion would not be misled. A somewhat similar objection was held untenable by another division of this Court in the case of Willis v. Higdon Hdw. Co., 288 Ill. App. 416.

A similar criticism is made to instructions 8 and 11 given on behalf of plaintiff. Instruction 8 told the jury that a motorman who is operating a street car along a public highway is required to exercise ordinary care for the safety of persons, including children, who might lawfully attempt to cross the street along which the car was approaching, and it then defines ordinary care. By instruction 11 the jury were told that if they believed from a preponderance of the evidence and under the instructions of the court that the motorman by using the faculties with ordinary and reasonable care in looking out for danger, could have avoided the accident, and that the motorman failed to do so, and that such negligence on his part, if any, as shown by the evidence, was the proximate cause of the injury, then the defendant should be found guilty, provided such negligence was alleged in the declaration or some count thereof as explained in the instructions and proven by a preponderance of the evidence. What we have said concerning the objections made to instructions 4 and 5, we think is sufficient to show that the defendant was not prejudiced by the giving of these instructions.

5. Complaint is also made that the court erred in refusing to give defendant's instruction one and the giving of plaintiff's instruction No. 9. Instruction 9, given on behalf of the plaintiff, told the jury that if they found from a

preponderance of the evidence, under the instructions of the court, that the child had escaped from his home and that the mother was guilty of negligence in permitting him to do so, or in not taking proper care of him, that such negligence, if any, on her part, could not be charged against the child. Refused instruction one, was to the effect that if the jury believed from the evidence that the child at the time and place of the accident was too young and inexperienced to be out upon the street, without some older person accompanying him, and that if his being unaccompanied was the sole proximate cause of his injury, then their verdict should be for the defendant. It is not contended as we understand, that instruction 9 was not correct because the negligence of the parent is not imputed to the child. Chicago City Ry. Co. v. Wilcox, 138 Ill. 370; Ohnesorge v. Chicago City Ry. Co., 259 Ill. 425. But the defendant's argument is that the court instructed the jury on behalf of the plaintiff that the negligence of the mother in permitting the child to escape was no defense and they had a right to have the jury instructed that if the negligence of the mother was the sole proximate cause of his being injured, no recovery could be had. We think the instruction was properly refused, because it might mislead the jury. They were told in several instructions that no recovery could be had unless the defendant was proven guilty by a preponderance of the evidence as alleged in the declaration, and that if the jury believed that the injury was a result of an accident without any negligence of the defendant, the verdict should be not guilty. The sole question of liability was predicated upon the negligence of the defendants. In these circumstances, we think the instruction was properly refused.

preponderance of the evidence, under the instructions of the court, that the child was [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] of [illegible] in permitting him to [illegible], or to [illegible] [illegible] [illegible] of the, that such [illegible], if any, on her part, would not be charged against the child. Refused instruction [illegible], was to the effect that if the jury believed from the evidence that the child by the time and place of the accident [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] upon the street, [illegible] [illegible] [illegible] [illegible] him, and that if his [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] mate cause of his injury, then their verdict should be for the defendant. It is not contended [illegible] [illegible] [illegible], that instruction 9 was not correct because the negligence of the parent is not imputed to the child. Chicago City Ry. Co. v. Wilcox, 138 Ill. 370; [illegible] v. Chicago City Ry. Co., [illegible] Ill. [illegible]. But the defendant's argument is that the court instructed the jury at request of the plaintiff that the negligence of the mother in permitting the child to [illegible] [illegible] [illegible] [illegible] and they had a right to have the jury instructed that if the negligence of the mother was the sole proximate cause of his being injured, no recovery could be had. We think the instruction was properly refused, because it might mislead the jury. They were told in several instructions that no recovery could be had unless the defendant was guilty [illegible] [illegible] [illegible] [illegible] [illegible] of the accident as alleged in the declaration, and that if the jury believed that the injury was a result of an accident without any negligence of the defendant, the verdict should be not guilty. The sole question of liability was predicated upon the negligence of the defendant. In these circumstances, we think the instruction was properly refused.

4. The defendants also contend that no liability could be predicated on counts 3 and 4, which charged the defendant with failing to ring a bell, sound a gong or to give other warning, because a child of such tender years, as the injured boy, would be without judgment or knowledge of the purpose of such warning to understand its significance. This was held to be the law by another division of this court in the case of Miller v. Chicago Rys. Co., 224 Ill. 468. The defendants argue that the liability of the defendants as alleged in these two counts was submitted to the jury by the court in plaintiff's instructions 2, 3, and 11. Instruction 2 told the jury that while as a matter of law the burden of proof was on the plaintiff for him to prove his case by a preponderance of the evidence, still if they believed that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient to find the issues in plaintiff's favor and against the defendants. And by instruction 3, the jury were told that as a matter of law plaintiff was not required to prove his case beyond a reasonable doubt, but only required to prove it by a preponderance of the evidence. Instruction 11 was to the effect that if the jury found from a preponderance of the evidence, under the instructions of the court, certain matters therein enumerated, then they should find defendants guilty, "provided such negligence is alleged in the declaration or some count thereof as explained in these instructions and proven by a preponderance of the evidence."

The giving of instructions similar to instructions 2 and 3 have been repeatedly held not to be reversible error

where such facts have been substantially the same as in the instant case. In the Miller case, an instruction was given embodying the substance of the allegation of the count charging the failure to ring a bell. In the instant case no reference is made in the instructions to the counts, charging the failure to ring a bell or to sound a gong, but specific instructions were given to the allegations of other counts. There is nothing to show that the jury knew of the counts in the declaration which alleged the failure to ring a bell or sound a gong. And in these circumstances it is clear that their verdict was based on the counts the allegations of which were set forth in the instructions. In the case of Loretto v. Director General 308 Ill. 348, complaint was made that the court erred in refusing to give an instruction requested by the defendants which set out in full a section of a statute which forbids a railway company from obstructing a public highway for more than ten minutes, and which sought to tell the jury that a certain ordinance set forth in the fourth count of the declaration was void. The court said (pp.354-355) "It is argued that the jury were referred to the declaration by certain instructions, and that this ordinance was in one count of the declaration, and that the jury's verdict may have been based on this void ordinance. There is nothing in the record to show that the jury ever saw the declaration or knew that the ordinance was set forth in its fourth count. The court should not permit the pleadings in civil cases to be taken by the jury when they retire to consider their verdict and we must assume that the court did its duty in this regard and did not deliver the declaration to the jury." Bernier v. Illinois

Central R. R. Co., 298 Ill. 464.' In the instant case although the counts charging the failure to ring a bell or sound a gong were not withdrawn and even if no liability could be predicated upon them, yet we think there was no error in giving the instructions complained of.

5. Complaint is also made that the judgment of $17,000.00 is excessive. Considering the nature of the child's injuries, the damages are not subject to mathematical computation. In the case of Posch v. Chicago Railways Co., 221 Ill. App. 241, we said (pp. 254-255) 'The damages awarded by the jury may be larger than would have been sustained a few years ago, and on the question of the amount the earlier decisions of this State are of little assistance. We cannot, however, be unmindful of the fact that money value of life and health is appreciating and the purchasing power of money depreciating during recent years. Without deciding whether the amount is larger than we would have awarded had the responsibility been ours, we think it is not so excessive as to require interference on our part. De Fillippi v. Spring Valley Coal Co., 202 Ill. App. 61; Delohery v. Quinlan, 210 Ill. App. 321; Girdzus v. Van Etten, 211 Ill. App. 323. In view of the permanent injuries suffered by the child, we think we would not be warranted in disturbing the judgment on the ground that it was excessive.

Judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, J. CONCURS;
TAYLOR, P.J. SPECIALLY CONCURRING:

In such a case as this it is exceedingly difficult to determine what may constitute negligence on the part of the

motorman. In the conventional case, where the one charged with negligence and the person injured are both mature and admittedly capable of exercising ordinary care, of course, different principles are applicable. Here, however, no question arises as to ordinary care on the part of the child, and so the only question is, did the motorman, considering all the circumstances, exercise ordinary care? As a general rule of conduct, it would seem to be fair to say that where the driver of the street car or motor vehicle sees a child of tender years ahead of him off the sidewalk in the street, the driver as the result of ordinary common sense is expected to realize that such a child may suddenly start off in any direction, and, having that knowledge, he is in duty bound to obtain as quickly as it is mechanically practicable such control of the machine he is driving as to be ready, if actual danger of injuring the child arises, to stop almost upon the instant.

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EDWARD E. MILLER, guardian of the estate of FRANCES TABOR, a minor,

Appellee,

v.

PILSEN PRODUCTS COMPANY, a corp., formerly PILSEN MFG. CO.,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 628

Opinion filed Feb. 27, 1924.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

At about seven o'clock in the evening of March 2, 1920, an automobile truck belonging to the defendant and operated by one of its servants struck and injured Frances Tabor, a girl about seven years of age, the rear wheel of the truck passing over the child's leg and fracturing the bone above the knee. The injured child's guardian brought this suit to recover damages for such injuries and there was a verdict and judgment in favor of the plaintiff for $7000.00.

The record discloses that Frances Tabor lived with her parents on the west side of Loomis street, a north and south street in Chicago, a few doors north of 19th street, an east and west street; that she was sent on an errand which took her to a store located on the west side of Loomis street and a few doors south of 19th street, and as she was returning to her home and crossing 19th street, near the west crosswalk, an automobile truck which was being driven west in 19th street by one of defendant's servants, struck the child and injured her as above stated. It was

MR. JUSTICE O'CONNOR delivered the opinion of the court.

At about seven o'clock in the evening of March 4, 1935, an automobile truck belonging to the defendant and operated by one of its employees struck and injured Frances Daley, a girl about seven years of age, the rear wheel of the truck passing over the child's leg and fracturing the bone above the knee. The injured child's guardian brought this suit to recover damages for such injuries and there was a verdict and judgment in favor of the plaintiff for $7000.00.

The record discloses that Frances Daley lived with her parents on the west side of Loomis street, a north and south street in Chicago, a few doors north of 18th street, an east and west street; that she was sent on an errand which took her to a store located on the east side of Loomis street and a few doors south of 18th street, and as she was returning to her home and crossing 18th street, near the east crosswalk, an automobile truck which was being driven west in 18th street by one of defendant's servants, struck the child and injured her as above stated. It was

dark at the time and there was ice on the street and sidewalks so that they were slippery. The roadway of each street at the place in question was 38 feet wide.

Plaintiff's version of the matter is that the truck was being driven west on the south side of 19th street at from 30 to 35 miles per hour and that but one of the headlights was burning; that before the child stepped into the roadway, she looked but did not see the truck; that she was about 6 feet from the south curb near the west crosswalk of the intersection, the left hand front fender of the truck struck her, turning her around so that she fell and the left rear wheel passed over her leg just above the knee; that she did not see the truck until it was about six inches from her. There was also evidence tending to show that no horn was sounded, and that after the child was struck the truck ran from 130 to 140 feet before it was stopped. Testimony to this effect was given on behalf of the plaintiff, although varying somewhat in detail, by Joseph Sluka, a boy about fifteen years of age, at the time of the accident who was on the sidewalk at the southwest corner of the intersection, facing north; by John Schulz, a boy of about the same age, who was at the northwest corner of the intersection; by Anna Medved, who was walking west and who was near the southeast corner of the intersection. Frances Tabor, the little girl who was injured and Grace Wikse who was with her and who was also about seven years of age, also testified for the plaintiff, but their testimony was not very clear, apparently on account of their age.

The defendant's version was as testified by the chauffeur who was driving the truck; that he was driving west in 19th street north on the center of the roadway at about 9 to 10 miles per hour; that the truck was loaded with about 50 sacks of sugar, weighing about 2½ tons; that when he was about 125 feet east of Loomis street, he saw some children, three or four playing around the southwest corner of the intersection, sliding on the sidewalk and in the street; that when he was about 30 feet east of Loomis street he sounded the whistle or horn; that the witness Joseph Sluka, was walking north across 19th street near the west cross-walk; that when he came to within a few feet of where the truck would pass in front of him, he stopped apparently to permit the truck to pass; that when the truck was about opposite him, the little girl Frances Tabor ran north across the intersection and just east of Sluka; that Sluka grabbed her and that she fell and slipped underneath the truck; that he did not know he had run over the little girl's leg; that he stopped the truck in about 43 feet and went back to see if she was injured; that he found that she was injured and took her to a doctor's office in the vicinity.

Other evidence on behalf of the defendant tended to show that the chauffeur in charge of the truck was an experienced driver; that there was a governor on the machine and it was so regulated that the truck could not run at a greater speed than 15 miles per hour; that this governor was on the machine when it was bought, which was some months prior to the accident and then it was in good condition.

The defendant's version was as testified by the chauffeur who was driving the truck; that he was driving west in 19th street north of the center of the roadway at about 8 to 10 miles per hour; that the truck was loaded with about 80 sacks of sugar, weighing about 3½ tons; that when he was about 125 feet east of Loomis street, he saw some children, three or four playing around the southeast corner of the intersection, sliding on the sidewalk and in the street; that when he was about 50 feet east of Loomis street he sounded the whistle or horn; that the witness Joseph Sinka, was walking north across 19th street near the west cross-walk; that when he came to within a few feet of where the truck would pass in front of him, he stopped apparently to permit the truck to pass; that when the truck was about opposite him, the little girl Frances [illegible] ran north across the intersection and just east of Sinka; that Sinka grabbed her and that she fell and slipped underneath the truck; that he did not know he had run over the little girl's leg; that he stopped the truck in about 42 feet and went back to see if she was injured; that he found that she was injured and took her to a doctor's office in the vicinity.

Other evidence on behalf of the defendant tended to show that the chauffeur in charge of the truck was an experienced driver; that there was a governor on the machine and it was so regulated that the truck could not run at a greater speed than 15 miles per hour; that this governor was on the machine since it was bought, which was some months prior to the accident and that it was in good condition.

The evidence further showed that after the injury the child was taken to the hospital where she remained for more than three months; that there was a fracture of the thigh bone about four inches above the knee; that the fracture had not been properly reduced; that the thigh bone was out of aligmment at an angle of about 35 degrees; that there was a shortening of about two inches of the leg; that there was a large sloughing on the surface on the inside of the lower part of the thigh; that at the time of the trial the leg was smaller than the one which was not injured and that the injury was permanent.

The defendant contends that (1) The greater weight of evidence shows that the driver of the truck was not guilty of the negligence alleged in counts one and four of the declaration. (2) That the injured child was guilty of contributory negligence as a matter of law. (3) That there was no evidence to sustain the allegations of the third count and (4) That the court erred in not sustaining appellant's motion to withdraw a juror.

1. The first count charged general negligence in the operation of the car. The second count was withdrawn. The third count charged that the truck was operated through a closely built up business portion of the city at a rate of speed of 10 miles per hour contrary to the statute. The fourth count charged that the automobile was operated in excess of 15 miles per hour in a residential portion of the City of Chicago, contrary to the provisions of the statute. If the jury believed from the evidence that the automobile truck wastraveling 20 to 25 miles per hour on the wrong side of the street, with only one headlight,

and the driver of the truck admitting that he saw children playing at the southwest corner of the intersection when he was a considerable distance east of Loomis street and considering the fact that the street and sidewalk were icy and slippery; and that it was dark, all of which the evidence tended to show, although plaintiff's chauffeur testified that he was traveling on the north side of the street, not faster than nine or ten miles per hour and that the little girl ran into the side of the machine,- in these circumstances, we would not be warranted in disturbing the verdict of the jury. Nor do we think that it can be said as a matter of law or as a matter of fact, in view of the verdict of the jury, that the finding of the jury to the effect that the injured child was in the exercise of that degree of care which the law required of her for her own safety, is against the manifest weight of the evidence. The question whether the truck was operated negligently and whether the child was in the exercise of that degree of care which the law requires, we think were both proper questions for the jury.

The defendant contends that the court should have granted its motion for a directed verdict as to the third count, because as we understand counsel, the evidence fails to show that the place in question was a closely built up portion of the city. We think there is no merit in this point because it was agreed that the place in question was occupied by stores, flats and houses. Moreover, even if there was any error in this respect, it would not warrant a reversal, because there were other good counts in the declaration which

we have held were sustained by the evidence. Scott v. Parlin & Orendorff Co., 245 Ill. 460.

It is further contended that there was error in the ruling of the court in overruling the defendant's motion to withdraw a juror and continue the cause, because counsel for plaintiff in examining one Sorensen on his voir dire, asked such questions as would let it be known that the defendant was covered by a liability insurance. This contention is not borne out by the record. There is nothing to indicate that the defendant was protected by liability insurance. The record discloses that Sorensen in reply to questions put to him by counsel for the plaintiff said that he was secretary of a furniture company; that his concern used automobile trucks for the delivery of its merchandise. He was then asked, if his company had ever been sued for damages caused by the operation of its automobile trucks. He answered. "Not direct, they pay compensation insurance." The witness then said that they had liability insurance; that they had one or two cases, but his company had not been sued direct, but that there had been accidents claimed to have occurred through the negligence of their drivers of the trucks. Of course, there is nothing in this that would indicate in the remotest degree that the defendant in the instant case carried liability insurance.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

we have held were admitted by the pleadings. Smith v. Parlin & Orendorff Co., 346 Ill. 491.

It is further contended that there was error in the ruling of the court in restricting the defendant's motion to withdraw a juror and continue the cause, for where counsel for plaintiff in examining the jurors on the voir dire, asked such questions as would let it be known that the defendant was covered by a liability insurance. This contention is not borne out by the record. There is nothing to indicate that the defendant was protected by liability insurance. The record discloses that Harrison in reply to questions put to him by counsel for the plaintiff said that he was secretary of a furniture company; that his concern used automobile trucks for the delivery of its merchandise. He was then asked, if his company had ever been sued for damages caused by the operation of its automobile trucks. He answered, "Not directly, they carry compensation insurance." The witness then said that they had liability insurance; that they had one or two cases, but his company has not been sued direct, but that there had been accidents claimed to have occurred through the negligence of their drivers of the trucks. Of course, there is nothing in this that would indicate in the remotest degree that the defendant in the instant case carried liability insurance.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Wilson, P.J. and Friend, J. concur.

338 - 28071

J. CALVIN MECARTNEY, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
HENRY W. KERN, Appellant.	)	COOK COUNTY.

233 I.A. 628

Opinion filed Feb. 27, 1924

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a bill in chancery filed by the complainant Mecartney against the defendant Kern, in the Superior Court of Cook County. Both of the parties are engaged in the real estate business. The bill is a bill for an accounting, in which the complainant claims a one-half interest in the profits, growing out of the purchase and sale of certain real estate known as the H. W. Kern Subdivision. It was the position of the defendant that the complainant had no interest whatever in any share of the profits with him growing out of this subdivision. The issues presented by the bill and answer were considered by the chancellor in open court and after hearing all the testimony a decree was entered, finding that the complainant was entitled to an accounting and that the complainant was entitled to one-half the profits, if any, and liable for one-half the loss, if any, arising from the transaction involving the purchase, subdivision, and sale of the various parcels of real estate comprising the Kern Subdivision and also arising from two other transactions, one involving the purchase and sale of a parcel of real estate, known as the Mecartney Re-Subdivision, and the other involv-

ing the acquisition by the parties of the exclusive contract for the sale of 45 lots known as the Zeutell lots, in the neighborhood of the two subdivisions referred to, these latter transactions growing out of the main transaction involved. The decree further found that as to the Kern Subdivision and the Mccartney Re-Subdivision, the arrangement between the parties was that Kern was to advance the money needed to purchase, subdivide, advertise and sell the properties, and Mccartney was to furnish his experience and attend to the management of the subdivisions and the sale of the lots; and the money realized from the sales of the various lots was to be applied toward the payment of all legitimate expenses and the repayment to Kern of all the money he had advanced, and the balances, if any, was to be divided between Kern and Mccartney equally, and in the event of a loss, the parties should each pay one-half of it. The decree further found that Mccartney had carried out his part of the joint enterprise, and, as already stated, was entitled to one-half of the profits, if any, or if there was a loss he was liable for one-half of it. The decree further referred the cause to a Master in Chancery for the taking of an accounting between the parties and it provided that if Kern did not pay any amount that might be found due to the complainant, on the taking of the account, then certain lots and parcels of real estate, which were involved in the joint venture and which still remained unsold, the title being in Kern, were to be sold at judicial sale and the proceeds brought into court for distribution.

The decree, as originally entered, was subsequently vacated and a new decree entered, making some alterations from its original provisions. The last paragraph of the decree

ing the complainant by the parties of the exclusive contract for the sale of 48 lots known as the Crutwell Lots, in the neighborhood of the two subdivisions referred to, these latter transactions growing out of the main transaction involved. The Master further found that as to the Fern subdivision and the Macartney co-subdivision, the arrangement between the parties was that Fern was to advance the money needed to purchase, subdivide, advertise and sell the properties, and Macartney was to furnish his experience and attend to the management of the subdivisions and the sale of the lots; and the money realized from the sales of the various lots was to be applied toward the payment of all legitimate expenses and the repayment to Fern of all the money he had advanced, and the balance, if any, was to be divided between Fern and Macartney equally, and in the event of a loss, the parties should each pay one-half of it. The master further found that Macartney had carried out his part of the joint enterprise, and, as already stated, was entitled to one-half of the profits, if any, or if there was a loss he was liable for one-half of it. The decree further referred the cause to a master in chancery for the taking of an accounting between the parties and it provided that if Fern did not pay any amount that might be found due to the complainant, on the taking of the account, then certain lots and parcels of real estate, which were involved in the joint venture and which still remained unsold, the title being in Fern, were to be sold at judicial sale and the proceeds brought into court for distribution.

The decree, as originally entered, was subsequently vacated and a new decree entered, making some alterations from its original provisions. The last paragraph of the decree

as finally entered, is somewhat ambiguous, but it would seem from an examination of the original decree as well as the final decree, that the last paragraph of the decree, as finally entered, was intended by the chancellor to provide, and we will consider it as providing, that the court retain jurisdiction of the cause, for the purpose of decreeing to Mccartney or Kern such part of the net cash profits, or loss if any, arising out of the entire joint adventure as may appear to be due to either of them after the account has been taken.

The only contention made in this court by the defendant in support of his appeal, is that the findings of the chancellor and the decree entered, are against the manifest weight of the evidence. Thus the only question presented to this court on this appeal is one of fact. There are some elements presented in the record which make a decision of that question in this case, one which is not at all free from difficulty.

The substance of the testimony of the complainant, Mccartney, was to the effect that he and the defendant Kern had been acquainted for thirty years and that they had had many business dealings, including several transactions which they had gone into together, Kern putting up the money and Mccartney doing most of the work and each of them taking one-half of the profits of the deal. Such of these joint transactions as were specifically referred to in the evidence, were profitable. He further testified that in March or April of 1913, he learned of a pieceof property which was in the market at what he considered an attractive price and Kern having shortly before told him of some cash he expected to

as finally entered, is somewhat ambiguous, but it would seem from an examination of the original decree as well as the final decree, that the last paragraph of the decree, as finally entered, was intended by the chancellor to provide, and we will consider it as providing, that the court retain jurisdiction of the cause, for the purpose of determining an accounting as to each part of the net cash profits, or loss if any, arising out of the entire joint adventure as may appear to be due to either of them after the accounting has been taken.

The only contention made in this court by the defendant in support of his appeal, is that the findings of the chancellor and the decree entered, are against the manifest weight of the evidence. Thus the only question presented to this court on this appeal is one of fact. There are some elements presented in the record which make a decision of that question in this case, one which is not at all free from difficulty.

The substance of the testimony of the complainant, Montgomery, was to the effect that he and the defendant Rozen had been acquainted for thirty years and that they had had many business dealings, including several transactions which they did quite [illegible] together, Rozen putting up the money and Montgomery doing most of the work and each of them taking one-half of the profits of the deal. Each of these joint transactions as were specifically referred to in the evidence, were profitable. He further testified that in March or April of 1945, he learned of a piece of property which was in the market at what he considered an attractive price and from having shortly before told him of some deal he expected to

have available he, Macartney, talked to Kern about the advisability of buying the property and subdividing it, and that this led to the purchase of the property by Kern, and that it was understood and agreed between them that it was to be a joint venture, Kern to put up the money and taking the title, and Macartney giving his services in accomplishing the subdivision and re-sale of the various parcels into which it was to be divided. Macartney in the course of his testimony went into many details involved in the purchase of this property which came to be known as the Kern Subdivision, and relating to its subdivision and re-sale, which it will not be necessary to refer to here in detail. In the course of his testimony he stated that he and Kern had had occasion to visit the office of Kern's lawyer, Mr. George W. Brown, relating to steps that became necessary to clear up the title, and that on that occasion Brown asked Kern what Macartney's interest was in the property and that Kern's answer was to the effect that it was a half interest in the profits. Macartney also went into considerable detail as to the services he rendered, particularly in relation to the selling of the lots into which the property was subdivided. The property was in a neighborhood which was inhabited largely, if not entirely, by families of foreign birth, and to accomplish sales, it was desirable to employ agents of the same nationality as the prospective customers, and this was done, and Macartney described his relations with these various agents. It appears further from the testimony of Kern as well as that of Macartney that shortly after the Kern Subdivision transaction was begun, Macartney's attention was called to some property referred to in the record as the Richmond Lots (which came to the Macartney Re-Subdivision) which were in the neighborhood of the Kern Subdivision, and

Mecartney testified he called this property to the attention of Kern and told him that the lots could be acquired at a good price, and while they were not saleable as they then stood, they could be so resubdivided as to make them so, and the parties concluded and agreed to acquire them and carry them along, on the same basis as they were carrying the Kern Subdivision property, and they did this, Kern again putting up the necessary funds, which were $[illegible],000. The funds which Kern put up in the acquisition of the Kern Subdivision property were approximately $12,000.

Some months later, Mecartney testified he called Kern's attention to a tract comprising 45 lots adjoining the Kern Subdivision, which were in the hands of eastern owners, with a local representative whose name was Zustell, and Mecartney testified he suggested that, through Zustell they could acquire an exclusive agency to sell these lots; that as they then stood they were competing with the Kern Subdivision lots, and he suggested that an exclusive agency on the Zustell lots be acquired, "to protect our lots, as they were being offered cheaper than the price we put on ours (in the Kern Subdivision and Mecartney Subdivision) and I could get a commission for the sale of them and we would have the control of them." He further testified that Kern approved of the idea, and as a result of this he acquired from Zustell an exclusive agency for the sale of the lots; that again he and Kern agreed that they would sell these lots of Zustell's through the same agencies they were employing in connection with their attempts to sell the other lots and that they would divide equally all commissions earned in connection with the sale of these Zustell lots; that these lots were all sold except three,

Mecartney testified he called this property to the attention of Leon and told him that the lots could be acquired at a good price, and while they were not saleable as they then stood, they could be so subdivided as to make them so, and the parties conferred and agreed to acquire them and carry them along, on the same basis as they were carrying the Leon Subdivision property, and they did this, Leon again putting up the necessary funds, which were $3,000. The funds which Leon put up in the acquisition of the Leon Subdivision property were approximately $13,000.

Some months later, Mecartney testified he called Leon's attention to a tract comprising 44 lots adjoining the Leon Subdivision, which were in the hands of eastern owners, with a local representative whose name was Gunnell, and Mecartney testified he suggested that, through Gunnell they could acquire an exclusive agency to sell these lots; that as they then stood they were competing with the Leon subdivision lots, and he suggested that an exclusive agency on the Gunnell lots be acquired, "to protect our lots, as they were being offered cheaper than the price we put on ours (in the Leon Subdivision and Mecartney Subdivision) and I could get a commission for the sale of them and we would have the control of them." He further testified that Leon approved of the idea, and as a result of this he acquired from Gunnell an exclusive agency for the sale of the lots; that again he and Leon agreed that they would sell these lots of Gunnell's through the same agencies they were employing in connection with their attempts to sell the other lots and that they would divide equally all commissions earned in connection with the sale of these Gunnell lots; that these lots were all sold except three,

the commissions amounting to $1500.00 or $1600.00; that Kern contributed nothing in the way of service in the selling of these lots; that he did buy the last three lots and made a profit on them. It would seem from the evidence in the record that one-half of the commissions realized from the sale of these Zuetell lots was turned over to Kern. The latter admits receiving something over $700.00 in cash as a division of the commissions on the sale of these lots and he further admits that he did nothing in the way of assisting in their sale except as his purchase of three of them might be considered as such assistance.

On cross-examination Mccartney testified that he turned all of the money he collected on the sale of the lots in the Kern Subdivision over to Kern, not retaining any of it as his share of the profits, his explanation being that they had agreed not to have a settlement until all these lots had been disposed of.

One Petrizlek, the man who called Mccartney's attention to the property which was purchased and which came to be the Kern Subdivision, and who later had a good deal do with the actual sale of the lots of the Subdivision, testified to conferences he had with Mccartney and Kern together, and he stated that in referring to the Subdivision the defendant Kern always used the pronoun "we". He also testified as to Mccartney's activities in connection with the management of the Subdivision.

The substance of the testimony of the defendant Kern was flatly contradictory of Mccartney's, in many respects, but in many others it was substantially the same as

the commissions amounting to $1860.00 or $930.00; that Ross contributed nothing in the way of service in the selling of these lots; that he did buy the last three lots and made a profit on them. It would seem from the evidence in the record that one-half of the commission realized from the sale of these Kuehnl lots was turned over to Ross. The latter admits receiving something over $700.00 in cash as a division of the commissions on the sale of these lots and he further admits that he did nothing in the way of assisting in their sale except as his purchase of three of them might be considered as such assistance.

On cross-examination Greenberg testified that he turned all of the money he collected on the sale of the lots in the Ross subdivision over to Ross, not retaining any of it as his share of the profits, his explanation being that they had agreed not to have a settlement until all these lots had been disposed of.

Sam Peterlin, the man who called Greenberg's attention to the property which was purchased and which came to be the Ross Subdivision, and who later had a good deal to do with the actual sale of the lots of the Subdivision, testified to conferences he had with Greenberg and Ross together, and he stated that in referring to the subdivision the defendant Ross always used the pronoun "we". He also testified as to Greenberg's activities in connection with the management of the subdivision.

The substance of the testimony of the defendant Ross was flatly contradictory of Greenberg's, in many respects, but in many others it was substantially the same as

Mccartney's testimony. On all vital points, going to the question of whether there had been any joint adventure between them, involving the Kern Subdivision, it was flatly contradictory. He admitted, however, that the Mccartney Subdivision was a deal on which they had entered on a basis of each having a one-half interest and that the same was true with regard to the sale of the Nustell lots, but that when the Kern Subdivision deal was entered into he told McCartney that it involved such an amount of money as made it necessary, if Mccartney wanted to come in on an equal share, that he contribute one-half the money needed to complete the deal, which was approximately $6000.00.

Counsel for the defendant, Mr. Brown, took the witness stand and flatly contradicted the testimony of Mccartney to the effect that the latter had come to his office with Kern, with regard to the title of the Kern Subdivision, and that at that time Brown had asked Kern what Mccartney's interest in the deal was and that the latter had stated that it was a one-half interest. Brown's testimony was to the effect that no such occurrence ever took place; that Mccartney and Kern had never come to his office at any time and that Mccartney had never even been in his office when he, Brown, was there. Some criticism is made in the brief of counsel for the plaintiff, relating to the action of Mr. Brown in taking the witness stand. In our opinion the facts do not justify any criticism in that regard. The plaintiff having testified as to the conversation between him and the defendant, and having further testified that it took place in counsel's presence, in his office, counsel had a right and a duty, if this position was to the contrary, to take the stand and say so.

McMurtney's testimony. On all vital points, going to the question of whether there had been any joint adventure between them, involving the Kern Subdivision, it was flatly contradictory. He admitted, however, that the preliminary conversation was a deal on which they had entered on a basis of each having a one-half interest and that the same was true with regard to the sale of the Russell Lots, but that when the Kern Subdivision deal was entered into he told McMurtney that it involved such an amount of money as made it necessary, if McMurtney wanted to come in on it equal shares, that he contribute one-half the money needed to complete the deal, which was approximately $3000.00.

Counsel for the defendant, Mr. Brown, took the witness stand and flatly contradicted the testimony of McMurtney to the effect that the latter had come to his office with Kern, with regard to the title of the Kern Subdivision, and that at that time Brown had asked Kern what McMurtney's interest in the deal was and that the latter had stated that it was a one-half interest. Brown's testimony was to the effect that no such conference ever took place; that McMurtney and Kern had never come to his office at any time and that McMurtney had never even been in his office when he, Brown, was there. Some criticism is made in the brief of counsel for the plaintiff, relating to the action of Mr. Brown in taking the witness stand. In our opinion the facts do not justify any criticism in this regard. The plaintiff having testified as to the conversation between him and the defendant, and having further testified that it took place in counsel's presence, in his office, counsel had a right and a duty, if this position was to the contrary, to take the stand and say so.

After a careful consideration of all the evidence we have come to the conclusion that we would not be justified in disturbing this decree. We have come to this conclusion in spite of the fact that we have every confidence in the integrity of Mr. Brown and in the truthfulness of his testimony. We do not doubt that the chancellor who entered the decree had as high a regard for Mr. Brown and as high an appreciation of his testimony as this court has; but that the chancellor also was led, in spite of that fact, to enter a decree for the complainant, on all the evidence presented.

We feel obliged to affirm the decree because of the fact that there are a number of matters which are without contradiction and a number of others which are not seriously controverted, which appear to us to be entirely consistent with the contention of the complainant that the Kern Subdivision transaction was a joint adventure between these parties on a basis of an equal share in the profits, and, on the other hand, these matters to which we refer are utterly inconsistent with the contention of the defendant, to the contrary.

In the first place, these two parties, both real estate men, had been acquainted with one another for many years and had admittedly been engaged in several joint ventures on what is referred to in the record as a"50 - 50 basis," and these had been profitable. Again, there is no contradiction of the fact that this was the basis on which these two parties went into the Macartney Subdivision transaction, Kern furnishing the money, and this was also the basis on which they acquired the exclusive sale of the Zuetell lots and the Macartney Subdivision transaction was entered into very shortly after the Kern Subdivision property

was acquired, and the transaction involving the sale of the Zustell lots was undertaken only a few months later; and both the Macartney Subdivision property and the so-called Zustell property were contiguous to or very near the Kern Subdivision, and their being on the market would almost certainly have some effect on the sale of the Kern Subdivision lots. It seems very natural that the parties should enter into these other two deals in the manner described by the complainant, which indeed is not denied by the defendant, and it seems equally clear and natural that such a course should follow an undertaking of the parties, involving the Kern Subdivision, in the manner described by the complainant.

It appears from the record that in the course of the handling of the Kern Subdivision matter, Kern went to his bank and opened a new account which was known as the "H.W. Kern Subdivision Account" and receipts from the sale of lots, from the Kern Subdivision, went into that account instead of Kern's personal account. In our opinion the explanation which Kern gives of this incident is not very impressive. That explanation is to the effect that he was obligated to the extent of $16,000.00 on a mortgage covering this Subdivision and he was obliged to make payments every now and then on this mortgage, and he tried to do this for some time from his own account, but things got mixed up and he was sometimes overdrawn, so he thought he would start another account for the purpose of getting this money together for the purpose of paying this mortgage. He testifies that he did not deposit all the money received from the Subdivision in that account and that he paid some of his own personal bills out of the account. It is rather difficult

to appreciate why it was necessary to open an account in the bank, known as the Subdivision account, in order to keep his payments on the mortgage straight, especially if he used it, in part, as a private account.

There can be no doubt whatever, from the record, that Macartney did a very considerable amount of work in connection with this subdivision. We will not comment on it in detail, but it was considerable, and according to the theory and the testimony of Kern, this was all done for nothing,- Macartney never asked to be paid for it and never submitted any bill for it. He was managing some flat buildings belonging to Kern, and collecting rents and receiving commissions for that, and apparently it is the defendant's theory that all of the services of Macartney, in connection with the Subdivision, which, as we have already stated, were considerable, were done for nothing. This seems quite unreasonable and utterly out of all harmony with what happened, according to the defendant's own admissions, in connection with the Macartney Subdivision and the Sustell Lots deals, both of them coming at the very time of or shortly following the undertaking of the Kern Subdivision deal.

The sale of the lots in the Kern Subdivision became impossible in the summer of 1913, owing to the fact that a defect was discovered in the title and it was not until the fall of that year, after the selling season was over, that the title was cleared up. Sales were further slowed up by reason of the fact that many of the people moving into this Subdivision were affected by the War and the real estate market in that neighborhood was apparently at a standstill. Most of the sales that were made were in 1915 and 1916. On cross-examina-

in connection with it was necessary to keep an account in the Bank, hence in his subdivision account, in order to keep his payments on the mortgage straight, especially if he used it, in part, as a private account.

There can be no doubt whatever, from the record, that Hedderburg did a very considerable amount of work in connection with this subdivision. He did not testify as to it in detail, but it was considerable, and according to the theory and the testimony of Jens, this was all done for nothing,— Hedderburg never asked to be paid for it and never submitted any bill for it. He was managing some flat buildings belonging to Jens, and collecting rents and receiving commissions for that, and apparently it is the defendant's theory that all of the services of Hedderburg, in connection with the subdivision, which, as we have already stated, were considerable, were done for nothing. This seems quite unreasonable and utterly out of all harmony with what happened, according to the defendant's own admissions, in connection with the Lawrence subdivision and the Russell Lane deals, both of these coming at the very time of or shortly following the undertaking of the Park Subdivision deal.

The sale of the lots in the Park Subdivision became impossible in the summer of 1915, owing to the fact that a defect was discovered in the title and it was not until the fall of that year, after the selling season was over, that the title was cleared up. Sales were further slowed up by reason of the fact that many of the people moving into this subdivision were affected by the War and the real estate market in that neighborhood was apparently at a standstill. Most of the sales that were made were in 1916 and 1918. On cross-examina-

tion Mccartney was asked why he had waited until 1921 to institute this proceeding, if he thought he had a claim against Kern for one-half of the profits on the Kern Subdivision property, and he answered that he had taken the matter up repeatedly with Kern and that Kern had never at any time taken the position that he did not have a half interest in that property, but had put the complainant off with the suggestion that they should not settle their accounts until the lots had all been sold, and on several occasions had put him off with the statement that he was short of funds. When the defendant was on the stand and was being examined in chief by his counsel, he was asked whether he had ever told the complainant "that you had not any money on hand to account", and he said he did,- that "he came over and made a demand one time, some time ago, and I said I had no money." In our opinion, one who was making the contentions which the defendant makes now, would not meet a demand for an accounting in that way. But, further, it appears from the record, without contradiction, that under date of May 28, 1921, which was nearly six months before this suit was started, the complainant wrote the defendant a letter saying, "Enclosed herewith, I hand you a statement of our subdivisions. This statement is about how the account stood when we last checked up the contracts and your books. Of course there are other items which are no doubt shown by your books and receipted bills. * * * Would you kindly check over these items and let me know what the amounts are. The matter has been running so long that I think we should now close it up by dividing the assets or liabilities, whatever the final statement will show." Enclosed with this letter

were two statements, a rather brief one headed "J. C. Macartney's Subdivision" and a much longer one headed "Kern's Subdivision." The latter is apparently an itemized statement of lots, by number, the amounts for which they were sold, the interest payments made in connection with them, the commissions paid on the sales, and the amounts paid out in connection with the acquisition of the property as a whole. The defendant admits that he received this communication and he further admits that he never replied to it and that he paid no attention to it. It seems improbable that the defendant should receive a letter from the complainant, inclosing what the complainant calls in the letter a statement of the account of how "our subdivisions" stood on the defendant's books, at the time the complainant and the defendant last checked these books over, this letter containing an itemized account referring to the Kern Subdivision as well as an itemized account referring to the Macartney Subdivision, which the defendant admits the parties were interested in on the basis contended for by the complainant, and that he should remain silent after receiving such a communication, and yet that it should be true, as the defendant now contends, that the complainant in fact had no interest in the profits which might result from the Kern Subdivision.

It is such uncontroverted matters as these which seem to us to be so utterly inconsistent with the defendant's position that have led us to the conclusion that the chancellor's decree must be affirmed, in spite of our confidence and belief in the truth and correctness of Mr. Brown's testimony, on the points on which he and the complainant are in conflict.

There are some other matters in conflict, involving complainant's testimony, which are strongly urged as further reasons why the decree should not be upheld, but we do not deem them of sufficient importance to warrant such a course. Some of them had to do with details on which the complainant may have been mistaken, and others do not contain, in our judgment, the elements of conflict with the facts which are contended for. For example, it is entirely clear from the record that when the property which came to be known as the Kern Subdivision was being purchased and negotiations were being instituted for the issuance of a title guaranty policy by the Chicago Title & Trust Company, Mr. Brown, representing the defendant, conferred with the representatives of that Company and he made a formal application for such a policy and signed that application. It is contended that the complainant testified that Kern signed that application. He does testify to that effect, but almost immediately, in the course of his testimony, he shows that he is not certain about it and expresses doubt whether he ever saw the application. He was also apparently either confused or mistaken about the question of the opinion of title which disclosed the defect, which necessitated some litigation in order that it might be cleared up, the complainant having the impression that the opinion was one from the Chicago Title & Trust Company, whereas, it is clear from the record that it was an opinion submitted to Kern by Mr. Brown.

The defendant has submitted cross errors, contending that the court erred in vacating the decree as originally entered and making the changes to which some reference was made at the beginning of this opinion. We believe the decree as entered

issuance

apparently, by inadvertence, omitted three lines immediately before the final paragraph designated as (a) and that it is clear that the court intended that paragraph to be preceded by the words, "and it is hereby ordered that this court shall and hereby does retain jurisdiction of this case for the following purposes." But even without those formal words, it seems clear that the decree is to the effect that the complainant is entitled to an accounting on the Kern Subdivision transaction and the transactions involving the Macartney Subdivision and the Eustell lots, and if the accounting on those transactions shows a profit, the lots remaining unsold being considered in the accounting at a reasonable valuation, the defendant shall pay the complainant one-half of such amount, and if he fails to do so, then the lots remaining unsold shall be sold at judicial sale and the proceeds brought into court, and the court retains jurisdiction for the purpose of making such decree as may then appear to be necessary. That being the very evident meaning of the decree, it gives the complainant an interest in one-half of the profits on the entire venture including the Macartney Subdivision and the Kern Subdivision and the Eustell lots; and this includes both a half interest in whatever cash profits may be developed on an accounting, as well as a one-half interest in the lots which still are unsold.

For the reasons stated the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

apparently, by inadvertence, [illegible] [illegible] [illegible] immediately before the final paragraph designated as (a) and that it is other than the words [illegible] that paragraph, [illegible] preceded by the words, "and it is hereby ordered that this court shall [illegible] [illegible] [illegible] jurisdiction of this case for the following purposes:", and [illegible] [illegible] [illegible] [illegible] words, [illegible] [illegible] [illegible] that the decree is to the effect that the complainant is entitled to an accounting [illegible] [illegible] [illegible] [illegible] [illegible] and the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the Boswell lake, and if the accounting [illegible] [illegible] [illegible] shows a profit, the [illegible] [illegible] [illegible] [illegible] in the accounting [illegible] [illegible] [illegible], the defendant shall pay the complainant one-half of such [illegible], and if [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] shall be [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible], and the court retains jurisdiction for the purpose of making such decree as may then appear to be necessary. [illegible] being the very evident meaning of this decree, it gives the complainant an interest [illegible] one-half of the profits [illegible] [illegible] [illegible] including the [illegible] [illegible] and the [illegible] [illegible] and the [illegible] [illegible]; and this [illegible] [illegible] a [illegible] interest in whatever such profits may be [illegible] [illegible] [illegible] as well as a [illegible] interest in the [illegible] [illegible] [illegible] [illegible].

For the reasons stated the decree of the Chancery court is affirmed.

[illegible] [illegible]

[illegible], [illegible], [illegible], J., [illegible].

269 - 28104

MINNIE PERSSON,
Appellee,
v.
CHICAGO RAILWAYS COMPANY, et al,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 329

Opinion filed Feb. 27, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Minnie Persson, brought this action against the defendants to recover damages for personal injuries which were alleged to have been sustained as a result of the negligence of the defendants' servants, in connection with the operation of one of their street cars, at a time when the plaintiff was alighting from a car. The evidence was submitted to a jury, resulting in a finding for the plaintiff and assessing her damages at the sum of $3800.00. A judgment for that amount was duly entered on the verdict, from which judgment the defendants have perfected this appeal.

A number of matters are urged by the defendants, in support of their contention that the judgment should be reversed. After a careful consideration of all the evidence in the record, we have come to the conclusion that the contention of the defendants, to the effect that the verdict and judgment are against the manifest weight of the evidence, is supported by the record, and it will therefore not be nec-

essary for us to review the other errors referred to in the briefs.

The plaintiff was a woman about fifty two years of age. The occurrence happened between nine and ten o'clock on the evening of January 30, 1931. The plaintiff was a passenger on an eastbound Irving Park Boulevard car. When she boarded the car she asked the conductor to let her know when she reached Hamlin avenue, as she wanted to get off at that street. As the car approached Hamlin avenue, the conductor called out the name of the street and gave the motorman the bell to stop the car. It is the plaintiff's theory that after the car had come to a full stop she proceeded to alight, holding on to one of the hand railings, and just as she got one foot on the ground, the car made a sudden start forward and threw her down; and that in consequence of this alleged negligence on the part of those who were in charge of the car, she suffered the injuries complained of. On the other hand, the theory of the defendants is that the plaintiff came out onto the rear platform, as the car was slowing down and after the speed had been reduced to something less than the speed of an average walk, she suddenly stepped down on the step and then to the ground, the car coming to a full stop approximately 8 feet beyond the point where she alighted; that when she stepped to the ground, she was facing backward, and that this fact, together with the fact that the car was still in motion, resulted in her being thrown over on her back.

There were no corroborating witnesses to the account of the occurrence, as given by the plaintiff herself. The plaintiff testified that the conductor announced Hamlin avenue as the car approached that street and she stepped to the platform as the car was slowing down; that the car stopped at the regular stopping place at that street, and that after it stopped she attempted to alight. As the car was going east, the plaintiff would be facing south, in looking toward the sidewalk. She testified that in stepping down on the pavement she faced east toward the front of the car and just as she was stepping down on the pavement, with her right foot, keeping hold of the upright hand rail with her right hand, the car started with a jerk and swung her down and she fell on her back, with her head to the west and her feet to the east. The evidence in the record is all to the effect that as she alighted, the hand rail she kept hold of with her right hand was the perpendicular rod located along the outside edge of the platform about midway from the body of the car to the rear of the platform. The plaintiff further testified that she was unconscious until they picked her up; that she gave the conductor her name, and, in response to a question from him, stated that she could get home alone; that she started for home and "went pretty good at first and then I begin to stagger and wriggle and I leaned against a tree and then I walked on again." On cross examination she stated that she did not know how long it took her to get home but that it was not very long; that she rested three or four times on the way and that she staggered as she walked along; that nobody overtook her on the way home or offered her any aid; that she walked across the grass plot to reach some trees and leaned up against them, and that she

-[illegible]-

Young [illegible] corroborating [illegible] the

account of the accident, as given by the plaintiff her-

self. The plaintiff testified that she [illegible]

[illegible] and she

stepped to the platform as the car was slowing down; that

the car stopped at the [illegible] place [illegible],

and that after it started she attempted to alight. At the

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

The plaintiff further testified that she was unconscious un-

til they picked her up; that she gave the conductor her name,

and, in response to a question from him, stated that she would

get home alone; [illegible]

good at first and then I began to [illegible] and I

[illegible]

[illegible]

[illegible]

[illegible] as she walked along; [illegible]

[illegible]

[illegible]

did this several times on the way home,- she could not remember whether it was two or three or four times - and that at one point on her way home she took hold of a railing to help herself along. She further testified, on cross-examination, that the car stopped "where the stopping place is"; that after it stopped there it jerked forward, and that after she was thrown down it stopped again at least 30 feet beyond where it had stopped the first time, and that after the second stop the car was still on the west side of Hamlin avenue. She stated that she knew positively that there was no one on the back platform, other than the conductor. In giving her position at the time the jerk came, the plaintiff stated that her left foot was on the step and her right foot was just touching the ground and she was holding the center upright bar with her right hand, with her left hand free, and that after she was thrown down her head pointed toward the west and her feet in the direction of the car. This was the substance of all the testimony of the plaintiff, relating to the occurrence.

The defendants presented three occurrence witnesses other than the conductor and motorman. While the motorman did not witness the accident itself, his testimony strongly corroborates that given by the other occurrence witnesses of the defendants, so far as it had to do with the movements of the car at the time in question. His testimony was that he got the bell to stop the car at Hamlin avenue and that he made his regular stop at that point, with the front end of the car about even with the crosswalk on the west side of Hamlin avenue; that after he stopped he waited, according to his judgment, about ten seconds, which he considered rather

an unusual wait, "unless quite a few passengers are getting on"; that after waiting approximately that length of time, he opened the door of the front platform and looked out and saw the conductor talking with a woman, and he got off and walked back and asked what the trouble was; that he asked the plaintiff if she was hurt and she said she was not. He further testified that the car made only one stop at this point, and that it had not moved between the time he brought the car to a stop and the time he opened the door and saw the conductor talking to the plaintiff. The usual accident report covering the occurrence in question was made by the employees of the defendants at the time, and this report contained a "Motorman's Statement" which was introduced in evidence. This statement was apparently written out by the motorman under a caption directing him to state how the accident happened. In this statement the motorman set forth that his conductor gave him the usual stop bell and he stopped, and then waited for two bells, which he did not get; that he looked out and saw the conductor talking to a woman; that he asked the conductor what the trouble was and he said the woman stepped off the car before it stopped. This statement was introduced in evidence without objection.

The conductor testified that when the plaintiff boarded the car that night she asked him to let her off at Hamlin avenue; that he called out the name of that street as the car approached it, and gave the motorman the bell to stop; and as the car neared Hamlin avenue the plaintiff came out on the platform and took hold of the middle bar with her right hand; that he was standing about three feet from

her in his usual position, and that as the car got near the stopping place, the plaintiff stepped down off the step; that the witness cautioned her to wait until the car stopped and as she stepped down he attempted to reach her but did not get hold of her; and "she kept right on going, hitting the pavement." He testified further that as the plaintiff stepped down, she was facing west, namely, backward, and the car was coming to a stop and moving very slowly; that as her foot touched the ground she fell backward, with her head to the east and her feet to the west; and that the car moved about 2 feet after she touched the ground, this placing her head about even with the rear dashboard of the car when it came to a stop; that this was the only stop the car made and that it was in the regular stopping place. He further testified that after he had assisted the plaintiff to her feet, he asked her if she was hurt and she said she was not and that she was able to go to her home alone; that he assisted her over to the north side of Irving Park Boulevard; that as they were standing by the car, just after he had helped her up, a police officer who was going to board the car at this point, stepped up; that he was in plain clothes and as he came up he stated that he was an officer. The witness then stated that his conversation with the plaintiff was had in the officer's presence. On cross-examination, the conductor said he was positive the plaintiff was not carrying an umbrella under her arm; that as she was going to step down to the platform step he cautioned her; that the car had almost stopped, at the time she stepped off, and it was not moving as fast as an ordinary man walks; that the plaintiff hesitated a few moments when she first came out on the platform, and then stepped down and he

her in his usual position, and that as the car got near
the stopping place, the plaintiff stepped down off the
step; that the plaintiff [illegible] [illegible] to walk until the
car stopped and as she stepped down in attempting to [illegible]
that she did not get hold of [illegible] and 'she went right on
going, hitting the pavement.' He testified further that
as the plaintiff stepped down, she was facing north, towards
[illegible], and that the car was [illegible] at a slow and moving very
slowly; that he next [illegible] the plaintiff she fell [illegible]-
ward, with her back to the [illegible] and her feet to the north,
and that the car moved [illegible] a few [illegible] after she touched the
ground, [illegible] placing her hand [illegible] with the [illegible]
[illegible] of the car when it [illegible] a stop; that this
was the only stop the car made and that it was in the re-
gular stopping place. He further testified that after he
had assisted the plaintiff to her feet, he asked her if
she was hurt and she said she was not and that she was able
to go to her home alone; that he assisted her over to the
north side of Irving Park Boulevard; that as they were cross-
ing to the curb, just after he had helped her up, a police
officer who was going to board the car at this point, stopped
[illegible] that he was in plain clothes [illegible] [illegible] [illegible] [illegible] [illegible]
that he was an officer. The witness [illegible] stated that his con-
versation with the plaintiff was had in the officer's presence.
On cross-examination, the conductor said he was positive
the plaintiff was not stepping on [illegible] [illegible] the time
that she [illegible] going to [illegible] [illegible] [illegible] the [illegible] [illegible] by
[illegible] [illegible] [illegible] car had almost stopped, [illegible] [illegible] [illegible]
the stepped off, and it was not moving as fast as an ordinary
man walks; that the plaintiff hesitated a few seconds when she
first [illegible] out on the platform, [illegible] [illegible] [illegible] [illegible] and he

reached for her; that there was one passenger on the rear platform.

The report submitted to the defendants, covering this accident, which contained the statement of the motorman, which has already been referred to, also contained a statement by the conductor, which read as follows: "This woman asked me to stop the car at Hamlin avenue, and just as the car was coming to a stop I asked her to wait until it did and before I knew, she stepped off, falling to the pavement. I got off and helped her on her feet and asked her if she was hurt and she said that she was all right and that she could get home safe without any assistance, getting her name and address." The statements of both of these employees coinincides with the testimony they gave on the trial. Both statements were not only introduced in evidence without any objection, on the part of the plaintiff's counsel, but her counsel called on counsel for the defendants to produce them. Preceding the statements of the conductor and motorman which have been quoted, there were some thirty different printed inquiries calling for information which were to be filled in by the employees referred to, and the report shows all these questions answered, followed by the signatures of the conductor and motorman. Counsel for the plaintiff points out that some of the information, given in response to these questions, does not coinincide in all its details with the answers made by these witnesses to questions put to them when they were testifying on the trial of this case. For example, the conductor was asked, as a witness, how many passengers were on the car at the time of

the accident in question, and he said he thought there were about 15. In the written report a statement was made to the effect that there were 40 passengers on the car. Further, the written report gives the plaintiff's name as "Pierce". This led counsel for the plaintiff to go so far as to intimate that the accident which this motorman and conductor saw, and which they told about on the witness stand was probably some other accident, although the address of the "Mrs. Pierce" referred to in the written report is given as 4221 Hamlin avenue, and while she was testifying on the stand the plaintiff said that at the time of the accident, she was living at 4331 Hamlin avenue.

One Mauser, an insurance salesman, 29 years of age, testified that he had boarded the car on which the plaintiff was a passenger, about five blocks west of Hamlin avenue and when the car reached that street he was standing on the rear platform on "the blind side"; that as the car was coming to a stop, he saw the plaintiff come out of the car to the platform; that she stepped down on the first step with her left foot, and then, before the car had stopped, she stepped down to the street and fell, striking the back of her head; that she stepped down to the platform step with her left foot and then brought the right foot down to the step and then stepped to the street with her left foot; that she continued to keep hold of the upright bar; that as she stepped down she was facing west in a backward position, and when she fell her head was to the east and she fell on her back; that the car moved about six or eight feet after she fell, stopping "flush with the street at Hamlin avenue,- the usual stop" that the car made no other movement, from the time it came

to its first step until after the conductor returned to the car. On cross-examination this witness testified that he remained on the platform throughout the occurrence; that the car was moving "much slower than a man would walk" at the time the plaintiff stepped off.

The police officer mentioned by the conductor in his testimony, was a detective sergeant in plain clothes, named Rowan. It appears from the testimony in the record that Rowan and his wife had been attending a motion picture theatre, with their two children, aged seven and nine years, on Irving Park Boulevard, some blocks to the west of Hamlin avenue; that Rowan was to report at the Hudson avenue police station for duty that night about 11 o'clock; that after leaving the theatre the Rowans walked east on the south side of Irving Park Boulevard, Rowan intending to take an east bound car when one came along and Mrs. Rowan and the children intending to go to their home, which was several blocks to the north of Irving Park Boulevard. The car on which the plaintiff was a passenger came along as the Rowans were nearing Hamlin avenue, and as the car slowed down, to make the stop at Hamlin avenue, it passed the Rowans and Rowan bid his family good night and started to run after the car, intending to board it at Hamlin avenue. Rowan testified to these facts, saying that the car passed him, "some little distance from Hamlin avenue", and he said good-bye to his family and followed the car on a trot. He testified that just before the car came to a stop, he saw the plaintiff step to the street, with her face toward him, and fall over on her back; that he proceeded in the

direction of the plaintiff and the car and reached her after the conductor did, and that his memory was, that by the time he reached the plaintiff the conductor had assisted her partially to her feet; that he told the plaintiff he was a police officer and asked her if she was hurt and she replied that she was not and she stated she did not live very far away and could get home all right; that the conductor took the plaintiff's name and then, taking her by the arm, walked with her over to the north side of Irving Park Boulevard; that the witness got on the car and went on his way. He further testified that at the time the plaintiff fell the car had not stopped but was coming to a stop and going very slowly; that after the plaintiff fell, the car moved eight or ten feet before it came to a stop; that the plaintiff fell with her head to the east and her feet to the west, her head being 3 or 4 feet from the back of the car at the point whereit stopped; that the car stopped at the regular stopping place. He testified that he gave his name to the conductor, but that he himself made no police report of the occurrence; that it was customary for police officers to turn in reports of any accidents they observed, if there were any injuries to anyone, but that it was not customary to make any reports unless someone was injured, and that he made no report of this accident because it was his understanding that the plaintiff had not been injured.

Mrs. Rowan, the wife of the last witness referred to, testified as her husband had, concerning the movements of herself and her family, up to the time they reached the place of the occurrence in question. She further testified that as the car on which the plaintiff was a passenger approach-

ed, her husband ran for it, and when the accident happened "we were just a little west from the place where it did happen." She testified that when she first saw the plaintiff she was on the platform; that the car was moving and slowing down; that the plaintiff got off the car backward while it was moving and before it had stopped and that she fell flat on her back as she stepped to the street, with her head to the east, and that after she fell, the car moved about 9 or 10 feet so that her head was about 3 feet back of the car. This witness further testified that after her husband got on the car and the car had proceeded east, she and her children crossed over Irving Park Boulevard at Hamlin avenue, and in proceeding toward her home they took the same route which was taken by the plaintiff as the latter proceeded to her home. Mrs. Rowan testified that she and the children were walking about 50 feet behind the plaintiff until the latter reached her home; that the plaintiff walked along straight without any indication of needing any assistance; that she did not stagger or stop and rest anywhere and that she did not see her lean up against any trees or take hold of anything to aid her along; that the plaintiff's home was a little more than two blocks north of the place of the accident and that as she walked to her home, she walked along at about the same pace as the witness and her children, and that the witness did not notice anything unusual about the plaintiff as she walked along. On cross-examination this witness testified that the street car was still moving when her husband left her and ran for the car; that she did not notice whether the plaintiff was carrying anything in her hand; that she did not offer the plain-

tiff any assistance because from what she said she seemed well enough to go by herself; that she did not appear to be dazed; that when the witness and her children reached the northeast corner of Irving Park Boulevard and Hamlin avenue, the plaintiff had reached a point on the east side of Hamlin avenue and about fifty feet ahead of the witness, and as the witness and her children proceeded on toward her home the plaintiff kept about this distance ahead of her, up to the point where the plaintiff turned in to her home a little over two blocks away.

Of course, as counsel for the plaintiff say in their brief, it may not be said that the verdict and judgment are against the manifest weight of the evidence simply because a greater number of witnesses testified for the party against whom the judgment was entered, but, in our opinion, there is much more involved in the foregoing statement of the substance of the testimony of the witnesses, relating to the facts of the occurrence, than the mere matter of the relative number of witnesses. We have given careful consideration to the analysis of the testimony presented by counsel for the plaintiff, in their brief, but it would serve no purpose to refer to it here in any detail. In any description of such an occurrence as this, by a group of witnesses, slight discrepancies or differences or contradictions, are almost always present, assuming every witness to have given an honest and truthful account of all that he or she can recall of what they saw or heard. The fact that such minor inconsistencies or discrepancies are present, is an indication of the truthfulness of the witnesses, rather than the contrary.

How it could possibly be said that on the foregoing testimony, the plaintiff had established, by a preponderance of the evidence, that she had been injured because of the negligence of the defendants' servants, who were in charge of the car, is difficult to see. In our opinion it is entirely clear that the judgment and verdict for the plaintiff are against the manifest weight of the evidence, and for that reason, the judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the injuries received by the plaintiff, upon the occurrence in question, were the result of her own negligence and were not caused by any negligence on the part of the servants of the defendants.

TAYLOR, P.J. CONCURS;
O'CONNOR, J. DISSENTING:

I am of the opinion that the judgment should be reversed and the cause remanded for a new trial, on account of the error in giving plaintiff's instruction 12. By that instruction the jury were told that where witnesses testify directly opposite to each other on a material point, they were not bound to consider the point not proven; that they had the right to consider all the surrounding circumstances as shown by the evidence. The instruction then continued, "So, in this case, although the plaintiff, upon the question whether she fell from the car on the street, may testify one way, and the conductor and policeman may swear the other way", the jury are not bound to consider the point proven. This instruction

How it could possibly be said that on the foregoing testimony, the plaintiff had established, by a preponderance of the evidence, that she had been injured because of the negligence of the defendants' servants, who were in charge of the car, is difficult to see. In our opinion it is entirely clear that the judgment was entered for the plaintiff and against the manifest weight of the evidence, and for that reason, the judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the injuries received by the plaintiff, upon the occurrence in question, were the result of her own negligence and were not caused by any negligence on the part of the servants of the defendants.

[illegible], P.J. [illegible]
DISSENTING [illegible]

I am of the opinion that the judgment should be reversed and the cause remanded for a new trial, on account of the error in giving plaintiff's instruction 11. By that instruction the jury were told that where witnesses testify directly opposite to each other on a material point, they were not bound to consider the [illegible] that they had the right to consider all the surrounding circumstances as shown by the evidence. The instruction then continued, "As, in this case, although the plaintiff, upon the question whether she fell from the car or the street, may testify one way, and the conductor and policeman may swear the other way, the jury are not bound to consider the [illegible] proof. This instruction

was highly misleading, because the plaintiff alone testified that the car stopped and then as she was alighting therefrom, it started up again causing her to fall. On the other hand, the conductor and the policeman mentioned in the instruction, testified that the car had not stopped when plaintiff alighted from it. This was also the effect of the testimony of the passenger on the rear platform, the policeman's wife and the motorman of the car. By the instruction, the jury might understand that the court was of the opinion that plaintiff's version of the matter was contradicted alone by the policeman and conductor.

32 - 28271

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel The Grand Jury, etc.,

Defendant in Error,

v.

ROBERT J. COCHRANE,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

233 I.A. 629

Opinion filed Feb. 27, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the plaintiff in error seeks to reverse a judgment of the Criminal Court of Cook County, sentencing him to imprisonment in the County Jail for a period of ninety days, for a contempt of court, such contempt, consisting in his refusal to answer certain questions propounded to him by the Grand Jury.

The Grand Jury involved here, was the regular August, 1923, Grand Jury of Cook County, which is the same Grand Jury which was involved in the case of The People v. Brautigan, 310 Ill. 473. In the case cited, Brautigan, while a witness before that jury, at a time subsequent to the August, 1923 term, refused to answer certain questions which were put to him, whereupon the court adjudged him guilty of contempt of court and sentenced him to imprisonment in the County Jail for four months. On writ of error, the Supreme Court held that the Grand Jury involved, having been continued beyond the term of court for which it was called, by an order of court entered without compliance with the statutory method

of summoning a special grand jury, had no *de facto* existence beyond the term for which it was originally called, there being in existence after that term and at the term at which the plaintiff in error was adjudged guilty of contempt of court, another grand jury *de jure* performing the duties of such body. It was further held in that case that a witness may not be punished for contempt in refusing to answer questions during an examination before such unauthorized grand jury; that the question of the want of jurisdiction could not be waived but might be asserted at any time.

In the case at bar, Cochrane was adjudged guilty of contempt of court at a term subsequent to the August, 1922, term, for refusal to answer questions before the same grand jury. By appropriate assignment of error, the question of jurisdiction has been raised and by supplemental record filed pursuant to leave duly granted by this court, it is shown that at the term at which the plaintiff in error, in the case at bar, refused to answer questions before this grand jury and was adjudged guilty of contempt of court, there was another grand jury *de jure* performing the duties of a grand jury in Cook County. It further appears, as in the Brautigan case, that the grand jury, before which plaintiff in error was a witness, had been continued beyond the term for which it was called, by an order of court entered with out compliance with the statutory method of summoning a special grand jury. As above stated, it was the same jury as was involved in the case referred to.

Following the authority of the *Brautigan case*, we are obliged to hold that the grand jury in question had no

de facto existence and that plaintiff in error could not be punished for contempt of court in refusing to answer questions put to him before that body.

For the reasons stated, the judgment appealed from is reversed.

JUDGMENT REVERSED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

Ed.: In abstracting call attention to fact that this was consoli- [illegible]

220 - 38877

THE NORTHERN TRUST COMPANY, as Trustee under the Last Will and Testament, and codicil thereto, of Sidney A. Kent, Deceased,

Appellee,

v.

HELEN L. MASSENAT, et al

SIDNEY KENT LEGARE,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 629

Opinion filed Feb. 27, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

This case was consolidated for hearing in this court with case Number 38876. Both cases involve appeals from the same decree entered in the Circuit Court of Cook County. The other case was an appeal by Helen Massenat, while this case is an appeal by Sidney Kent Legare. We have set forth the situation presented and the parties in interest, in the opinion filed in case Number 38876, and it will not be necessary to repeat them here.

The appeal perfected by Sidney Kent Legare, involves the question of the proper interpretation and construction of the last sentence found in the third paragraph of Item Eight of the Codicil to the Will of the testator, Sidney A. Kent. That paragraph reads as follows:

> "If one daughter dies leaving descendants and leaving the other daughter surviving, one-half of the income from the trust fund (less five thousand dollars

($5,000) per annum above provided to be paid to the husband if he survives) shall be paid quarterly to the surviving daughter, and out of the other half the Trustee shall pay to or for the benefit of the descendants of the deceased daughter such amounts from time to time as the Trustee shall consider to be for the best interest and welfare of such descendants respectively, and the equality or inequality of such payments out of the income and the manner of their application shall rest in the sole discretion of the Trustee. Any unexpended income shall be added to the principal."

In submitting the question of the proper interpretation and construction of the last sentence of that paragraph, to the trial court, it was the contention of the appellant, Sidney Kent Legare, that the time when income, unexpended in his interest or turned over to him by the Trustee, should be added to principal, was the time at which the principal would be distributed at the end of the trust period. It was his contention further, that pending the time when such unexpended income would thus be added to principal and distributed as such, it should be kept by the Trustee in a separate fund and should be considered available to be paid to him by the Trustee, subject to its discretion, as income, at any time, up to the time of the end of the trust, or up to the time of his (Sidney Kent Legare's)death, if he died before the end of the trust. On the other hand, it was the contention of the other parties in interest, who have taken part in this litigation, that such part of the income from the trust fund, as was bequeathed to the Trustee for the use of the descendants of the deceased daughter, or, in other words, for Sidney Kent Legare, for the period in question, as was unexpended, should be added to the principal from time to time, and that, although the will and codicil did not provide any time or times for so doing, it

was reasonable and logical to add the unexpended income referred to, to the principal of the trust fund at annual rests.

On this point the decree entered by the chancellor in the Circuit Court provided:

> "That said provision of said codicil requiring that any unexpended income shall be added to principal means and requires that at convenient periods any surplus of income which such descendants would, but for the exercise of the discretion of the Trustee in withholding the same, be entitled to receive, shall be added to and become a part of the principal trust fund of said estate ultimately subject to distribution upon the termination of the trust estate. That the period of one year is the period for the determination of what, if any, of such surplus shall be added to principal, and such annual determination shall be made on the anniversaries of the death of Stella Alberta Legare, viz., July 29th of each year. And it is hereby determined that in case more than one year has elapsed since the death of Stella Alberta Legare at the time of entry of this decree, the Trustee shall forthwith make such payments to said Sidney Kent Legare as it shall consider for his best interest and welfare, for any year or years or part of a year since July 29, 1922, and shall transfer the balance of the income, if any, for said elapsed years or part of a year to the principal of the trust fund, as part thereof."

In our opinion, it is entirely clear that it was not the intention of the testator that the unexpended income referred to in the last sentence of the third paragraph of Item Eight of the Codicil, should be kept separate by the Trustee and considered as available to be paid to the descendants of a deceased daughter at any time in the future, during their lives and prior to the end of the trust. It is true that no time is expressed when additions of unexpended income are to be made to the principal, but it seems to us that it is to be clearly inferred from the language found in the paragraph in question, that such additions are to be made "from time to time." The testator provides in this paragraph that "the Trustee shall pay to or for the benefit of the descend-

ants of the deceased daughter, such amounts from time to time, as the Trustee shall consider to be for the best interest and welfare of such descendants respectively," and then it is provided that "any unexpended income shall be added to principal." It seems entirely reasonable to conclude that it was the intention that this also should be done "from time to time," - not necessarily at the same times that payments of income are made by the Trustee to descendants, but at such periods, "from time to time" as are consistent with sound investment practice. It will further be noted that when the testator provides for the ultimate distribution of the principal of the trust fund, in the last paragraph of Item Eight, he refers to it as the trust fund "with any accumulations and additions." Accumulations, imply additions to the trust fund"from time to time," and not at the end of the trust. In our opinion the provisions of the decree to the effect "that the period of one year is the period for the determination of what, if any, of such surplus (income) shall be added to principal," and fixing the time of such annual determinations as the anniversaries of the death of the testator's widow, were proper.

If it were the intention of the testator to provide that, unexpended income should accumulate, and still retain the character of income, and be subject to be paid out as such by the Trustee, at any subsequent time prior to the end of the trust, he would have used some language other than that found in this paragraph. Certainly, after directing the Trustee to pay the income to the descendants, or for their benefit, "from time to time," the very next direction, to the effect that

" any unexpended income shall

ents of the interest thereafter, such amounts from time to time, as the Trustee shall consider to be for the best interest and welfare of such beneficiaries respectively," and then it is provided that "any unexpended income shall be added to principal." It seems entirely reasonable to conclude that it was the intention that this plan should be used "from time to time" — not necessarily at the same times that payments of income are made by the Trustee to beneficiaries, but at such periods, "from time to time" as are consistent with sound investment practice. It will further be noted that when the testator provides for the ultimate distribution of the principal of the trust fund, in the last paragraph of item Eight, he refers to it as the trust fund "with any accumulations and additions." Accumulations, being additions to the trust fund "from time to time," and not at the end of the trust. In our opinion the provisions of the decree to the effect "that the period of one year is the period for the determination of what, if any, of such surplus [income] shall be added to principal," and "fixing the time of such annual capitalization as the anniversaries of the death of the testator's widow, were error."

If it were the intention of the testator to provide that, unexpended income should accumulate, and still retain the character of income, and be subject to be paid out as such by the Trustee, at any subsequent time prior to the end of the trust, he would have used some language other than that found in this paragraph. Certainly, after directing the Trustee to pay the income to the beneficiaries, at the times named, "from time to time," the very next direction, to the effect that:

" any unexpended income shall

be added to principal," expresses no thought or suggestion of directing the Trustee to withhold the unexpended income and to continue to treat it as income, subject to be paid out to or for the benefit of such descendants, at the Trustee's discretion, so long as the trust lasts. The intention seems clearly to be the contrary.

Furthermore the construction here contended for by the appellant would lead to a distribution of income contrary to the express directions of the testator, as contained in the fifth paragraph of Item Eight of the Codicil. In that paragraph it is directed that, after the death of both daughters, and until the time arrives for the distribution of the principal, the Trustee shall apply the income of the trust fund, or so much thereof as it may deem advisable, to and for the benefit of the descendants of the testator's daughters, "irrespective of all questions of representation as between such descendants." If unexpended income is to be held by the Trustee and treated as income subject to be paid to or for the benefit of the descendants of the daughter dying first, until the end of the trust, it would become impossible, in case the descendants of the daughter dying first, survived the other daughter, for the Trustee to fulfill the direction in the fifth paragraph to the effect that the distribution between the descendants of the daughters, after the death of both of them, shall be made "irrespective of all questions of representation as between such descendants."

For the reasons given, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

be added to principal," expresses no thought or suggestion of directing the Trustee to withhold the unexpended income and to continue to treat it as income, subject to be paid out to or for the benefit of such descendants, at the Trustee's discretion, so long as the trust lasts. The intention seems clearly to be the contrary.

Furthermore the construction here contended for by the appellant would lead to a distribution of income contrary to the express directions of the testator, as contained in the fifth paragraph of Item Eight of the Codicil. By that paragraph it is directed that, after the death of both daughters, and until the time arrives for the distribution of the principal, the Trustee shall apply the income of the trust fund, or so much thereof as it may deem advisable, to and for the benefit of the descendants of the testator's daughters, "irrespective of all questions of representation as between such descendants." If unexpended income is to be held by the Trustee and treated as income subject to be paid to or for the benefit of the descendants of the daughter dying first, until the end of the trust, it would become impossible, in case the descendants of the daughter dying first, survived the other daughter, for the Trustee to fulfill the direction in the fifth paragraph to the effect that the distribution between the descendants of the daughters, after the death of both of them, shall be made "irrespective of all questions of representation as between such descendants."

For the reasons given, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

DAVISON, C.J. AND O'CONNOR, J. [illegible].

93 - 28369

KARL HERR and REBECCA HERR,
Appellees,

vs.

HARRY GROSSMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

23 ... 629

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from the judgment in favor of the plaintiffs entered upon the finding of the court. The plaintiffs allege in their statement of claim that they were owners of one pair of diamond ear screws at the value of $2,000; that these were pledged with the defendant, a pawn broker of the city of Chicago as security for a loan on or about February 21, 1920; that demand was made of the defendant for the return of the ear screws, with an offer to pay the amount borrowed, with interest, but the defendant refused to make return.

The affidavit of merits set up by way of defense that on October 7, 1920, defendant sold and assigned his business to one Jacob Klein; that the property mentioned in the plaintiffs' statement of claim was, under said assignment and sale, delivered to the said Klein, and that every protection taken by pawn brokers in the city of Chicago was taken by said Jacob Klein to protect the property; that Klein was at the time and place aforesaid engaged in the pawn broking business and was a man in good standing and financially able to assume all the obligations of the defendant, Grossman; that the place of business of the said Klein was robbed and with other property that mentioned in the plaintiffs' statement of claim was removed. The affidavit further alleged that, under the sale to Klein, the only interest conveyed was that of the defendant in the property pledged; that the defendant was not guilty of any negli-

[illegible]

LANG ROSE and [illegible] ROSE,
Appellees,

vs.

[illegible],
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

258 I.A. 619

MR. PRESIDING JUSTICE [illegible]
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from the judgment in favor of the plaintiffs entered upon the finding of the court. The plaintiffs allege in their statement of claim that they were owners of one pair of diamond ear screws of the value of $2,000; that these were pledged with the defendant, a pawn broker of the city of Chicago as security for a loan on or about February 21, 1929; that demand was made of the defendant for the return of the ear screws, with an offer to pay the amount borrowed, with interest, and the defendant refuses to make return.

The affidavit of merits set up by way of defense that on October 7, 1929, defendant sold and assigned his business to one Jacob Klein; that the property mentioned in the plaintiffs' statement of claim was, under said assignment and sale, delivered to the said Klein, and that every protection taken by pawn brokers in the city of Chicago was taken by said Jacob Klein to protect the property; that Klein was at the time and place aforesaid engaged in the pawn broking business and was a man in good standing and financially able to assume all the obligations of the defendant; moreover, that the place of business of the said Klein was robbed and with other property that mentioned in the plaintiffs' statement of claim was removed. The affidavit further alleges that, under the sale to Klein, the only interest conveyed was that of the defendant in the property pledged; that the defendant was not guilty of any negli-

gence and that he used all possible care and caution to protect the property. In his brief defendant states: "The contention of appellant turns upon a question of law which was determined adversely to our contention by this court in Jacobs v. Grossman, 225 Appellate, 649, general number 27602, opinion filed May 1, 1922. This court granted a certificate of importance and that case is now pending in the Supreme Court and the judgment in the instant case will be determined by the action of the Supreme Court."

Since the brief in this case was filed, the Supreme Court in Jacobs v. Grossman, 310 Illinois, 247, has decided the points argued by the defendant here adversely to his contention. It therefore only remains for us under the authority of that case to affirm this judgment.

AFFIRMED.

McSurely and Johnston, JJ., concur.

189 - 28465

EDWARD HINES LUMBER CO., a Corporation, Appellant, vs. C. T. DAWSON, HATTIE M. BELLOWS, CHICAGO TITLE & TRUST CO., et al., Appellees.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

238 I.A. 320

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Edward Hines Lumber Company, a mechanic's lien claimant in the trial court, from a decree which sustained exceptions of the defendant to the report of a Master in Chancery to whom the cause had been referred, and dismissed complainant's bill for want of equity.

The Master found that on May 15, 1919, Hattie M. Bellows was the owner of certain described premises; that on that date she entered into a contract with one C. T. Dawson to alter, repair and construct certain portions of the building then on premises owned by her; that Dawson thereafter made a contract with the complainant Lumber company for the purchase of certain lumber and other material needed; that the lumber and material were delivered to the said premises; that on July 21, 1919, complainant caused a notice of lien to be served on the owner in form as prescribed by law; that the first delivery of the material was on May 15, 1919, and the last material was delivered on June 24, 1919; that there was due the complainant the sum of $470.82, and that the complainant was entitled to and has a valid mechanic's lien attaching in favor of the Edward Hines Lumber Company; that Dawson had breached this contract with Bellows and was not entitled to any lien or claim against defendant Bellows; that the material allegations of the complaint were proved and sustained by evidence.

[illegible]

[illegible] LUMBER CO.,
a Corporation,
Appellant,

vs.

J. W. DAWSON, [illegible],
[illegible] TITLE & TRUST CO., et al.,
Appellees.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

[illegible]

MR. [illegible] JUSTICE [illegible]

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the [illegible] Lumber Company, a mechanic's lien claimant in the trial court, from a decree which sustained exceptions of the defendant to the report of a Master in Chancery to whom the cause had been referred, and dismissed complainant's bill for want of equity.

The Master found that on May [illegible], 1929, [illegible] was the owner of certain described premises; that on that date she entered into a contract with one J. W. Dawson to alter, repair and construct certain portions of the building then on premises owned by her; that Dawson thereafter made a contract with the complainant Lumber company for the purchase of certain lumber and other material needed; that the lumber and material were delivered to the said premises; that on July [illegible], 1929, complainant caused a notice of lien to be served on the owner in form as prescribed by law; that the first delivery of the material was on May 15, 1929, and the last material was delivered on June [illegible], 1929; that there was due the complainant the sum of $[illegible], and that the complainant was entitled to and had a valid mechanic's lien attaching in favor of the [illegible] Lumber Company; that Dawson had breached his contract with [illegible] and was not entitled to any lien on [illegible]; that the material allegations of the complaint were proved and sustained by evidence.

The particular exception upon which the defendant relies is that the Master held that the failure of Dawson to obtain a license as a Mason contractor did not prevent a valid mechanic's lien attaching in favor of the complainant, and that the Master failed to hold that the contract between Dawson and Bellows was illegal and void for that reason and could not form the basis of any valid lien in favor of the complainant. The complainant has argued here the insufficiency of the evidence tending to show that Dawson did not have a license, but in view of the fact that he made no objection to the finding of the Master in this regard, we think it is hardly in a position to so argue in this court. Matthews v. Whitethorn, 220 Ill., 36; Jones v. Crary, 234 Ill., 26. It seems to be the law that a valid contract with the owner of the land to be improved is necessary in order that a claim under the mechanic's lien law by a third party may be based thereon. The Rittenhouse & Embree Company v. The Warren Construction Company, 264 Ill., 619; Von Platen v. Winterbotham, 203 Ill., 198. The controlling question in the case therefore involves a construction of the statute, requiring a mason contractor to procure a license. That statute provides (see Hurd's Illinois Revised Statutes, 1913, chapter 48, sections 91 to 97) that in all cities of this state of 150,000 inhabitants or over, every mason contractor or employing mason shall be required to obtain an annual license therefor. The second provides: "Every person desiring to engage in the business of mason contractor or employing mason shall make application to a board of examiners, etc." From a reading of the several sections of this act we think it appears that it was the intention of the Legislature that only those desiring "to engage in the business" should be required to take out such license.

The evidence taken before the Master fails, we think, to establish the necessary fact that Dawson was engaged in such business. It does not appear therefrom that he had ever undertaken

The particular exception upon which the defendant relies is that the Master held that the failure of Sexton to obtain a license as a mason contractor did not prevent a valid mechanic's lien attaching in favor of the complainant, and that the Master failed to hold that the contract between Sexton and Roiley was illegal and void for that reason and would not form the basis of any valid lien in favor of the complainant. The complainant has argued here the insufficiency of the evidence tending to show that Sexton did not have a license, but in view of the fact that he made no objection to the finding of the Master in this regard, we think it is hardly in a position to so argue in this court. [illegible] v. [illegible], 302 Ill., 86; Jones v. [illegible], 206 Ill., 55. It seems to be the law that a valid contract with the owner of the land to be improved is necessary in order that a claim under the mechanic's lien law by a third party may be based thereon. The Hillenbrand & Roberts Company v. The [illegible] Construction Company, 301 Ill., 159; The [illegible] v. [illegible], 240 Ill., 190. The controlling question in the case therefore involves a construction of the statute regulating a mason contractor to procure a license. That statute provides (see Cahill's Illinois Revised Statutes, 1925, chapter 46, sections 51 to 57) that in all cities of this state of 100,000 inhabitants or over, every mason contractor or employing mason shall be required to obtain an annual license therefor. The act provides: "Every person desiring to engage in the business of mason contractor or employing mason shall make application to a board of examiners, etc." From a reading of the several sections of this act we think it evident that it was the intention of the legislature that only those engaged in the business should be required to take out such license.

The evidence taken before the Master fails, we think, to establish the necessary fact that Sexton was engaged in such business. It does not appear therefrom that he had ever undertaken

any other contract involving masonry construction. In analogous cases it has been held that a single transaction does not constitute doing business within the meaning of the statute. Grilly v. Young, 152 Ill. App., 72; O'Neill v. Sinclair, 153 Ill., 525. The burden of proof was upon the defendant, Bellows, to establish the defense set up, and we think the evidence introduced by her fell short in this respect and that the finding of the Master was therefore justified. It appears from the defendant's testimony that Dawson was engaged in making certain repairs upon the dwelling house situated upon her premises (largely under her personal direction) and that the plan for these repairs was changed from time to time. She says "The sun parlor was to have a concrete floor. The work that Mr. Dawson did required the bricks that were taken out of the house to be relaid and the steps were to be masonry work. There was no other masonry work in connection with the sun parlor, but in cutting this window they had to have a mason come and do the work. The masonry work was part of Mr. Dawson's contract." It does not appear that any of the material which was furnished by the complainant was made use of in connection with this masonry work.

The court erred in sustaining this exception to the Master's report, and for that error the decree is reversed and the cause remanded with directions to enter a decree in conformity with the report of the Master.

REVERSED AND REMANDED
WITH DIRECTIONS.

McSurely and Johnston, JJ., concur.

any other contract limiting sundry construction. In analogous cases it has been held that a single transaction does not constitute doing business within the meaning of the statute. Cullis v. [illegible], 150 Ill. App. 71; O'Neill v. [illegible], 153 Ill. 335. The burden of proof was upon the defendant, [illegible], to establish the defense set up; and we think the evidence introduced by her fell short in this respect and that the finding of the Master was therefore justified. It appears from the defendant's testimony that Carson was engaged in making certain repairs upon the dwelling house situated upon her premises (largely under her personal [illegible]) and that the plans for said repairs was changed from time to time. She says "The sun parlor was to have a concrete floor. The work that Mr. Carson did required the bricks that were taken out of the house to be rebuilt and the steps were to be masonry work. There was no other masonry work in connection with the sun parlor, but in putting this window they had to have a cement case and on the porch. The masonry work was part of Mr. Carson's contract." It does not appear that any of the material which was furnished by the complainant was made use of in connection with this masonry work.

The court erred in sustaining this exception to the Master's report, and for that error the decree is reversed and the cause remanded with directions to enter a decree in conformity with the report of the Master.

REVERSED AND REMANDED

WITH DIRECTIONS.

[illegible] and Johnston, JJ., concur.

198 - 29474

L. C. HARVEY, Appellee, vs. JAMES FRIEL et al., Appellants.	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

238 I.A. 330

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from a decree of the Superior court. The cause was heard upon objections filed to the report of a Master, which objections were by order of the court permitted to stand as exceptions. The complaint was a creditor's bill in the usual form, based upon a judgment theretofore obtained on June 20, 1921, for an indebtedness contracted in December, 1920.

The judgment was entered in the Municipal court of Chicago against James Friel and Margaret Casey for $1472 and costs. The bill prayed a discovery and answer under oath, the appointment of a receiver, and an injunction. The defendants answered under oath, denying the equity of the bill. Pending litigation, a receiver was appointed in the proceeding for the property and effects of James Friel.

The defendants here complain of the decree in two respects. One of these is that James Flynn was ordered to pay to the receiver theretofore appointed, within three days, the sum of $1115.40 with interest thereon from March 21, 1922, being the amount received by him from the Equitable Life Insurance Society of the United States, and that the complainant was decreed to have a lien upon said fund. Second, the defendant Gus Tomaris was ordered and directed to pay to the receiver within three days the sum of $1,000, and the decree provided that unless the said sum was so paid the

receiver should within fifteen days thereafter sell a certain soft drink parlor situated in the city of Chicago, including an electric piano, glassware, stove, cash register, leasehold and good will of the business to the highest bidder.

It is the contention of the defendants who appeal that the decree in these two respects is not supported by the evidence. It is not argued that the findings of fact if true would not support the decree. These findings by the Master have been approved by the Chancellor and this court may not disturb them unless an examination of the record shows that the weight of the evidence is ~~clearly and manifestly~~ against the findings.

With reference to the soft drink parlor complainant's bill alleged that James Friel had theretofore been engaged in the business and was an owner of some of the property there of considerable value, which he had transferred to one Gus Tomaris without consideration, that the transfer was merely colorable, and with a view of placing the property beyond the reach of complainant's judgment. The answerof James Friel admitted that he conducted the business, but alleged that during the month of November, 1930, he sold and transferred it to Tomaris,and denied that the transfer was without consideration but on the contrary alleged it was made in good faith. Tomaris in his answer stated that he bought this business in the month of December, 1930, and agreed to pay therefor the sum of $1,000 providing the prohibition laws and the Constitution of the United States were so amended and changed as to make it lawful for him to sell light wines and beer in connection with the business, and that if this event did not take place he would not be required to pay. The evidence taken upon the hearing we think amply sustained the findings of the Master and of the decree in this respect. It appeared that Tomaris had worked for Friel for several years at his place of business, that no written contract was made at the

time the business was transferred (which was on December 11, 1930); that only Tomaris and James Friel were present at that time. Tomaris says that at that time there was nothing said about light wines and beer coming back, although he expected that to happen, but that at a later date he had a conversation with Friel and Friel said to him, "You stick, and if beer comes back you owe me a thousand dollars; if they don't, you don't owe me a cent." At the time of the hearing Tomaris was still conducting the business at that place. He was subpoenaed to bring in the papers, contracts, books of account, etc., but failed to do so, saying that there were none. It appears from the evidence that he was taking in $12 or $15 a day; that after taking possession of the business he secured another lease upon the premises; that Friel went with him to secure the lease and in fact guaranteed it. At the expiration of that lease a new lease was obtained, Friel again guaranteeing the rent, which was $200 a month. He says that sometimes he takes in as high as $25 a day, but has not figured what the percentage of profit is. While the fixtures generally belong to the Brewing Company, it appears that there is a piano, a cash register and glassware which undoubtedly are the property of the judgment debtor, Friel. The value of these is about $500. We think the undisputed evidence shows that the decree in this respect was just. A court would be indeed credulous to accept defendant Friel's contentions in view of the undisputed facts.

With reference to the endowment insurance policy, the bill alleged that the judgment debtor, Friel, had a policy of life insurance in the Equitable Life Insurance Society of the United States in the amount of $2,000, which had a cash surrender value and which was in the possession of the defendant, James Flynn, or the defendant Julia Friel, wife of the judgment debtor, under an assignment from the defendant, but charged that if there was such an assignment it was merely colorable with a view of protecting the

property and effects of Friel and placing them beyond the reach of the complainant's judgment. The answer of the defendant Julia Friel admitted that shortly after she married James Friel he had such an endowment policy, which then ran to his brother, Edward Friel; that the policy was changed so that she, Julia, was made the sole beneficiary thereof; that she carried the policy and paid the installments thereon from that time down to the time when she turned it over to her cousin, James Flynn; that about six months prior to the time of her answer she learned that her husband was involved in litigation; that he came to her about the first day of March, 19[illegible], requesting her to turn over the policy to him so that he could deliver the same to Judge Richardson in the Municipal court of Chicago, which she absolutely refused to do; that on January 11, 1921, she owed the defendant James Flynn about $700 of borrowed money; that she had borrowed other moneys from him, making a total amount of about $1250; that on that date her husband at her request and at the request of James Flynn executed and delivered to James Flynn a judgment note for that amount to secure the money already loaned and other moneys to be thereafter loaned to her; that she used this money to pay household expenses, doctors' bills, etc.; that when her husband asked her for the policy she told him she owed James Flynn this amount of money and that if anybody got that policy it would be James Flynn; that she thereupon had a conference with the defendant James Flynn and her husband and afterwards assigned the said policy to Flynn as the sole beneficiary; that Flynn afterwards took the policy to the Insurance Company and surrendered the same and received whatever money was due on the policy and applied the same to the payment of the judgment note for $1250. Defendant James Flynn in his answer sets up the execution of the note for $1250 to secure the moneys owing to him by the Friels, alleges that thereafter Julia and James Friel, at his request, assigned to him the policy and that he, Flynn, took the same after it had been duly endorsed over

to him by James Friel, and surrendered the same to the Equitable Life Insurance Company of New York and received in payment therefor the sum of $1115.40. The policy was produced upon the hearing before the Master and is in the record. It was issued on May 28, 1912, to the defendant James Friel, was what is known as a 15-year life insurance endowment policy for the sum of $2,000. He at all times had and retained the right of revocation in so far as the beneficiary named was concerned.

It is argued here in behalf of Julia Friel that the evidence shows that she had entire control of the policy and the possession of it, and that she for several years paid the premiums thereon. The evidence is somewhat indefinite in this respect, and we think the burden was on her to establish these facts. She testified in a general way to the payment of a part of the premiums but did not state the exact amount, nor did she establish the fact that these premiums were paid out of her own separate funds. It affirmatively appears from the evidence that her husband, during that time, paid an allowance to her.

James Friel was not indebted to James Flynn and Julia Friel consented to the surrender of the policy and the acceptance from the Company of its surrender value. We think this cash surrender value under the evidence constituted an asset of the husband's estate which would pass to the receiver. In re. Slingluff, 106 Fed. 154; In re. Martens, 131 Fed. 972; Talcott v. Field, 34 Nebr. 611; Ellison v. Straw, 119 Wis., 502; Brigham v. Home Life Insurance Co., 131 Mass., 319.

Being of the opinion that there was no error in the matters alleged and argued by the defendants in this court, the decree must be affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

254 - 28530

E. H. A. KUNDEE,
Appellee,

vs.

THE PICTORIAL REVIEW COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

233 I.A. 630

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $10,000, entered upon the verdict of a jury in an action on the case for malicious prosecution, motions for a new trial and in arrest of judgment having been overruled by the court.

The cause went to the jury on the first count, which in substance alleged that on July 24, 1919, the defendant appeared before the grand jury of Cook County and procured an indictment against plaintiff for larceny by bailee and embezzlement, causing his imprisonment; that the proceedings were terminated by an acquittal December 20, 1919, in the Criminal court of Cook county; that these proceedings were brought by defendant maliciously, intending to injure the plaintiff. To this declaration the defendant filed a plea of the general issue. At the close of plaintiff's evidence and again at the close of all the evidence, the defendant moved the court for a directed verdict in its behalf, which motion was denied. It is argued here that this was error and in the view we take of the case this is the controlling question.

The ground of the motion was, and the defendant as appellant in this court, again contends, that there was no evidence tending to show that the agent of the defendant, who in-

stituted the criminal proceedings upon which the suit for malicious prosecution is based, had any authority from the defendant to bring such proceedings. It is not contended that the evidence in the case discloses express direction from defendant to its agent to begin the prosecution, nor ratification of such action after it was begun, but the plaintiff contends, as he necessarily must, that there are facts disclosed in the evidence from which a jury might reasonably conclude that the agents of defendant who participated acted within the scope of their employment in so doing. There is practically no conflict in the evidence.

The defendant is a corporation of the state of New York. Its principal office is in New York City, where it publishes the magazine known as "Pictorial Review." It was at the time in question also a manufacturer and seller of dress patterns. Its officers, directors and executives resided in the city of New York and there controlled and conducted the activities of the corporation business. The corporation maintained local offices in Chicago and in other places. At the time in question it had in the city of Chicago three separate local offices and each one of these offices had its own local manager. At one of these offices defendant conducted an advertising business, at another its pattern business, and in still another the business of soliciting subscriptions for the magazine in question and collecting the proceeds thereof. One Scantlin had charge of the local subscription office at the time in question. He did not have, so far as the evidence discloses, any connection with or authority over the other local offices. He had supervision over solicitors who took subscriptions in certain territory for the magazine and the collectors of subscription accounts and crew managers in the territory assigned to him, which included the state of Wisconsin. Scantlin hired solicitors and collectors. These reported their work to him and he reported to a department of the defendant corporation in the city

[illegible] the criminal proceedings upon which the suit for malic-
ious prosecution is based, nor any authority from the defendant
to bring such proceedings. It is not contended that the evidence
in the case discloses express direction from defendant to its agent
to begin the prosecution, nor ratification of such action after it
was begun, but the plaintiff contends, as he necessarily must, that
there are facts disclosed in the evidence from which a jury might
reasonably conclude that its agents in instituting the proceedings
acted within the scope of their employment in so doing. There is
practically no conflict in the evidence.

The defendant is a corporation of the state of New
York. Its principal office is in New York City, where it pub-
lishes the magazine known as "Pictorial Review". It has in the
city in addition thereto a manufacturing and office [illegible];
its officers, directors and principal persons are [illegible] in New
York and there supervise and determine the operations of its cor-
porate business. Its subscription department [illegible] branches in
Chicago and in other places. At the time in question it had in the
city of Chicago three separate local offices and each one of these
offices had its own local manager. At one of these offices de-
fendant conducted an advertising business, at another the premium
business, and at still another its business of soliciting subscrip-
tions for the magazine in [illegible] and collecting the proceeds
thereof. One [illegible] had charge of its local subscription office
at the time in question. He [illegible], so far as the evidence
discloses, any connection with or authority over the other local
offices. He had supervision over [illegible] subscription
in certain territory for the magazine and the solicitation of sub-
scription accounts and [illegible] in the territory assigned to
him, which includes the state of [illegible]. [illegible] lived within
[illegible] and collection. These reported their work to him and he re-
ported to a department of the defendant corporation in the city

of New York, which was in charge of one MacKinnon, general manager and a director of the defendant corporation. The subscription contracts were sent to New York for approval and there accepted or rejected. The magazine itself was published in New York and mailed to its subscribers. Scantlin had an account in his own name in a Chicago bank in which was placed money which had been advanced to him by the defendant. The receipts from defendant's business were by him deposited in this account and disbursed therefrom by his personal check. He sent weekly reports and expense accounts and remittances to the defendant in New York City, and where the amount of expenditures exceeded the receipts was reimbursed by defendant's check. He was paid a salary and commission, was not an officer, director or general manager of the defendant corporation. He had never, so far as the evidence discloses, begun any suits for defendant or proceedings either civil or criminal. The legal business of defendant was handled by its general counsel at the New York office.

The subscription solicitors were paid a commission for their services, which consisted of canvassing from house to house. They used two printed forms of subscription blanks. One of these required a cash payment of 25¢ and fifteen monthly payments of 25¢ each; the other, a cash payment of 50¢ and seven monthly payments of 50¢ each. Sometimes subscribers would pay the entire amount of the subscription to the solicitor and the solicitors collected the entire amount if it was possible to do so. The solicitors working a given territory were designated as a crew and each of these crews was in charge of a crew manager, whose duty it was to supervise their work, verify signatures to subscriptions, and receive from the solicitors the moneys collected, which he in turn would remit with the subscriptions to the local manager, Scantlin, at Chicago.

In 1918 the plaintiff was employed by defendant as a solicitor. He began work in October and quit in December. In February, 1919, he again entered defendant's employment as a crew manager, soliciting and collecting subscriptions at certain Wisconsin points. He was hired by Scantlin. He had eight boys working under him soliciting subscriptions in these Wisconsin points, and was receiving a salary of $20 a week plus a commission of 10¢ on every subscription over 200 a week procured by his crew. A settlement of his accounts was made on May 8th and thereafter up to May 19th, which was the date of his arrest, he forwarded neither reports nor remittances. May 17th Scantlin was informed by one of the boys over long distance 'phone that the boys were at a hotel in Green Bay, Wisconsin, stranded, that the plaintiff had absconded and that they did not know where he had gone. Scantlin went to Green Bay, when he was informed by the boys that plaintiff had left two days before, that he had not paid them their commissions and that they did not know where he had gone; that they had turned over to him 250 subscriptions in the ten days before his leaving, quite a number of which were paid in full, and that all cash collections had been turned over to him, amounting, as they said, to about $200. The boys had no money and a hotel bill of over $100 had accrued against them. Scantlin took with him one McElvay, a collector employed by defendant. The collector reported by telephone that his investigations disclosed in almost every case that plaintiff had collected on the contract but had not marked the amount collected; that in one day he had discovered $25 of unreported collections. McElvay went over the entire territory which had been covered by plaintiff and reported a shortage in excess of $100. The statement of the boys to Scantlin was that "plaintiff had skinned out and left them." Scantlin telephoned to the plaintiff's home in Fond du Lac, Wisconsin, but was unable to locate the plaintiff and was informed by plaintiff's father that he did not know

where the plaintiff was. Thereupon Scantlin telephoned to one Massey, a bookkeeper for the defendant in Chicago, to send him money to get the boys out of the hotel, and instructed Massey to have the plaintiff arrested in case he appeared.

Shortly thereafter plaintiff came into the Chicago office and was arrested by a police officer, at the request of Massey, and taken to the Clark street police station. It was disclosed when plaintiff was taken to the station that he had no money with him. Scantlin came back to Chicago the following day and was informed by Massey of the arrest of plaintiff, and the police offi er who made the arrest informed Scantlin that the plain tiff had admitted that he was short in his accounts and had no mone with him, and Massey reported that he had checked over the account and found a shortage. Scantlin then telephoned to Mr. Heckman, an attorney employed in the office of Baker & Holder, requesting him t go to the police station where, it seems, the plaintiff had been held over night without any formal complaint having been signed. Scantlin testifies that he related to this attorney the facts as he knew them and was advised to swear to a complaint, which he did, charging that the plaintiff had embezzled the sum of $266.11. It appears that Scantlin did not at any time communicate with or receive instruction from any superior of the defendant company, and that the New York office of the defendant was not at any time informed of this proceeding. Scantlin and Massey were the only employees of the defendant who had any connection with the matter or communicated with Heckman in regard to it. The New York office of defendant neither sent nor received any communication at any time from either Scantlin or the attorneys with reference to the matter. The plaintiff gave bail, and upon his hearing waived examination an was bound over, a judge of the Municipal court finding that there w probable cause to believe the plaintiff guilty.

The trial of plaintiff took place in the Criminal court December 16, 1919, and he was found not guilty by the jury. The defendant was not represented by any special counsel at that trial. Scantlin, who in the meantime had quit the defendant's employment and moved away from Chicago, returned as a witness, coming to Chicago at his own expense for that purpose, and he was not reimbursed therefor by the defendant. Massey also testified but it does not appear that it was by the defendant's request.

The evidence of the plaintiff shows that Scantlin took charge of defendant's office about Christmas, 1918, that plaintiff, Scantlin, Norton and Stafford, the latter of the New York office, were present; that Norton introduced Stafford and said that Scantlin was going "to take charge of the Chicago office." A letter of the defendant company signed in its name by Stafford to the plaintiff and dated April 21, 1919, is in evidence. It states "The Wisconsin territory is in the Chicago district; therefore any subscription entered into the Pictorial Review Co. in this territory will have to be made with our branch manager, Mr. Scantlin, and I assure you that Mr. Scantlin has the authority to pay you and your boys as much money as you could get from the Home office. In addition, he is located near you and can give you the best possible service in regard to supplies, also in regard to paying your men, etc." Scantlin's testimony is to the effect that he and Massey "did all the work there was to do, looked after the money of the company, hired and discharged solicitors, paid money to solicitors, received money from them." Scantlin also testified as follows:

"Q. For whom were you acting?
A. Well, possibly acting in the interests of the company, as I saw it.
Q. You were not acting in your interest, were you?
A. Well, I possibly was at that time too. The whole thing is I thought I owed that to the company. I felt that he was absolutely guilty and ought to be punished."

It is the contention of the plaintiff that the court

was justified in submitting to the jury and the jury in finding affirmatively from this evidence that the actions of Conklin and Massey were within the scope of their employment or of the employment of one of them, and this, as has been said, is, in our opinion, the controlling question in the case. Whether a corporation is liable for a malicious prosecution begun by its agent, must in each case depend upon whether the prosecution was within the scope of the agent's employment. If, for example, the agent is employed as a police officer and it is a part specifically of his duty to decide whether an arrest shall or shall not be made, the corporation is, in such case, undoubtedly liable for his acts. The leading cases so holding are *Goff* v. *Great Northern Ry. Co.*, 3 El. & E., 672, 30 L.J.Q.B., 148; *Edwards* v. *Midland Ry. Co.*, 50 L. J. Q. B., 281; 6 Q. B. Div., 287. It is also held in another line of cases that where a prosecution is begun with the view to recover the property of the agent's principal or to protect his business or property, the principal may be liable. This doctrine has been stated in *Allen* v. *London, etc., R. Co.*, L. R. 6, Q. B. 65, where it is said "there is a marked distinction between an act done for the purpose of protecting the property by preventing following or recovering it back, or an act done for the purpose of punishing offender for that which had already been done. Upon this principle there is a clear distinction between an arrest brought about as a mere incident to a suit for the recovery of property or a suit begun by capias to procure the payment of a debt, and those cases where the prosecution of the supposed offender could have no other legal effect than the punishment of the guilty. In the last named class of cases the employer of the agent is not liable. The mere fact that the offense which was committed was against the property of the principal owner, the further fact that the agent in the commission of the tortuous act supposed that his act was for the benefit of his employer, is not sufficient." In the case of *Dally* v. *Young*,

3 Ill. App., 39, a plaintiff sued for malicious prosecution the Remington Sewing Machine Company, joining one Lathrop, who was the general agent of the company at Chicago, and one Daily, a sub-agent at Bloomington. The declaration averred that Daily, on behalf of and at the instigation of the defendants Lathrop and the Machine company, charged the plaintiff with embezzlement and in the trial court the plaintiff had judgment. It was reversed and the cause remanded, the court saying. "It is true Lathrop was the general agent of the company at Chicago, and that Daily was a sub-agent at Bloomington, and subject to his jurisdiction in all matters pertaining to the business of the company, but this circumstance of itself would not make him liable for a criminal prosecution commenced by Daily without his knowledge or consent. Where an agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same unless he adopts and continues the same with knowledge of all the circumstances. 2 Addison on Torts, p. 750; Burnap v. Albert, Taney's C. C. Dec. 244; Stevens v. Midland Co., R. W. Co., 10 E. C. L. R., 351."

In Springfield Engine & Thrashing Co. v. Green, 25 Ill. App., 106, one Kanacke, who was the agent to collect of the defendant company, began criminal proceedings against the debtor, who sued for malicious prosecution and had judgment which was upon appeal reversed, the court stating: "We do not propose to notice particularly the many cases cited by counsel. In some the act of the agent was clearly ratified, as in Fenton v. Wilson Sewing Machine Co., 9 Phila., 189. In others it was of the precise description expressly authorized to be performed in a proper case and manner, as in Pennsylvania Co. v. Weddell, 100 Ind., 134, and Chicago City Ry. Co. v. McMahon, 103 Ill., 485; but we find none maintaining the liability upon the clear ground of implied authority that may not be

8 Ill. App., 38. A plaintiff sued the [illegible] Sewing Machine Company, [illegible] Lathrop was the general agent of the company at Chicago, and one Kelly, a sub-agent at Washington. The prosecution occurred upon Kelly, or because of him, at the instigation of the defendants Lathrop and the Machine company, charged the plaintiff with embezzlement and in the trial court the plaintiff had judgment. It was reversed and the cause remanded, the court saying: "It is true Lathrop was the general agent of the company at Chicago, and that Kelly was a sub-agent at Washington, and subject to his direction in all matters pertaining to the business of the company, but this circumstance of itself would not make him liable for a criminal prosecution commenced by Kelly without his knowledge or consent. Where an agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same unless he adopts and ratifies the same with knowledge of all the circumstances. 2 Addison on Torts, p. [illegible]; [illegible] v. [illegible], [illegible]; [illegible] v. [illegible] Co., [illegible]."

In [illegible] v. [illegible], [illegible] Ill. App., [illegible], the [illegible] agent in [illegible] of the defendant company, began criminal proceedings against the [illegible], who sued for malicious prosecution and recovered judgment which was upon appeal reversed, the court stating: "It is not necessary to notice particularly the many cases cited by counsel. In view the act of the agent was clearly [illegible], it is [illegible] v. [illegible], [illegible]. In [illegible] it was one of the [illegible] expressly authorized by the principal in a proper case and manner, as in [illegible] Co. v. [illegible], [illegible], [illegible], and [illegible] v. [illegible], [illegible]; but we find none maintaining the liability upon the other grounds of implied authority that may exist

distinguished, on principle, from the one at bar. They show that to be implied, as within the scope of the authority expressly given, the act or proceeding must be of itself necessary, usual or appropriate to the performance of a duty or the accomplishment of an end of the kind expressly contemplated by the contract of agency, or usually performed or accomplished by agents of a like or corresponding character, or to meet some exigency naturally arising in the ordinary course of the business intrusted to him, for the protection, preservation or recovery of some property or right in his charge as agent." The judgment was reversed and the cause remanded.

In Cleveland Co-operative Stove Co. v. Mach, 37 Ill. App., 596, the plaintiff sued for malicious prosecution and had judgment. One Baldwin, the agent of the corporation (which was a foreign one) had authority to conduct its business in Chicago, to sell goods, make contracts, and collect money due. The testimony tended to show that Baldwin had at one time brought a suit on behalf of the company, but there was no evidence that the company knew of it or had given him any authority to bring suits. This court through Gary, J., stated: "But if they had given such authority, he would not be thereby authorized to charge the corporation with his own malicious acts in setting in motion the criminal procedure of the State, from any legitimate result of which the corporation could derive no benefit. And if his motive was to derive to the corporation a benefit from the abuse of the process, the corporation is not thereby charged. The act was not within the scope of his agency. The case is not distinguishable from Springfield E. & T. Co. v. Mack, 25 Ill. App., 106, on this point." The court in that case had instructed the jury that, if Baldwin was the agent in Chicago, that if the business of the corporation and the prosecution was in the line of his duty as he understood it, for the purpose of benefit to the corporation and not for any object personal to himself, the corpora-

tion was liable for his acts. The judgment was reversed and the cause remanded.

In Hancock v. Singer Manfg. Co., 174 Ill., 503, the plaintiff sued the defendant company for malicious prosecution. It appeared upon the trial that the plaintiff has been arrested upon a warrant sworn to by one Preston, who claimed to be an agent of the defendant company. The complaint charged that plaintiff was guilty of malicious mischief in taking apart and injuring a sewing machine, the property of the Singer Mfg. Co. The plaintiff had judgment in the trial court which was reversed by the Appellate court with a finding of fact that Preston was not the agent of and had no authority to act for the Sewing Machine company for that purpose, and that the Sewing Machine company had never in any way adopted or ratified his act, but as soon as advised of it, promptly disaffirmed it; that Preston was the agent of the Singer Co., but his authority was expressly confined to the selling and leasing of sewing machines and the collection of money therefor. The Supreme Court affirmed the Appellate Court, saying: "If the Singer Mfg. Co. did not cause the arrest of appellant, no argument is needed to establish the proposition that it could not be held liable to respond in damages for the arrest. The only way in which it was sought to hold the company liable was that Preston, who was an agent of the Singer Manfg. Company, caused the arrest. But the Appellate Court found Preston was not the agent of the company and had no authority to act as such in causing the arrest. As he was not, therefore, the agent, his acts could not be binding on the company unless ratified, which was not the case."

Decisions of other states tending to sustain the contention of the defendant are as follows: Larson v. Fidelity Mut. L. Ass'n, 71 Minn., 101; Russell v. Palatine Ins. Co. (Miss.), 63 So. Rep., 644; McNeal v. Miller, 220 S. W. 68 (Ark.); Wolff v. United Drug Co., 133 N. E. 130 (N. Y.); Ehrenreich v. Fox Film Co.,

[illegible]

[illegible]

[illegible]

180 N. Y. Supp. 486; Emerson v. Lowe Mfg. Co., 159 Ala., 350.

We understand the doctrine established by these cases to be that a defendant, whose agent maliciously sets in motion the criminal process is not liable for its agent's action unless, first, it expressly directed it; or, second, with knowledge approved and ratified; or, third, participated in the prosecution; or, fourth, unless the nature of the agent's employment is such that authority to set in motion criminal process would necessarily be implied therefrom.

There was no evidence in this case tending to show, or from which the jury could reasonably find, that any agent or agents of the defendant came within either of these classes or had such authority as above enumerated.

It follows that the judgment of the trial court must be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACTS.

McSurely and Johnston, JJ., concur.

254 - 28530 FINDING OF FACTS.

The court finds as a fact that in the bringing and prosecution of the criminal action on account of which the plaintiff sues the agents of the defendant, who participated in such prosecution, were without any authority, express or implied, to do so in defendant's behalf, and that such prosecution was without authority, and that the supposed agents of defendant who instituted the prosecution were not its agents for that purpose or in that respect.

279 - 28555

MATILDE H. KAY, Adm'x, etc., Appellee,	)	APPEAL FROM SUPERIOR COURT
vs.	)	OF COOK COUNTY.
HORACE L. BRAND, Appellant.	)	

233 I.A. 630

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Horace L. Brand, from a judgment in the sum of $44,8[illegible], entered upon the verdict of a jury, which was directed by the court on motion of the plaintiff at the conclusion of all the evidence.

It is the contention of the defendant, who is appellant here, that the court erred in refusing to allow defendant to file a plea in abatement, tendered by him, in directing the verdict, and in refusing to admit in evidence the wills of Richard Michaelis, Walter R. Michaelis, and Clara Michaelis.

The suit as originally brought was in assumpsit by Clara Michaelis, plaintiff, as executrix and trustee under the last will and testament of Richard Michaelis.

The basis of the suit was a promissory note executed by the defendant, Brand, on the 16th day of August, 1911, payable "to the order of Clara Michaelis, executrix and trustee under the last will and testament of Richard Michaelis." The declaration contained the consolidated common counts and a special count. The defendant filed the general issue and certain special pleas, setting up fraud and circumvention, failure of consideration, and one plea denying the right of the plaintiff to sue as executrix, etc., because, as alleged, her interest in the note was acquired in her own right.

Gen. No. [illegible]

[illegible], et al., Appellees,

vs.

Herman L. [illegible], Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 620

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Herman L. [illegible], from a judgment in the sum of [illegible], entered upon the verdict of a jury, which was directed by the court on motion of the plaintiff at the conclusion of all the evidence.

It is the contention of the defendant, who is appellant here, that the court erred in refusing to allow defendant to file a plea in abatement, tendered by him, in directing the verdict, and in refusing to admit in evidence the wills of [illegible], [illegible], and [illegible].

The suit as originally brought was in assumpsit by [illegible], plaintiff, as executrix and trustee under the last will and testament of [illegible].

The basis of the suit was a promissory note executed by the defendant, [illegible], on the [illegible] day of August, [illegible], payable "to the order of [illegible], executrix and trustee under the last will and testament of [illegible]." The declaration contained the consolidated common counts and a special count. The defendant filed the general issue and certain special pleas, setting up fraud and circumvention, failure of consideration, and one plea denying the right of the plaintiff to sue as executrix, etc., because, as alleged, her interest in the note was acquired in her own right.

September 27, 1922, the death of the plaintiff was suggested, and by order of the court Matilde H. May, administratrix de bonis non with the will annexed, was substituted and she was authorized to prosecute the action. On November 25, 1922, thereafter, the defendant moved for leave to file a plea in abatement, which prayed judgment of the writ and declaration "because the said Richard Michaelis died April 13, 1909, leaving a will in which he nominated Clara Michaelis, Hedwig Bowman, Walter Richard Michaelis and Helene Landweer executors thereof; that May 26, 1909, Walter Richard Michaelis, Hedwig Bowman and Helene Landweer filed their renunciation, declining to serve as such, and May 25, 1909, the said Clara Michaelis qualified in the Probate court of Cook County as sole executrix of said last will and testament, and that letters testamentary were issued to her on said date; that August 16, 1911, said Clara Michealis, executrix under said last will and testament of Richard Michaelis, deceased, sold,assigned and transferred and set over to the defendant, Brand, certain personal property and chattels and as part payment therefor the defendant, Brand, executed and delivered to the said Clara Michaelis, executrix as aforesaid, his promissory note dated August 16, 1911, for $40,000, upon which note this suit is brought; that on February 17, 1922, while this suit was still pending, the said Clara Michaelis died, leaving her last will and testament, in and by which she nominated and appointed the Reverend Alfred E. Meyer executor of her last will and testament, and that letters testamentary were issued to him April 4, 1922, and that he is still acting as such executor; that September 27, 1922, by order entered in the Superior court of Cook county, one Matilde H. May, administratrix de bonis non with will annexed of the estate of Richard Michaelis, deceased, was substituted as plaintiff in the said cause. Wherefore," etc.

This plea as presented set up matters which were not

September 27, 1921, the death of the plaintiff was suggested, and by order of the court William A. Kay, administrator de bonis non with the will annexed, was substituted and was authorized to prosecute the action. On February 28, 1922, thereafter, the defendant moved for leave to file a plea in abatement, which stated [illegible] of the suit and declaring that the said Richard Michaelis died April 17, 1917, leaving a will in which he appointed Clara Michaelis, Rudolph Berman, Walter Richard Michaelis and [illegible] executors thereof; that May 18, 1920, Walter Richard Michaelis, Rudolph Berman and [illegible] resigned as such executors, leaving [illegible] as sole executrix; and May 21, 1920, the said Clara Michaelis qualified in the Probate Court of Cook County as sole executrix of said last will and testament, and that letters testamentary were issued to her as such [illegible] that August 13, 1920, said Clara Michaelis, executrix under said last will and testament of Richard Michaelis, deceased, [illegible] by the [illegible], certain personal property, and [illegible] and delivered to the said Clara Michaelis, executrix as aforesaid, his promissory note dated April 15, 1918, for $20,000, upon which note this suit is brought; that on January 17, 1922, while this suit was still pending, the said Clara Michaelis died, leaving her last will and testament, in and by which she nominated and appointed the Reverend Alfred R. Meyer executor of her last will and testament, and that letters testamentary were issued to him March 1, 1922, and that he is still acting as such executor; that September 27, 1921, by order entered in the Probate Court of Cook County, one William A. Kay, administrator de bonis non with will annexed of the estate of Richard Michaelis, deceased, was substituted as plaintiff in the said cause. "Wherefore," the [illegible]

This plea as originally set up matters which were not

of record in the suit and therefore considered as a plea in abatement it would be necessary under the provision of section 1 of the Abatement act, Cahill's Revised Statutes, 1923, p. 61, that the same should be "verified by the affidavit of the person offering the same or of some other person for him." It was not so verified, and we therefore think the court did not err in refusing to permit it to be filed, even if it should be conceded (a matter on which we do not pass) that the plea was filed in apt time. The court did not err, therefore, in this respect.

Of course, irrespective of any plea which might have been filed, it was necessary that the plaintiff should prove that she was the owner of the note. The note produced by the plaintiff proved this necessary fact and there was no evidence in the record nor evidence offered from which a jury could have found that the plaintiff was not the owner of the note. This being the case, the court properly directed a verdict for the plaintiff as to the amount due thereon.

The plaintiff has made a motion in this court that damages be assessed against the defendant for the reason, as alleged, that the appeal is taken for the purpose of delay. It is a close question as to whether such damages should not, under the circumstances be allowed; yet, upon the whole record, we are disposed to give the appellant the benefit of the doubt and deny the motion.

The judgment is affirmed. The motion to assess damages is denied.

JUDGMENT AFFIRMED.

MOTION TO ASSESS DAMAGES DENIED.

McSurely and Johnston, JJ., concur.

34 - 28663

FLORENCE G. COWLES,
Appellant,

vs.

EDWARD BROW and MASSACHUSETTS BONDING AND INSURANCE CO., a Corporation,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff below from a judgment entered in favor of the defendants and against the plaintiff after the statement of claim on motion of defendants had been stricken from the files. The motion was not preserved by a bill of exceptions and the defendants contend that under the rule laid down in Mann v. Brown, 263 Ill., 394, the action of the court is not open to review here. That case has been distinguished by the Supreme Court in the later case of Harmon v. Callahan, 286 Ill. 59. In this latter case the rules of the Municipal Court were incorporated in the record, which was not true of the Mann case and is not true of this one, and the defendants argue plausibly that this case is controlled by Mann v. Brown, supra, rather than by Harmon v. Callahan. We prefer, however, to place our decision upon other grounds.

The stricken statement of claim alleged that the defendants executed an appeal bond upon an appeal taken to the Appellate Court of Illinois from a judgment entered in the Municipal Court of Chicago in favor of the plaintiff, for the possession of certain real estate; that the judgment was reversed by the Appellate Court and the cause remanded to the trial court, where judgment for possession was again rendered in favor of the plaintiff. The breach of the condition of the bond was claimed to be

that no rent was paid to the plaintiff by the defendants after the rendition of the first judgment for possession. The abstract does not contain the copy of the bond which was attached to the statement of claim. It appears, however, to have been in the usual form and its condition was as follows:

> "Now, therefore, if said Edward Brow shall duly prosecute his said appeal with effect, and moreover pay all rent now due or that may become due before the final determination of this suit, and also all damages and loss which the plaintiff has sustained or may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done or to be done thereto during said withholding until the restitution of the possession thereof to the plaintiff, together with all costs accrued or that may accrue in case said judgment is affirmed or said appeal dismissed, then the above obligation to be void, otherwise to remain in full force and effect."

It is the contention of the plaintiff in this court that an appeal bond may contain several covenants or conditions, each of which is severable from the other. Coons v. People, 76 Ill., 385; Shunick v. Thompson, 25 Ill. App. 620; Erlinger v. People, 36 Ill. 458. The plaintiff further contends that the condition of this bond is such that the covenant for the payment of rent pending the appeal is distinct from the other covenants and is not conditioned upon the manner in which the appeal should be terminated. Tomlin v. Green, 39 Ill., 226; Farber v. Natry, 16 Wis., 149; Chase v. Dearborn, 23 Wis., 443, are cited as cases tending to sustain this construction. The plaintiff concedes that the statement of Justice Magruder in the case of Rehm v. Halverson, 197 Ill., 378, is to the contrary, but urges that the statement there made is "purely obiter dicta." The court there said, "Nor can it be said that there is any difference in principle between the affirmance of a money judgment and the affirmance of a judgment for restitution, so far as liabilities of obligors in the appeal bond are concerned. There must be an affirmance of the judgment, or a dismissal of the appeal, to sustain a suit on the bond." The statement there made was, however, based upon the law as previously laid down by the Supreme Court in the case of Daggitt v. Mensch et al. 141 Ill., 395, affirming this court in the same case, and that case

that no rent was paid to the plaintiff by the defendants after the rendition of the first judgment for possession. The abstract does not contain the copy of the lease which was attached to the statement of claim. It appears, however, to have been in the usual form and the condition was as follows:

> "Now, therefore, if said (first) party shall duly prosecute his said appeal with effect, and moreover pay all rent now due or that may become due before the final determination of said suit, and also all damages and loss which the plaintiff may have suffered by reason of the withholding of the premises in controversy, and by reason of any injury done to the same during such withholding until the restitution of the possession thereof to the plaintiff, together with all costs, in case said appeal shall be dismissed, then the above obligation to be void, otherwise to remain in full force and effect."

It is the contention of the plaintiff in this court that an appeal bond may contain several covenants or conditions, each of which is separable from the others. Gray v. Smith, 96 Ill., 289; Donlan v. Thompson, 40 Ill. App. 547; Gallagher v. Rogers, 80 Ill. 426. The plaintiff further contends that the condition of this bond is such that the covenant for the payment of rent pending the appeal is distinct from the other covenants and is not conditioned upon the manner in which the appeal shall be determined. Taylor v. Gray, 37 Ill. 235; Taylor v. Burns, 14 Ill. 289; Clark v. [illegible], 47 Ill., 141, are cited as cases tending to sustain this construction. The plaintiff concedes that the statement of Justice Marsh in the case of Hahn v. Ritchie, 149 Ill. 376, is to the contrary, but urges that the statement there made is 'merely obiter dicta.' The court there said, "Nor can it be said that there is any difference in principle between the affirmance of a money judgment and the affirmance of a judgment for possession, so far as the liability of sureties on the appeal bond are concerned. There must be an affirmance of the judgment, or a dismissal of the appeal, to sustain a suit on such bond." The statement there made was, however, based upon the law as previously laid down by the Supreme Court in the case of Merritt v. [illegible], [illegible] Ill., 566, affirming this court in the same case, and that case

cannot be distinguished from the one now before us. In that case the trial court sustained a demurrer to the declaration brought upon a bond given on appeal from the judgment in forcible detainer, because it did not allege either that the judgment from which the appeal was taken had been affirmed or the appeal dismissed. The Supreme Court said: "The averment that 'on May 26, 1890, said suit was finally terminated by order of said Circuit Court then duly entered of record,' is manifestly insufficient to fix the liability of appellees, because the order so rendered may have been in favor of the appellees; but by the terms of the bond they are liable only in the event that the 'judgment from which the appeal was taken should be affirmed or the appeal dismissed.'" The rule there announced was later followed by this courtin the case of Hawes v. Sternheim, 57 Ill. App., 126.

These cases are squarely in point and compel an affirmance of the judgment.

AFFIRMED.

McSurely and Johnston, JJ., concur.

74 - 28724

LEA HERRICK,
Plaintiff in Error,

vs.

MOIR HOTEL CO.,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

233 I.A. 631

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff below from a judgment in favor of the defendant, entered upon the finding of the court.

The statement of claim, which was filed February 14, 1916, alleged that the plaintiff was engaged in the business of giving theatrical productions; that the defendant is a corporation operating the Morrison Hotel and Boston Oyster House; that plaintiff on October 18, 1915, entered into a contract with the defendant to produce a Musical Revue similar to one which plaintiff was at that time producing for defendant under a prior contract; that this production was to begin October 31st and continue for a period of twenty weeks, for which the defendant agreed to pay the plaintiff the sum of $900 a week, with a guaranty of twenty weeks' engagement; that plaintiff entered upon his duties and produced a musical show as called for under the contract; that defendant afterwards requested a modification of the contract in the matter of price, and that on December 2, 1915, plaintiff notified the defendant by telegram that he would play out the existing contract for $775 weekly, beginning December 5; that defendant replied that he would be willing to continue the show for $700, but could not afford to pay more; that thereafter on December 4, 1915, plaintiff sent a telegram to the defendant, stating: "Will give you present show without DeVay for seven hundred net or with her for seven hundred forty net, you

course pay costumes in addition * * *"; that on the same day defendant replied by telegraph as follows: "Will accept seven hundred dollar proposition sending check tonight for costumes will deliver transportation to New York for Hales and McVay costumes must be here tenth;" that on January 12, 1916, defendant by letter requested a further reduction and that on January 12, 1916, plaintiff notified the defendant that this proposition was impossible; that on January 14 the defendant, through its agent, sent the following telegram: "Cannot accept proposition I hereby give you two weeks notice for the entire show," meaning thereby that the defendant at the end of two weeks would break or refuse to continue the contract; that on January 14, 1916, the plaintiff replied: "Beg to advise you that my contract with you is guaranteed for twenty weeks and that there is no two weeks clause or any concellation clause whatever in it Every chorus girl and principal in the company is under contract to me personally; while I do not expect or desire trouble with you, and am always ready to meet you half way, I expect you to live up to the terms of your contract." The statement of claim further alleges "that the defendant after January 14, 1916, refused to and did not carry out the terms of the foregoing contract; and the defendant then and there solicited all the employees of this plaintiff, which employees were giving the theatrical performance at the Morrison hotel and the Boston Oyster House to break their contracts of employment with this plaintiff, and the defendant then and there caused the said employees of this plaintiff to break their contracts with this plaintiff; and the defendant then and there hired all of said employees to work for it, the defendant, and the defendant then and there proceeded to and did give and is now giving the same theatrical performance without accounting or paying to this plaintiff in any way whatsoever for the same." The declaration claimed total damages in the sum of $7,900.

The defendant filed an affidavit of merits in which its defense was stated to be that "on January 14, 1916, the plaintiff wholly failed to comply with the terms of the contract then existing between the plaintiff and the defendant, and did not render any services nor perform or cause to be performed any of the terms of the contract after January 14, 1916." The affidavit further averred that defendant had paid all that was due and owing to plaintiff at the time of the breach of the contract on January 14, 1916, and denied that it was in any way liable to the plaintiff in any sum whatever. Leave was afterwards given to defendant to file an additional affidavit of merits, which it did, stating as a further defense to the suit that, since the institution thereof, the parties in consideration of entering into a new contract for a new show had agreed that the suit should be dismissed and that there should be no further claim made by the plaintiff against the defendant by reason of the previous contracts.

There has been certified to this court as a part of the record in this case the rules of the Municipal court of Chicago, in which the cause was tried. Rule 19 thereof provides as follows: "(k) Every allegation of fact in any pleading, except allegations of unliquidated damages, if not denied specifically or by necessary implication in the pleading of the opposite party, shall be taken to be admitted, except as provided by Rule 19. (m) Express admissions and denials must be direct and specific, not argumentative. (o) It shall not be sufficient to deny generally the grounds for relief alleged in the statement of claim, set-off or counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth."

The plaintiff upon the hearing introduced evidence tending to sustain the allegations of his statement, but the defendant contends here that the statement of claim does not disclose a cause of action, because there was no sufficient allegation of

performance or excuse for non-performance by plaintiff of his contract with the defendant, and because there were no proper allegations as to the amount or measure of damages. The trial court, apparently upon the theory that the evidence offered by the plaintiff was insufficient in these respects, made a finding for the defendant. The theory of the defendant seems to be that assuming the defendant's telegram of January 14, 1916, to be a renunciation and refusal on the part of the defendant to perform his contract, plaintiff was thereupon put to his election; that he might (1) treat the contract as ended and sue for damages; (2) treat the contract as rescinded; or (3) might elect to keep the contract in existence for the benefit of both parties, citing L. S. & M. S. Ry. Co. v. Richards, 152 Ill., 59, Roebling's Sons Co. v. Lock Stitch Fence Co., 130 Ill., 660. Defendant urges that the statement of claim shows an election to keep the contract alive and that in such case it was necessary that plaintiff should allege and prove a readiness, willingness and ability to perform on his part and a tender of such performance. Dunlap v. C. M. & St. P. Ry. Co., 151 Ill., 409, Central Funding Co. v. Gibson, 206 Ill. App. 236. It is urged that there was neither such averment nor proof.

That the rule of law with respect to contracts is generally as stated, may be conceded, but there were facts alleged in this statement and not denied (and which under the rule of the Municipal court must therefore be considered proved) which take this case out of this general rule. The law does not require a party to do a useless thing, and a careful reading of the cases on which the defendant relies indicates that circumstances may vary the rule as stated.

Where one party to a contract has given notice to the other that he does not intend to further perform, the other party has a right to treat this notice as a breach, and where, as here, it is alleged and, by reason of the rule of court, practically

admitted that the defendant by the hiring of plaintiff's performers made it impossible for him to carry out the contract, we think it is unnecessary for the plaintiff to aver and prove his ability and will to carry it out. In *Levy and Hipple Motor Co.* v. *City Motor Cab Co.*, 174 Ill. App., [illegible], this court said: "It is also the law that where one contracting party can show that the other prevented his performance of the contract, it is to be taken as *prima facie* true that he would have accomplished it if he had not been so prevented." See also *Chicago Title and Trust Co.* v. *Sagola Lumber Co.*, 148 Ill. App. 333; *Village of Lockport* v. *Shields*, 87 Ill. App. 130; *Hull* v. *Croft*, 139 Ill. App. 509. We think, therefore, the court erred in finding for the defendant.

The plaintiff urges that he is entitled to a reversal with judgment for the damages as alleged in his statement of claim. The defendant, however, is entitled to introduce evidence on that and other issues in the case, if it so desires.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely and Johnston, JJ., concur.

admitted that the defendant by failing of plaintiff's purchases made it impossible for him to carry out the contract, so that it is unnecessary for the plaintiff to show and prove his ability and will to carry it out. In [illegible] v. [illegible] Co., 174 Ill. App. 70, this court said: "It is also the law that where one contracting party can show that the other prevented his performance of the contract, it is to be taken as prima facie true that he would have consummated it if he had not been so prevented." See also [illegible] and [illegible] Co. v. [illegible] Co., 188 Ill. App. 296; [illegible] v. [illegible], 87 Ill. App. 186; Hall v. Scott, 183 Ill. App. 292. We think, therefore, the court erred in finding for the defendant.

The plaintiff argues that he is entitled to a reversal with judgment for the amount as alleged in his statement of claim. The defendant, however, is entitled to introduce evidence on that and other issues in the case, if it so desires.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

81 - 28732

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM FOSTER,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

233 I.A. 681

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant in error was found guilty by a jury under the second count of an indictment which charged that on the 31st day of October, 1921, in Cook County, he kept and maintained a common gaming house "and in said gaming house did then and there unlawfully cause and procure divers idle and evil disposed persons to then and there frequent and to then and there come together to play together at a certain unlawful game then and there called dice." Motions for a new trial and in arrest of judgment were overruled and a fine imposed upon plaintiff in error. Examination of the evidence indicates that it is a doubtful question whether the conviction can stand.

One of the police officers testified that he arrested defendant with others in a pool room on Twenty-second street; that he went in at the front door of the pool room and went to the rear where there was a crowd of men around the pool table; that he rushed to the table, reached over the crowd and got some money, dice, and a stick. He says, "I broke the stick, a cane they use to rake up dice. The cane was in William Foster's hand. Foster is the man with crutches. I found some money on the table and in a bag. The bag was on the table in front of Foster. Nobody had the dice when I got there. They had all scattered for different doors. I got the dice. Foster was standing at the table. One dice was on the floor."

22 . 20733

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM FOSTER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT

OF CHICAGO.

233 I.A. 631

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The defendant in error was found guilty by a jury under the second count of an indictment which charged that on the 21st day of October, 1913, in Cook County, he kept and maintained a common gaming house "and in said gaming house did then and there unlawfully cause and procure divers idle and evil disposed persons to then and there frequent and to then and there come together to play together at a certain unlawful game then and there called dice." Motions for a new trial and in arrest of judgment were overruled and a fine imposed upon plaintiff in error. Consideration of the evidence indicates that it is a doubtful question whether the conviction can stand.

One of the police officers testified that he arrested defendant with others in a pool room on Twenty-second street; that he went in at the front door of the pool room and went to the rear where there was a crowd of men around the pool table; that he rushed to the table, reached over the crowd and got some money, dice, and a stick. He says, "I broke the stick, a cane they use to rake up dice. The cane was in William Foster's hand. Foster is the man with spectacles. I found some money on the table and in a bag. The bag was on the table in front of Foster. Nobody had the dice when I got there. They had all scattered for different doors. I got the dice. Foster was standing at the table. The dice was on the floor."

Another officer testified that at the time of the arrest he had a talk with one Krisan, another defendant; that Krisan was outside and knocked on the door; that witness asked what he wanted, to which the said Krisan replied that he wanted to talk with his partner, and that the witness said, "If you are one of the owners, you can come in," and then let him in. This witness says that he does not remember seeing Foster at that time, but thinks he was in the rear; that at the time Krisan knocked on the door another defendant named Lewis said to him, "He's all right, let him in." The witness further said that he never saw any of the defendants at that place before.

We think this evidence hardly sufficient to sustain the charge as specified in the second count of the indictment. Moreover, the defendant requested the following instruction, which was refused by the court:

> "The defendant in this case had a right to go upon the witness stand to testify in his own behalf, if he chose to do so. The law, however, expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. So in this case, the mere fact that this defendant has not availed himself of the privilege which the law gives him, should not be permitted by you to prejudice him in any way. It should not be considered as evidence either of his guilt or innocence. The failure of the defendant to testify is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part."

In view of the uncertain character of the evidence and the fact that plaintiff in error did not testify, we think this instruction should have been given.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Johnston, JJ., concur.

91 - 28742

AMELIA WICHMANN,
Appellee,

vs.

EMIL A. WICHMANN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the petitioner from an order denying the prayer of his petition that an order of the court theretofore entered should be vacated and set aside.

Appellant was the defendant to a bill of divorce brought by his wife, Amelia, and a decree in her favor was entered on the 24th day of December, 1912. This decree provided that the defendant should pay to the complainant $4.00 per week as alimony for the support of the complainant and their minor child, Arthur. On June 2, 1913, an order was entered which recites that the matter was heard upon presentation to the court of a written stipulation by the parties, in accordance with which it was recited that, as the complainant desired to have the care, custody, control and education of the child free and clear from any joint interference of the defendant, and desired to support the child solely at her own expense, and did not desire to receive any further alimony either in behalf of herself or the child, it was, therefore, agreed between the complainant and the defendant that the defendant should not thereafter be bound by the said decree to the payment of alimony either for complainant or the child, and that the defendant should thereafter cease to visit the child, as it was provided in the decree he might.

In accordance with this stipulation, the court ordered, adjudged and decreed that the original decree should be so modified.

233 I.A. 631

vs.

This is an appeal by the [illegible]

[illegible]

March 1, 1923, the complainant filed her petition setting up the previous proceedings, including the original decree and the modification thereof, and further that thereafter on March 30, 1915, she was married to one Peterson with whom she is now residing; that the child Arthur, who resided with the petitioner was twelve years old and had been suffering from infantile paralysis since he was three years old and needed medical attention; that she had no means or moneys to pay for the same; that the defendant earned $65 per week; that he had neglected and refused to comply with the original decree, and praying that the decree entered on June 2, 1913, might be modified so that the proper provision might be made for the support and maintenance and proper medical and surgical care of the child.

The defendant answered, admitting the facts as to the matters of record in court, stating that, by virtue of the decree of December 24, 1912, he was permitted to visit his child at the home of the petitioner; that he did so visit his child and make payments as required by the decree up to February 5, 1915; that the petitioner was thereafter married to one Kleversaat which marriage was annulled because the petitioner had remarried within the time prohibited by the statute after a decree of divorce; that he was earning the sum of $50 per week, that the child Arthur was then eleven years of age and living at the home of Chris Peterson, but needed the attention of this defendant, his father, and that he was desirous of having his child in his own home where he could give it proper care and education in a safe and proper environment. The answer further denied the jurisdiction of the court. On March 23, 1923, the decree of June 2, 1913, was changed and modified so as to provide that the defendant should pay the complainant for the support and maintenance of the child, Arthur Wichmann, the sum of $5 per week, the first payment to be made on March 26, 1923, and $5 each week thereafter until the further order of the court, and that

March 4, [illegible], the respondent filed her petition
setting up the previous proceedings, including the original decree
and the modification thereof, and further that thereafter on March
[illegible], she was awarded in the decree [illegible]
[illegible]; that the minor children, who resided with the petitioner
[illegible]
[illegible]
that she had no [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible].

The defendant [illegible], answering the claim [illegible]
the [illegible] in [illegible], alleging that, by virtue of the
decree of [illegible]
at the home of the [illegible]
made payments as required by the decree up to February [illegible]
that the petitioner and [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible], the court [illegible]
[illegible]
[illegible]
[illegible]

the defendant to be allowed to visit the child each Sunday thereafter until further order of the court.

On April 19, 1923, the defendant presented his petition, setting up in detail some differences with Peterson at the different times when defendant desired to visit the child, and praying that the order of the 23rd of March should be set aside.

Complainant answered this petition and the court, after hearing evidence, refused to set aside the order modifying the decree.

It is contended by the defendant that the court was without jurisdiction after the lapse of years to modify the former order or decree which had been entered by stipulation of the parties. It is said that such a decree is in the nature of a solemn contract which cannot be appealed from and on which error cannot be assigned, citing _Krieger_ v. _Krieger_, [illegible] Ill. [illegible], and other well-known cases where the same rule is expressed. The power, however, to modify a decree of divorce with respect to the alimony provided for is expressly conferred by a statute in this state, which vests full power and authority in the court, even at a subsequent term, to modify the original decree from time to time with respect to the alimony to be paid in accordance with the circumstances of the parties. See section 19, chapter 40, Smith and Hurd's Illinois Revised Statutes, [illegible]. The power so to do under this statute has been so often affirmed by the court that a citation of authorities would seem to be unnecessary. _Hilliard_ v. _[illegible]_, 197 Ill. 549; _Hohenadel_ v. _Steele_, 237 Ill. [illegible]; _Barrett_ v. _Barrett_, 252 Ill. 516; _Stafford_ v. _Stafford_, [illegible] Ill. 438. It would seem that notwithstanding the provision in the decree is entered by the court upon the stipulation of the parties, the court by virtue of this statute has authority to change it as the condition of the parties may from time to time change. The public

interest would seem to demand that parents be required to give to their children a proper support, and they cannot divest themselves of that duty by stipulation. Dunfor v. Dunfor, 218 Ill. App. 17[illegible].

We have no doubt the court had jurisdiction. The evidence submitted to the court also justifies the entry of the order complained of. It showed that defendant's child was afflicted with infantile paralysis and in need of medical attention, that the mother was without means to provide the same, and that the father is abundantly able to provide the amount required by the decree. Should the situation in the future change, the trial court will not be without jurisdiction to make such further order as may be necessary.

The decree is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

114 - 28766

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM J. MORAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

233 I.A. 631

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error upon trial by the court was found guilty "in manner and form as charged in the information." This information filed on June 16, 1923, charged that plaintiff in error "on the 14th day of June, A. D. 1913, at the City of Chicago in said State of Illinois aforesaid, then and there being, did then and there with a certain instrument commonly called an Automobile, said Automobile being a dangerous and deadly weapon, without any considerable provocation whatever, and under circumstances showing an abandoned and malignant heart, unlawfully, wilfully and maliciously make an assault in and upon one Clarence Arpin with intent then and there to inflict upon the person of said Clarence Arpin a bodily injury, contrary to the Statute in such case made and provided, and against the Peace and Dignity of the People of the State of Illinois."

The information was signed by Clarence Arpin and attached thereto is a purported affidavit signed by him, which, however, is not sworn to. Section 37, Municipal Court act (Jones & Addington's Annotated Statutes, chapter 37, section 3379) provides that, in a case of this character, when an information is presented by any person other than Attorney General or State's Attorney "it shall be verified by affidavit of such person that the same is true as he is informed and believes. **" In People v. Zlotnicki, 246 Ill., 185, a case where an amended information was

was not verified as required by this statute, the Supreme Court said:

> "The plaintiff in error was not bound by law to answer a charge so presented unless verified by the affidavit of the person presenting it, and the motion to quash the amended information should have been sustained. It is insisted that the record does not show that the plaintiff in error objected to the action of the court in overruling his motion to quash. It is essential to sustain a conviction that the record contain a sufficient information - one which the defendant is bound to answer. It appears on the face of the record that this information is presented by another than the State's attorney and is not verified by affidavit. An exception is unnecessary to present what already appears of record."

Other cases holding such an information insufficient where motions in the arrest were made, are People v. Honaker, 281 Ill., 295, 299, and People v. Clark, 280 Ill., 160. The proceedings, however, were further erroneous in that the information upon its face showed that the alleged misdemeanor was barred by the Statute of Limitations. See Jones & Addington's Annotated Statutes, vol. 2, chapter 38, section 4011.

The defendant in error contends that the defense of the Statute of Limitations must be raised by the plea or it is waived. Such is not the law as we understand it in criminal cases, in which, unlike civil cases, the pleader must allege statutory exceptions, if any exist, which would prevent the running of the statute. Garrison v. The People, 87 Ill., 96; Lamkin v. The People, 94 Ill. 501; Church v. The People, 10 Ill. App. 222. It may well be doubted whether, notwithstanding a plea of guilty by a defendant to an indictment such as this, the judgment would be reversed. Klawanski et al. v. The People, 218 Ill., 481.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Johnston, JJ., concur.

136 - 28700

233

WILLIAM OSCAR OLSEN,
Appellee,

vs.

JOHN A. LEVY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for possession entered in favor of the plaintiff upon a finding of the court.

The plaintiff purchased the premises in question from one George H. Adam, taking title thereto by warranty deed on February 27, 1923. The defendant at that time was in possession of the premises (by what right is the question of fact at issue in the case.) The defendant took a written lease of the premises dated March 1, 1913, which ended on February 28, 1916. The monthly rental reserved therein was $60. After the termination of this lease, the defendant remained in possession and, up to the month of June, 1922, paid a rental of $60 per month and thereafter $65 per month. Prior to October, 1920, Adam tendered the defendant a new lease for a term of five years beginning October 1, 1920, and ending September 30, 1925. The defendant testifies that at the time this lease (which was signed by Adam) was tendered to him he signed it in the presence of Adam. On May 24, 1923, plaintiff served a written notice that defendant's tenancy would be terminated on the 31st day of July, 1923. The controlling question before the trial court was whether the defendant had in fact accepted the written lease which was tendered to him, and the

230

[illegible]

Vs.

[illegible]

[illegible]

[illegible]

controlling question in this court is whether the finding of the trial court on that issue of fact is clearly and manifestly against the weight of the evidence. The burden of proof was on the plaintiff. The evidence of the witnesses is in direct conflict. That of Adam tending to show that defendant did not accept the lease, that of defendant that he did accept it. Both are credible witnesses but Adam is financially, so far as the record discloses, disinterested, while the defendant is very much interested. Moreover, the conduct of the defendant with reference to the payment of the rent tends to corroborate the testimony of Adam.

It appears without contradiction that for nearly three years, the terms of this supposed lease, had been disregarded in the payment of rent. The defendant could not change the inference to be drawn from this undisputed fact by making a tender as he did in court of the supposed arrearages of rent under the supposed lease. Moreover, the court saw and heard the witnesses. We are not able to say that the finding of the court is clearly and manifestly against the evidence.

The judgment is therefore affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

157 - 33610

NICK CHEROPOULOS, for use of
Julius Rosenfeld,
Appellee,

vs.

TOM CERVES and GEORGE D. POULOS,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

233 I.A. 632

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the garnishees from a judgment in the sum of $303 entered upon the finding of the court. The garnishment proceedings were brought for the benefit of Julius Rosenfeld, judgment creditor, and the garnishees answered orally that they had no funds. The creditor contested this answer.

Upon the motion of the garnishor, the garnishees were required to first submit evidence in their own behalf, which they did, Poulos testifying that he had neither money nor property belonging to the debtor either at the time of the service of the writ or thereafter. He stated that, as a broker, he had tried to sell the debtor's place of business, but that the debtor was unable to give a good title and that the sum of $1,000 which had been deposited with him for the purchase of the same by Cerves, his co-garnishee, had been by him (Poulos) returned to Cerves for that reason. Cerves testified to the same effect, saying that he later purchased the business property of the judgment debtor from one Bender, a mortgagee who had foreclosed his mortgage on it. The garnishor has not appeared in this court in support of the judgment which under the law and evidence clearly cannot be sustained.

It will therefore be reversed.

REVERSED.

McSurely and Johnston, JJ., concur.

190 - 28246

THE FOREMAN TRUST & SAVINGS BANK, a Corporation, Executor of the Estate of OTTO PERTSCH, Deceased, Appellee,

vs.

MARGARET L. CHAMBERS, LUTHER ALLEN Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 632

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment in favor of the plaintiff in an action of forcible detainer. The judgment was entered upon the verdict returned by a jury trying the cause, a motion for a new trial in behalf of defendants having been overruled. It is urged here that immaterial evidence was admitted and that a new trial should have been granted because the verdict was manifestly and clearly against the weight of the evidence. There is no conflict in the evidence submitted. Plaintiff introduced a certified copy of an order of the Probate court authorizing the plaintiff to act as trustee of the estate of Otto Pertsch, and a lease from Pertsch to defendant Margaret L. Chambers made on July 1, 1920. This lease demised to her the premises described as "Flats 1, 2, 3, 4, 5 and 6, in the building known as 3831 and 3833 Grand boulevard in the city of Chicago, to be occupied as a dwelling and apartment hotel and for no other purpose whatever." The lease by its own terms expired on June 30, 1923. By the terms of this lease the lessee covenants she "will not allow the said premises to be used for any purposes that will increase the rate of insurance thereon, and will not sublet the same, nor any part thereof, nor assign this lease, without having first in each case the written consent of the party of the first part."

The plaintiff also put in evidence an indenture made

[illegible]

[illegible],
Appellee,

vs.

[illegible],
Appellants.

APPEAL FROM [illegible] OF [illegible].

[illegible]

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the [illegible] from a judgment [illegible]

[illegible]

July 15, 1923, between M. L. Chambers as party of the first part, lessor, and Luther Allen, party of the second part, lessee, wherein a part of these premises was demised to said Allen on July 15, 1923, until the 30th day of June, 1924.

M. L. Chambers, the defendant, was called as a witness by the plaintiff and testified that she had leased the flat to Luther Allen for eleven months and a half at $150 a month, and that she was the party whose name was signed to the lease. Afterwards, as a witness in her own behalf, she testified that she sublet apartments as a means of livelihood; that she had six seven room flats; that she lived on the first floor and rented the rest of the building and rented any size of apartment desired; that her household consisted of her mother, her uncle and herself; that she had lived on the premises for three years last past and had always subrented the flats.

Uncontradicted evidence showed a violation of the provisions of the lease with regard to subletting. It is insisted that the court erred in permitting a statement to go in evidence that the agent of the building had heard colored people were moving into it, while an objection on cross-examination was sustained to the statement that the property was in a colored neighborhood. There is nothing in the record from which we can determine whether these rulings were prejudicial, but in view of the fact that the uncontradicted evidence disclosed a violation of the clause in the lease prohibiting subletting of the premises or any portion thereof without the written consent of the lessor, defendants were not injured thereby.

On the uncontradicted evidence the verdict of the jury could not have been otherwise. The defendants suggest that the clause in the lease which provides that the demised premises were "to be occupied for a dwelling and Apt. Hotel," amounts to a permission to sublet, and that since this appears in writing

[illegible]

[illegible] the defendant, was called as a witness by the plaintiff and testified [illegible]

[illegible]

[illegible]

while the provision against subletting is printed, the writing must control. We do not construe this phrase as showing it to be the intention of the parties that a sublease might be made.

The judgment will therefore be affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

9
29088

HARRY BLOCK,
Appellee,

vs.

JAMES H. HOOPER,
Appellant.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

239 I.A. 632

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an interlocutory order by which defendant was enjoined from prosecuting certain suits in forcible detainer in the Municipal court of Chicago, from transferring the title claimed by him in certain real estate and from interfering with the possession of complainant and his tenants.

The order recites that for good cause shown the injunction should issue without notice, and the defendant argues here (citing a large number of cases) that it does not appear from the bill or affidavit attached thereto that the complainant would have been injured by serving notice, and that it was therefore erroneous to enter the order without giving notice. Christian v. People, 223 Ill., 244; Thurston v. Chait, 86 Ill. App., 543; Suburban Construction Company v. Naugle, 70 Ill. App. 384. The cases cited hold that, in a case like this, it must be made to appear to the court, not as the conclusion of the pleader, but as a necessary inference from the facts stated, that the rights of the complainant will be prejudiced by giving notice. The affidavit which was attached to the appeal stated that, if notice was served, the defendant would convey the premises, and the defendant says that injury in this respect is precluded by the provisions of section 57 of chapter 22 of the statute, which provides in substance that every suit in equity affecting or involving real

property shall, from the time of filing the bill of complaint, be constructive notice to every person subsequently acquiring an interest in or lien on the property affected thereby, and that every such person shall, for the purposes of the act, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he was a party thereto.

Both the appeal and the affidavit may be considered in determining whether the showing was sufficient, and while the affidavit stated only that the injury would result from a conveyance of the premises, the bill, which on its face sets up a very meritorious case, shows that the trial of the suits at law were imminent and that the defendant was interfering with the tenants of complainant. We think too, notwithstanding the statute, that a conveyance of the premises to a third party might well have resulted in prejudice to complainant's rights.

We hold the court did not err in issuing the injunction without notice upon the showing made by the bill and affidavit attached thereto, and the order will be affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

99 - 28375

JOHANNA LUNDBLAD,
Appellee,

vs.

EARL G. KRUMRINE et al.
On Appeal of Earl G. Krumrine,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

233 I.A. 633

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Earl G. Krumrine, defendant, from a judgment in the sum of $3,000 against him and Paul Verticchio in an action brought by Johanna Lundblad, plaintiff, to recover damages for injuries received in a collision of the automobiles of Krumrine and Verticchio, alleged to have been caused by their joint negligence.

The plaintiff and her son, Eric G. Lundblad, were riding in Krumrine's automobile at Krumrine's invitation. There were seven passengers in the automobile of Verticchio. The collision occurred in Chicago at the intersection of Ashland avenue and Balmoral avenue, between ten and eleven o'clock at night. Ashland avenue is a north and south street and Balmoral avenue an east and west street. The neighborhood is a residence district. Krumrine's automobile was going south in Ashland avenue and Verticchio's automobile was going east in Balmoral avenue. There were four persons near the scene of the accident, who were eye-witnesses of the collision. Their testimony is in some respects conflicting.

Frank P. Vogt, called as a witness for the plaintiff, was one of the eye-witnesses. He is an engineer and chauffeur for the Fire Department of the City of Chicago. He testified that he was sitting on the platform of the engine house in a chair facing north, about 5 feet from the building line on Ashland avenue;

that he had been out there off and on all the afternoon and night; that the engine house is on the southwest corner at the intersection of Balmoral and Ashland avenues and fronts east on Ashland avenue; that it is about 7 feet from the sidewalk line on both front and side; that he first saw Krumrine's automobile when it was about a block to a block and a half - about 450 feet; that he watched it for the entire block as it came from the north on Ashland avenue; that it was going at the rate of about 15 miles an hour; that he first saw Verticchio's automobile on Balmoral avenue, when it was about 12 feet back from the sidewalk line on Ashland avenue; that it was about 24 feet from the west curb line of Ashland avenue; that it was going about 8 to 10 miles an hour; that as near as he could judge Krumrine's automobile reached the north sidewalk line of Ashland avenue at the same time that Verticchio's automobile reached the west sidewalk line of Ashland avenue; that Krumrine "stepped on the gas and cut his car cater-cornered" and went over to the east side of the street to avoid Verticchio's car, and "sped up from that crossing until where it was hit;" that Verticchio's automobile struck the right rear end of Krumrine's automobile; that Krumrine's automobile turned around after it was struck and was facing on a northwest angle lying on its side near the southeast corner on the crossing of the street "about a car length" from where the collision occurred; that Verticchio's automobile was over on a lawn east of Ashland avenue and about 50 or 75 feet from the place where the accident happened; that the lawn had been spaded up, sodded and seeded down, and that the wheels of Verticchio's automobile went down into the soft ground deep enough to leave a trench along the parkway; that the collision occurred "a little to the east of the center" of Ashland avenue; that Krumrine's automobile was going about 18 miles an hour at the time of the collision; that it was going faster than when it was further up the block; that it didn't slow down before it came to the intersec-

that he had been out there all and he saw the automobiles collide;
that the accident happened in or near the southwest corner of the intersec-
tion of Belmont and Ashland avenues and Francis saw an accident
happen; that it is about 7 feet from the sidewalk line on both
Fourth and Ninth; that he first saw Cummings's automobile when it
was about a block to a block and a half - about 400 feet; that he
watched it for the entire block as it came from the north on Ash-
land avenue; that it was going at the rate of about 18 miles an
hour; that he first saw Vertlenich's automobile on Belmont avenue,
when it was about 50 feet back from the sidewalk line on Ashland
avenue; that it was about 50 feet from the west curb line of Ash-
land avenue; that it was going about 8 to 10 miles an hour; that
as near as he could judge Cummings's automobile reached the south
sidewalk line of Ashland avenue at the same time that Vertlenich's
automobile reached the west sidewalk line of Ashland avenue; that
Cummings "stepped on the gas and cut his car cater-cornered" and
went over to the east side of the street to avoid Vertlenich's car,
and "went up from that crossing until where it was hit;" that
Vertlenich's automobile struck the right rear end of Cummings's
automobile; that Cummings's automobile turned around after it
was struck and was facing on a northwest angle lying on its side
near the southeast corner on the opposite of the street "about a
car length" from where the collision occurred; that Vertlenich's
automobile was over on a lawn east of Ashland avenue and about
50 or 75 feet from the place where the accident happened; that the
lawn had been graded up, sodded and seeded down, and that the
wheels of Vertlenich's automobile went deep into the soft ground
deep enough to leave a trench along the parkway; that the collision
occurred "a little to the east of the center" of Ashland avenue; that
Cummings's automobile was going about 18 miles an hour at the time of
the collision; that it was going faster than that when it was farther up
the block; that it didn't slow down before it came to the intersec-

tion; that Verticchio's automobile maintained about the same rate of speed - 8 to 10 miles an hour - until the collision occurred.

Nicholas Bink, a salesman, who testified in behalf of the plaintiff, saw the accident at the time he and another man were sitting on the doorstep in front of the house where he, Fink, lives at 5357 North Ashland avenue. He, Bink, was about 30 feet south of Balmoral avenue. Bink further testified as follows: That he was looking in a northerly direction; that he first saw Krumrine's automobile when it was about 100 or 150 feet from the north curb of Balmoral avenue; that he also saw the automobile of Verticchio about 100 feet west of Ashland avenue; that he saw both automobiles at once; that Krumrine's automobile was going at the rate of "perhaps" twenty miles an hour; that Verticchio's automobile was going at about the same rate of speed; that it appeared to him that both cars "accelerated their speed in a way immediately before the accident."

Charles Koch, a witness for the plaintiff, was an eye-witness of the accident. He is a "construction reporter." The pertinent part of his testimony is as follows: He was walking south on the west side of Ashland avenue about 75 feet north of Balmoral avenue. When he first "paid special attention" to Krumrine's automobile it was half way across Balmoral avenue, about four or five feet from where the accident happened. It had passed him "somewhere along there" but he "didn't pay any special attention to it." When he first saw Verticchio's automobile "it must have been about 15 or 20 feet west of the curb line of Ashland avenue on Balmoral avenue," and approximately ten or twelve feet from the point of collision. He was unable to estimate the speed of the automobiles because he "just saw them a few moments before the accident itself happened - perhaps a second or a second and a half." It "seemed as though" Verticchio's automobile was going faster than Krumrine's - "almost two to one faster."

line; that Vertleckie's automobile maintained about the same rate of speed - 5 to 10 miles an hour - until the collision occurred.

Nicholas Fink, a salesman, who testified in behalf of the plaintiff, saw the accident as he and another man were sitting on the doorstep in front of the house where Mr. Fink lives at 5817 South Ashland avenue. Mr. Fink's home is about 50 feet south of Garfield avenue. Fink further testified as follows: that he was looking in a northerly direction; that he first saw Kroeniger's automobile when it was about 120 or 150 feet from the north curb of Garfield avenue; that he also saw the automobile of Vertleckie about 300 feet west of Ashland avenue; that he had both automobiles in sight; that Kroeniger's automobile was going at the rate of "between" twenty miles an hour; that Vertleckie's automobile was going at about the same rate of speed; that it appeared to him that both cars "accelerated their speed in a way immediately before the accident."

Charles Ladd, a witness for the plaintiff, was an eye witness of the accident. He is a "construction engineer." The pertinent part of his testimony is as follows: He was walking south on the east side of Ashland avenue about 75 feet north of Garfield avenue. When he first "paid special attention" to Kroeniger's automobile it was half way between Garfield avenue, about fifty or five feet from where the accident happened; it had passed him "somewhere along there" but he "didn't pay any special attention to it." When he first saw Vertleckie's automobile "it must have been about 15 or 20 feet west of the west line of Ashland avenue on Garfield avenue," and approximately ten or twelve feet from the point of collision. He was unable to estimate the speed of the automobiles because it "just was like a few seconds before the accident itself happened - perhaps a second or a second and a half." It "seemed as though" Vertleckie's automobile was going faster than Kroeniger's - "almost two to one figuring."

Another eye-witness of the accident, called by the plaintiff, was Charles Letsche, Jr. He testified substantially that he and his wife were walking home on the west side of Ashland avenue; that they started east across Ashland avenue to Clark street and Balmoral avenue to a drug store; that they crossed the street and were on the southeast corner of Ashland avenue and Balmoral avenue; that he first saw Krumrine's automobile when it was 100 feet from Balmoral avenue and about 40 feet from where the accident occurred; that it was on the right hand side of the street; that it was going about eight or ten miles an hour; that he crossed the street in front of it and had "plenty of time to make it;" that he walked "in a hurry and his wife ran;" that his attention was first called to Verticchio's automobile by the sounding of the engine which "sounded as though it was going a pretty good gait;" that Verticchio's automobile was about 155 feet from the west side of Ashland avenue when his attention was first called to it, and that it travelled about 130 feet to the place of the collision; that it was going between twenty-five and thirty miles an hour; that there "didn't seem to be any change in either engine" in reference to altering or changing the rate of speed before the collision.

Eric G. Lundblad, a son of the plaintiff, testified in behalf of the plaintiff on the material facts as follows: That he was riding in the front seat of Krumrine's automobile; that the automobile was going about twenty-five miles an hour in the block immediately north of the scene of the accident; that when he first saw Verticchio's automobile, Krumrine's automobile was about 100 feet from the north curbstone of Balmoral avenue and was on the right side of Ashland avenue; that Verticchio's automobile was about 100 feet from the west curb of Ashland avenue about the same distanc "we were from Balmoral avenue," and was going about the same rate of

Another eyewitness to the accident, called by the plaintiff, was Charles [illegible], Jr. He testified substantially that he and his wife were walking east on the west side of Ashland avenue; that they started east across Ashland avenue to [illegible] street and Balmoral avenue to a drug store; that they crossed the street and were on the northeast corner of Ashland avenue and Balmoral avenue; that he first saw [illegible]'s automobile when it was 150 feet from Balmoral avenue and about 40 feet from where the accident occurred; that it was on the right hand side of the street; that it was going about eight or ten miles an hour; that he crossed the street in front of it and had "plenty of time to make it;" that he walked "in a hurry and his wife not;" that his attention was first called to [illegible]'s automobile by the racing of the engine which "sounded as though it was going a pretty good gait;" that [illegible]'s automobile was about 125 feet from the west side of Ashland avenue when his attention was first called to it, and that it travelled about 125 feet to the place of the collision; that it was going between twenty-five and thirty miles an hour; that there "didn't seem to be any change in either engine" in reference to altering or changing the rate of speed before the collision.

[illegible] H. [illegible], a son of the plaintiff, testified in behalf of the plaintiff to the material facts as follows: That he was riding in the front seat of [illegible]'s automobile; that the automobile was going about twenty-five miles an hour in the block immediately north of the scene of the accident; that when he first saw [illegible]'s automobile, [illegible]'s automobile was about 100 feet from the north curbline of Balmoral avenue and was on the right side of Ashland avenue; that [illegible]'s automobile was about 150 feet from the west curb of Ashland avenue about the same distance "as [illegible] from Balmoral avenue," and was going about the same rate of

speed as Krumrine's automobile; that when he first saw Verticchio's automobile he told Krumrine to "watch out for that machine, wait;" that Krumrine "took his foot off the accelerator for a flash, or a second or so, and started to put his foot on the brake; that Krumrine "evidently changed his mind for some reason or other and put his foot back on the accelerator and gave it more juice, shooting the car ahead faster than we had been going before;" that between the time when Krumrine took his foot off the accelerator and put it back, Krumrine's automobile "might have travelled probably 25 or [illegible] feet more;" that "instead of going straight ahead on the right side of the road, Krumrine cut over towards the left - in other words, towards the southeast corner - kind of running away from the other machine."

The plaintiff corroborates her son's testimony that he warned Krumrine of the approach of Verticchio's automobile. She testified that her son said, "Look out, Krum, there's a machine coming, stop;" and that after that Krumrine's automobile "went a little faster." This is all that she knows about the accident.

Verticchio testified that he first saw Krumrine's automobile when it was about 125 feet north, and when he, Verticchio, was about 75 feet from the west curb line of Ashland avenue; that he has no idea how fast Krumrine's automobile was going; that he, Verticchio, was going 10 or 12 miles an hour, and that he slowed down to 8 miles an hour when he was within about 15 feet of the west curb line of Ashland avenue; that Krumrine's automobile at that time was about 40 feet or so north of the curb line of Balmoral avenue; that Krumrine kept on coming in an easterly direction and that he, Verticchio, kept on going; that he, Verticchio, did not increase the speed of his automobile; that he believes that Krumrine's automobile was about 20 feet north when he, Verticchio, started to cross Ashland avenue; that he, Verticchio, was expecting that Krumrine's automobile would stop because he, Verticchio, had the right of way;

speed of Krumrine's automobile; that when he first saw Vartinecke's automobile he told Krumrine to "watch out for that machine, buddy;" that Krumrine "took his foot off the accelerator for a flash, or a second or so, and started to put his foot on the brake; that Krumrine "evidently changed his mind for that second or other and put his foot back on the accelerator and gave it more pickup, causing the car about faster than we had been going before;" that between the time that Krumrine took his foot off the accelerator and put it back, Krumrine's automobile "might have traveled probably 15 or 20 feet more;" that "instead of going straight ahead on the right side of the road, Krumrine cut over towards the left - in other words, towards the southeast corner - kind of running over from the right side."

The plaintiff characterizes her son's testimony that he warned Krumrine of the approach of Vartinecke's automobile. She testified that her son said, "Look out, Arny, there's a machine coming, Arny;" and that after that Krumrine's automobile "went a little faster." This is all that she knows about the accident.

Vartinecke testified that he first saw Krumrine's automobile when it was about 125 feet north, and that he, Vartinecke, was about 75 feet from the east curb line of Railroad avenue; that he [illegible] Krumrine's automobile was going faster than he, Vartinecke, was going 20 or 25 miles an hour, and that he slowed down to 8 miles an hour when he was within about 15 feet of the east curb line of Railroad avenue; that Krumrine's automobile at that time was about 60 feet or so north of the curb line of Railroad avenue; that Krumrine kept on coming in an southerly direction and that he, Vartinecke, kept on going; that he, Vartinecke, did not increase the speed of his automobile; that he believed that Krumrine's automobile was about 30 feet north when he, Vartinecke, started to cross Railroad avenue; that he, Vartinecke, was expecting that Krumrine's automobile would stop because he, Vartinecke, had the right of way;

that he, Verticchio, applied his brake and swung in a northerly direction; that when he saw that he was going to hit Krumrine's automobile he took his foot off the gas and put it on the brake.

Krumrine testified that when he first saw Verticchio's automobile he, Krumrine, was exactly 78 feet from the curb line; that he measured the distance and knew it because he saw Verticchio's automobile as soon as he, Krumrine, came out from behind the buildings north of the vacant lot; and that Verticchio's automobile was at the alley back of the engine house, about 150 feet from Ashland avenue; that all that Eric Lundblad said in reference to Verticchio's automobile was, "Krum, do you see that car?" and that he, Krumrine, said, "Yes" and took his foot off of the accelerator and put it on the brake; that Eric Lundblad did not say "Look out" or "Wait;" that he, Krumrine, was probably travelling 20 miles an hour at the time; that he probably slowed down to 8 or 10 miles an hour; that in the meantime Verticchio's automobile slowed down "when I was about 100 feet west of Ashland avenue;" that when he saw Verticchio's automobile slow down, he concluded that he, Krumrine, "had the right of way and stepped on it;" that he took his foot off of the brake and put it on the accelerator again; that Verticchio's car apparently started to speed up after slowing down; that he, Krumrine, gave his automobile "all the gas it would take - everything it had - and cut over to the left side of the street."

Three witnesses who were passengers in Verticchio's car testified, but their testimony is not material. They saw almost nothing of the accident.

One of the principal grounds on which counsel for the defendant ask for a reversal of the judgment is that there is a "great preponderance" of the evidence in favor of the defendant. That is not a precise statement of the form of the question for us to consider on the evidence. Although when we weigh the evidence we necessarily consider the question of preponderance, yet

that he, Terlizzi, applied his brake and swung in a northerly di-
rection; that when he saw that he was going to hit Armanino's au-
tomobile he took his foot off the gas and put it on the brake.

Armanino testified that when he first saw Terlizzi's automobile he, Armanino, was exactly 75 feet from the curb line; that he measured the distance and knew it because he saw Terlizzi's automobile as soon as he, Armanino, came out from behind the build-
ings north of the [illegible] and [illegible] Terlizzi's automobile was at the alley back of the engine house, about 150 feet from Ashland avenue; that all that Eric Lundblad said in reference to Terlizzi's automobile was, "Arma, do you see that car?" and that he, Armanino, said, "Yes" and took his foot off of the accelerator and put it on the brake; that Eric Lundblad did not say "Look out" or "Hit;" that he, Armanino, was probably travelling 20 miles an hour at the time; that he probably slowed down to 8 or 10 miles an hour; that in the meantime Terlizzi's automobile moved from "when I was about 150 feet west of Ashland avenue;" that when he saw Terlizzi's automo-
bile slow down, he concluded that he, Armanino, "had the right of way and stepped on it;" that he took his foot off of the brake and put it on the accelerator again; that Terlizzi's car suddenly started to speed up after slowing down; that he, Armanino, gave his automobile "all the gas it would take - everything it had - and got over to the left side of the street."

Three witnesses who were passengers in Terlizzi's car testified, but their testimony is not material. They saw [illegible] of the accident.

One of the principal grounds on which counsel for the defendant ask for a reversal of the judgment is that there is a "great preponderance" of the evidence in favor of the defendant. That is not a precise statement of the form of the question for us to consider on the evidence. Although when we weigh the evi-
dence we necessarily consider the question of preponderance, yet

the exact form of the inquiry which this court pursues in regard to the evidence is generally expressed in the formula whether the verdict of the jury is manifestly against the weight of the evidence.

Counsel for the defendant, Krumrine, have made a very thorough and careful analysis of the evidence. And they have argued their interpretation of the evidence with a great deal of fairness and force. We do not deem it necessary to review all of their argument in detail. It is sufficient to say that the substance of their contention, as they have stated it, is this: "That the defendant, Krumrine, had ample reason to think he had the right-of-way and that he was not negligent in starting" to cross the street; or, as they have expressed it in another form, "Krumrine was justified in assuming when the other (Verticchio's) car slowed down that he had the right-of-way", and that "he was, therefore, not bound to give" Verticchio the right-of-way. We do not understand counsel for defendant, Krumrine, as contending that Krumrine primarily had the right-of-way. As we read their argument, they impliedly concede that under the statute in Illinois on "Motor Vehicles," since Verticchio was approaching from the right, he had the right-of-way in the first instance. The statute provides as follows:

> "All vehicles traveling upon public highways shall give the right-of-way to other vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left." Cahill's Illinois Revised Statutes, 1921, chap. 95a, sec. 34.

In the case of Partridge v. Eberstein, 225 Ill. App. 209, 213, in which the opinion was delivered by Mr. Justice McSurely, the statute was held to mean (p. 213): "That a vehicle is approaching an intersection from the right, within the meaning of the statute, and entitled to the right of way when, on its left, on an intersecting street, another vehicle is approaching whose driver, in the exercise of due care, would or should see that unless [illegible] the right-of-way the vehicles might or would collide."

the weak fact of the insanity which this court pursues in regard to the evidence is generally expressed in the formula whether the verdict of the jury is manifestly against the weight of the evidence.

Counsel for the defendant, Grumwine, have made a very thorough and careful analysis of the evidence. And they have argued their interpretation of the evidence with a great deal of fairness and force. We do not deem it necessary to review all of their argument in detail. It is sufficient to say that the substance of their contention, as they have stated it, is this: "That the defendant, Grumwine, had ample reason to think he had the right-of-way and that he was not negligent in starting" to cross the street; or, as they have expressed it in another form, "Grumwine was justified in assuming when the other (Vertichnik's) car slowed down that he had the right-of-way", and that "he was, therefore, not bound to give" Vertichnik the right-of-way. It is not seriously argued for defendant, Grumwine, as contended, that Grumwine primarily had the right-of-way. As we read their argument, they impliedly concede that under the statute in Illinois on "Motor Vehicles," since Vertichnik was approaching from the right, he had the right-of-way in the first instance. The statute provides as follows:

> "All vehicles traveling upon public highways shall give the right-of-way to other vehicles approaching along intersecting highways from the right, and shall have the right-of-way over those approaching from the left." Cahill's Illinois Revised Statutes, 1933, chap. 95a, sec. 25.

In the case of [illegible] v. [illegible], 229 Ill. App. 208, 212, in which the opinion was delivered by Mr. Justice Mc-Surely, the statute was held to mean (p. 212): "That a vehicle is approaching an intersection from the right, within the meaning of the statute, and entitled to the right of way when, on its left, or an intersecting street, another vehicle is approaching whose driver, in the exercise of due care, would or should see that unless [illegible] the vehicles might or would collide."

On this construction of the statute counsel for defendant, Krumrine, contend that as Krumrine had fairly entered upon the crossing and "was almost entirely across Balmoral avenue," and as Verticchio had slowed down, indicating that he would yield the right-of-way, Krumrine became entitled to the right-of-way. In reaching the conclusion that Krumrine was entitled to the right-of-way, it is obvious that counsel have assumed that the evidence justifies the following inferences: That Krumrine fairly entered upon the crossing; that he was almost entirely across Balmoral avenue; that Verticchio slowed down as he approached the intersection.

The evidence, however, relating to these questions of fact is conflicting. The verdict of the jury determined the questions adversely to the defendant, Krumrine, and unless we can say that the verdict is manifestly against the weight of the evidence the verdict should not be disturbed.

The rule is a familiar one, and has been announced in many cases, "that where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside." Carney v. Sheedy, 295 Ill., 78, 83. It is also the rule that a verdict will not be disturbed merely because the evidence is doubtful. Illinois Central Railroad Company v. Cowles, 32 Ill., 116, 121; DeForest v. Oder, 42 Ill., 500, 501.

When the testimony of the defendant Krumrine is considered, it will be perceived that he narrows the question whether he had the right-of-way to the issue whether Verticchio slowed down when he, Verticchio, was about 100 feet west of Ashland avenue. Krumrine testified as follows: "I should say he was about, maybe, 100 feet west of Ashland. When I saw the other car (Verticchio's) slow down I concluded I had the right-of-way." To justify that

In this contention of the [illegible] counsel for defendant, Krumrine, contend that as Krumrine had fairly entered upon the crossing and "was almost entirely across Ashland avenue," and as Vartikonis had slowed down, indicating that he would yield the right-of-way, Krumrine became entitled to the right-of-way. In reaching the conclusion that Krumrine was entitled to the right-of-way, it is obvious that counsel have assumed that the evidence justifies the following inferences: That Krumrine fairly entered upon the crossing; that he was almost entirely across Ashland avenue; that Vartikonis slowed down so as to indicate the [illegible].

The evidence, however, relating to these questions of fact is conflicting. The verdict of the jury determined the questions adversely to the defendant, Krumrine, and unless we can say that the verdict is manifestly against the weight of the evidence the verdict should not be disturbed.

The rule is a familiar one, and has been announced in many cases, "that where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside." Lorenz v. Sheik, 288 Ill., 78, 85. It is also the rule that a verdict will not be disturbed merely because the evidence is conflicting, Illinois Central Railroad Company v. Goddard, 72 Ill., 567, 569; Schwartz v. [illegible], 49 Ill., 297, 301.

When the testimony of the defendant Krumrine is considered, it will be perceived that he accords the question whether he had the right-of-way to the issue whether Vartikonis slowed down when he, Vartikonis, was about 150 feet west of Ashland avenue. Krumrine testified as follows: "I should say he was about, maybe, 150 feet west of Ashland. When I saw the other car (Vartikonis's) slow down I concluded I had the right-of-way." To justify that

conclusion the evidence should show directly that Verticchio's automobile did slow down when it was about 100 feet west of Ashland avenue. If this fact only appears by reasonable inference, and if another fact contrary to it also may be inferred reasonably from the evidence with equal certainty, there would be no positive basis for Krumrine's conclusion. _Condon_ v. _Schoenfeld_, 214 Ill. 226, 229, 230; _Kavern_ v. _The People_, 224 Ill., 170, 175. Or, to express the rule in another form, if the fact relied on by Krumrine to support his conclusion that he had the right-of-way is controverted, and two equally certain inferences in respect to it may be drawn from the evidence, Krumrine has not established the fact upon which his conclusion is predicated. Is the question whether Verticchio's automobile slowed down when it was about 100 feet west of Ashland avenue a controverted question of fact? The material evidence in this respect is as follows:

Letsche, one of the eye-witnesses, testified that neither Krumrine nor Verticchio "seemed to alter" the rate of speed of their automobiles before the collision. Vogt, another eye-witness, testified that Krumrine did not slow down before he came to the intersection, and that he thought that Verticchio's automobile maintained about the same rate of speed of 8 to 10 miles an hour until the accident happened. Bink, also an eye-witness, testified that "it appeared to him that both cars accelerated their speed immediately before the accident." Koch, the other eye-witness, did not testify whether either of the automobiles slowed down. He only saw the automobiles a "second or a second and a half" before the accident. He was of the opinion that Verticchio's automobile was "travelling almost two to one faster than" Krumrine's. Verticchio testified that he slowed down to eight miles an hour when he was 15 feet of the west curb line of Ashland avenue; that at that time Krumrine was about 40 feet or so north of the curb line of Balmoral avenue; that Krumrine kept on coming and that he, Verticchio, kept

on going.

On the question whether Verticchio slowed down when he was about 100 feet west of Ashland avenue, we think that there is a controverted issue of fact, and that the inference that Verticchio's automobile did not slow down, when it was about 100 feet west of Ashland avenue, is at least equally as certain as the inference that it did. We are not, however, resting our decision on this single, isolated fact. We have merely discussed this aspect of the evidence to show that on the defendant Krumrine's own theory of the case we would not be warranted in disturbing the verdict of the jury.

On a consideration of all the evidence, we are clearly of the opinion that the verdict of the jury is not manifestly against the weight of the evidence. The evidence shows that both Verticchio and Krumrine realized that one or the other would have to yield the right-of-way in order to avoid a collision. The defendant, Krumrine, concluded from the relative positions of the two automobiles, as they approached the crossing, that he was entitled to the right-of-way. It was for the jury to decide whether his conclusion in the circumstances was that of an ordinarily prudent and careful man. The jury decided this question adversely to the defendant, Krumrine, and we think the evidence is amply sufficient to sustain the verdict. The jury also decided that the collision resulted from the joint negligence of both Verticchio and Krumrine. In our view there is sufficient evidence to sustain the verdict in this respect.

Counsel for the defendant, Krumrine, contend that the trial court committed reversible error in the giving of an instruction for the co-defendant, Verticchio, which counsel assert had a prejudicial effect as to the defendant, Krumrine. Counsel for the plaintiff maintain that if any error was committed in the giving of the instruction for the co-defendant, Verticchio, which they deny, the error cannot be complained of by the defendant, Krumrine. On the

authority of MacDonald v. Chicago City Ry. Co., 243 Ill., 239, 241-245, we are of the opinion that the error assigned on the instruction by counsel for the defendant may be considered.

Two objections are urged by counsel for the defendant in connection with the instruction. First, that the instruction is, in itself, erroneous; and, second, that the instruction "directly contradicts" an instruction given for the defendant, Krumrine. The instruction given for the co-defendant, Vertiechio, is as follows: "You are instructed that it is provided by the laws of this state that all vehicles traveling upon public highways shall give the right-of-way to other vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left." This instruction is in the language of Section 33 of the "Motor Vehicles Act."

The instruction given for the defendant, Krumrine, is as follows:

> "The court instructs the jury that if you believe from the evidence that the automobile of the defendant Earl G. Krumrine had fairly entered upon the crossing in question before the automobile driven by defendant Paul Vertiechio, in plain view of him reached said crossing, and if you further find from the evidence that he continued over the crossing which he had so entered upon, with all due care and caution for the safety of others rightfully there, if you so find from the evidence, that he had fairly entered upon said crossing before the Vertiechio car reached said crossing, then you should find defendant Earl G. Krumrine not guilty."

Counsel for the defendant contend that although the instruction which was given for Vertiechio is in the language of the statute, it does not state the "law applicable under the special circumstances of this case;" that the law has been modified by judicial construction; that the "modification is an essential and necessary part of the law," and should have been inserted in the instruction. Counsel for the defendant specifically state that the instruction should have been modified by adding the following clause: "provided both vehicles arrive at the intersection at approximately the same time."

authority of Hardwick v. Chicago City Ry. Co., 264 Ill., [illegible], [illegible], we are of the opinion that the error assigned on the instruction by counsel for the defendant may be considered.

Two objections are urged by counsel for the defendant in connection with the instruction. First, that the instruction is, in itself, erroneous; and, second, that the instruction "directly contradicts" an instruction given for the defendant, Emerine. The instruction given for the co-defendant, Verticchio, is as follows: "You are instructed that it is provided by the laws of this state that all vehicles traveling upon public highways shall give the right-of-way to other vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left." This instruction is in the language of section 22 of the "Motor Vehicles Act."

The instruction given for the defendant, Emerine, is as follows:

"The court instructs the jury that if you believe from the evidence that the automobile of the defendant Earl W. Emerine had fairly entered upon the crossing in question before the automobile driven by defendant Paul Verticchio, in plain view of him reached said crossing, and if you further find from the evidence that he continued over the crossing, which he had a natural right, with all due care and caution for the safety of others rightfully there, if you so find from the evidence, that he had fairly entered upon said crossing before the Verticchio car reached said crossing, then you should find defendant Earl W. Emerine not guilty."

Counsel for the defendant contend that although the instruction which was given for Verticchio is in the language of the statute, it does not state the "law applicable under the special circumstances of this case;" that the law has been modified by judicial construction; that the "modification is an essential and necessary part of the law," and should have been inserted in the instruction. Counsel for the defendant specifically state that the instruction should have been modified by adding the following clause: "provided both vehicles arrive at the intersection at approximately the same time."

It is asserted by counsel for the defendant that "the courts have nearly always criticised instructions given in the words of a statute, for the reason that they are nearly always abstract and misleading." We do not understand that to be the rule. On the contrary, ordinarily "where an instruction is given in the language of the statute it must be regarded as sufficient, because laying down the law in the words of the law itself ought not to be pronounced to be error." *Mertens* v. *Southern Coal Company*, 235 Ill., 540, 551; *Kellyville Coal Company* v. *Strine*, 217 Ill., 516, 536; *Donk Bros. Coal & Coke Co.* v. *Peton*, 192 Ill., 41, 43, 44; *Mt. Olive Coal Company* v. *Rademacher*, 190 Ill., 538, 543. To the same effect are the cases of *Ward* v. *Meredith*, 220 Ill., 66, 68, and *The People* v. *McIntosh*, 242 Ill., 602, 606.

In approving an instruction in the language of the "Motor Vehicles Act," the Illinois Appellate Court of the Fourth District, in the case of *Geschwinder* v. *Comer*, 222 Ill. App. 417, said (p. 421): "In cases where the Motor Vehicle Act was under consideration, it has been held that an instruction which lays down a rule of law in the words of the law itself is good."

Unless there is something in an instruction calculated to mislead the jury in the application of the law to the particular case, no error will be committed in giving the instruction in the language of the statute. *The People* v. *McIntosh*, *supra*.

In the case at bar we do not think that there is anything in the instruction calculated to mislead the jury. There is nothing obscure in the phrase "right-of-way." It has a well understood meaning. The jury undoubtedly knew what it meant. The Century Dictionary defines the phrase as follows: "The right to pass over a path or way, to the temporary exclusion of others; as an express train has the right-of-way as against a freight train." (Century Dictionary s. v. "Way.") The phrase "grant the right-of-way" in connection with a statute relating to "a crossing

It is asserted by counsel for the defendant that "the courts have nearly always criticised instructions given in the words of a statute, for the reason that they are nearly always abstract and misleading." It is not uncommon here to be the point. On the contrary, ordinarily "where an instruction is given in the language of the statute it must be regarded as sufficient, because laying down the law in the words of the law itself ought not to be pronounced to be error." Kirchner v. Lexington Coal Company, [illegible] Ill., [illegible]; Collinsville Coal Company v. Fleming, [illegible] Ill., [illegible]; Mark Bros. Coal & Coke Co. v. Patton, [illegible] Ill., 41, 43, 44; [illegible] Coal Company v. [illegible], [illegible] Ill., [illegible]. To the same effect are the cases of Lund v. Osterlind, [illegible] Ill., 83, 86, and The Lincoln v. McIntosh, [illegible] Ill., 200, 276.

In approving an instruction in the language of the "Motor Vehicles Act," the Illinois Appellate Court of the Fourth District, in the case of [illegible] v. [illegible], [illegible] Ill. App. [illegible], said ([illegible]): "In cases where the Motor Vehicle Act was under consideration, it has been held that an instruction which lays down a rule of law in the words of the law itself is good."

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rule with a right-of-way" has been held to mean "that at such a crossing the driver of one vehicle has an affirmative duty to keep out of the other's way." Brillinger v. Ozias, 174 N. Y. Supp., 282, 283.

The case of Partridge v. Eberstein, supra, expressed the construction that the ordinarily intelligent man would give to the statute. The statute is not ambiguous. In reading the instruction the jury undoubtedly understood that the phrase "shall give the right-of-way" meant, as was held in the case of Partridge v. Eberstein, supra, that the right-of-way should be yielded when it was reasonably apparent that "the vehicles might or would collide."

It is further contended by counsel for the defendant, Krumrine, that "the jury could have held Krumrine negligent under the instruction as given, if Verticchio had been in sight, although three hundred feet away from the crossing when Krumrine reached it." We do not think that the jury reasonably would have placed any such construction on the instruction. Counsel for defendant, Krumrine, insist that the instruction should have been modified substantially as they have indicated. We are of the opinion that no modification was necessary; that without any modification the jury would have understood the phrase "shall give the right-of-way" to mean substantially what it was said to mean in the case of Partridge v. Eberstein, supra.

Counsel for the defendant maintain that the instruction "directly contradicts the instruction" given for the defendant, Krumrine. They argue that "if the jury followed what was alleged to be the law as laid down in the instruction" given for the co-defendant, Verticchio, "they could not have found that" Krumrine "was fairly upon the crossing and in the exercise of due care, because though Verticchio was one hundred feet away, he was approaching from the right and under this statement of the law had

with with a right-of-way" has been held to mean "that if such a crossing the driver of the vehicle has an affirmative duty to keep out of the other's way." Bellizzari v. Gaine, 172 N. Y. Supp., 102, 103.

The case of Castaldano v. Ingraham, supra, approved the construction that the ordinarily intelligent man would give to the statute. The statute is not ambiguous. In reading the instruction the jury undoubtedly understood that the phrase "shall give the right-of-way" meant, as was held in the case of Castaldano v. Ingraham, supra, that the right-of-way should be yielded when it was reasonably apparent that "the vehicles might or would collide."

It is further contended by counsel for the defendant, Kroavina, that "the jury could have held Kroavina negligent under the instruction as given, if Verticchio had been in sight, although three hundred feet away from the crossing when Kroavina reached it." We do not think that the jury reasonably would have placed any such construction on the instruction. Counsel for defendant, Kroavina, insist that the instruction should have been modified substantially as they have indicated. We are of the opinion that no modification was necessary; that without any modification the jury would have interpreted the phrase "shall give the right-of-way" to mean substantially what it was held to mean in the case of Castaldano v. Ingraham, supra.

Counsel for the defendant contends that the instruction "utterly emasculates the instruction" given for the defendant, Kroavina. They argue that "if the jury believed what was alleged to be the law as laid down in the instruction" given for the co-defendant, Verticchio, "they could not have found that" Kroavina "was fairly upon the crossing and in the exercise of due care, because though Verticchio was one hundred feet away, he was approaching from the right and under this statement of the law had

the right-of-way;" that "Krumrine's defense, therefore, was thrown into the discard;" and that the instruction given for Verticchio "was inconsistent and opposed to defendant Krumrine's instruction."

From the views that we have expressed in regard to the objection to the instruction given for the co-defendant, Verticchio, it follows that we must hold that the present contention of counsel for the defendant, Krumrine, is unsound. If we are correct in our conclusion that the instruction given for Verticchio was proper, then the defendant, Krumrine, cannot complain of an inconsistency or contradiction caused by the instruction given at his own request. Furthermore, the instruction given for the defendant, Krumrine, contained a more favorable statement of the law than he was strictly entitled to. The instruction invaded the province of the jury. It singled out a state of facts which bear directly on the question whether Krumrine had the right-of-way, and told the jury that if they believed those facts, then they should find the defendant, Krumrine, not guilty.

The question who had the right-of-way was one of fact for the jury, and the jury should have been left free to determine that fact from all of the evidence. Hartrich v. Hawes, 202 Ill., 334, 342, 343; Pennsylvania Company v. McCaffrey, 173 Ill., 169, 175, 176. It was not the province of the court to tell the jury peremptorily as a matter of law, what facts, if believed, would or would not determine the question of the right-of-way. Pennsylvania Company v. McCaffrey, supra; Hartrich v. Hawes, supra; Eckels v. Muttschall, 230 Ill., 462, 466; Faulkner v. Waken, 231 Ill., 276, 284. It was error to have given the instruction, but as the error was in favor of the defendant, Krumrine, he cannot complain. In Henry v. Stewart, 185 Ill., 448, the court said (p.453): "The court gave two instructions at the instance of the defendant which were very favorable to such defendant, and which counsel says cannot be harmonized with the one above quoted, given for the

the right-of-way; that "Gianini's vehicle, therefore, was there upon the street;" and that the instruction given for Vasiliauskis "was inconsistent and opposed to defendant Kreutzer's instruction."

From the views that we have expressed in regard to the objection to the instruction given for the co-defendant, Vasiliauskis, it follows that we must hold that the general contention of counsel for the defendant, Kreutzer, is unsound. If we are correct in our conclusion that the instruction given for Vasiliauskis was proper, then the defendant, Kreutzer, cannot complain of an inconsistency or contradiction caused by the instruction given at his own request. Furthermore, the instruction given for the defendant, Kreutzer, contained a more favorable statement of the law than he was strictly entitled to. The instruction invaded the province of the jury. It singled out a state of facts which bear directly on the question whether Kreutzer had the right-of-way, and told the jury that if they believed those facts, then they should find the defendant, Kreutzer, not guilty.

The question who had the right-of-way was one of fact for the jury, and the jury should have been left free to determine that fact from all of the evidence. [illegible] v. [illegible], 208 Ill., 133, 142, 143; [illegible] Company v. [illegible], 170 Ill., 190, 178, 179. It was not the province of the court to tell the jury specifically as a matter of law, what facts, if believed, would or would not determine the question of the right-of-way. [illegible] v. [illegible]; [illegible] v. [illegible]; [illegible] v. [illegible], 205 Ill., 425, 431; [illegible] v. [illegible], 241 Ill., 278, 284. It was error to have given the instruction, but as the error was in favor of the defendant, Kreutzer, he cannot complain. In Henry v. Stewart, 185 Ill., 448, the court said (p.453): "The court gave two instructions at the instance of the defendant which were very favorable to such defendant, and which counsel says cannot be harmonized with the one above quoted, given for the

plaintiff. The defendant could not object to those given at his instance, and if he is not able to harmonize them with the correct instruction given for the plaintiff it is not ground for reversal." To the same effect is the case of Rogers v. Daniels, 116 Ill. App. 515, 517.

It is earnestly contended by counsel for the defendant, Krumrine, that a remark made by the plaintiff, from which it would be inferred by the jury that the defendant, Krumrine, was protected against loss by insurance, was prejudicial to the defendant, Krumrine, and constitutes reversible error. The remark was this: "Mr. Krumrine's insurance company sent out a man to me--" The remark was made when the plaintiff was being examined by counsel for the defendant as a witness on behalf of the defendant. The examination related to a written statement concerning the accident which a representative of the defendant named Twyman had presented to the plaintiff and which she had signed. Part of the examination is as follows:

> "Counsel for the defendant: Q. Shortly after you were injured did a gentleman come out to see you and show you a paper that Mr. Krumrine had signed?
> Counsel for the plaintiff: Wait a minute, please. I want to object to this. He has made her his own witness. It's a leading question.
> Counsel for the defendant: Can't I cross-examine her as my own witness?
> Counsel for the plaintiff: No, I object on the ground you are cross-examining your own witness."

The court ruled that the question could be answered. The examination then continued:

> "Counsel for the defendant: Did Mr. Twyman come out to see you and show you a paper that he told you Mr. Krumrine had signed?
> Counsel for the plaintiff: That's objected to.
> The Court: She may answer.
> Counsel for the plaintiff: Exception.
> The Court: Do you know Mr. Twyman?
> The Witness: I don't know him.
> Counsel for the defendant: Well, did any gentleman--
> The Witness: Mr. Krumrine's insurance company sent out a man to me--
> Counsel for the defendant: Now, if the court please, I ask--
> The Court: Strike it out. Just answer the question.

plaintiff. The defendant could not object to those given at his instance, and if he is not able to harmonize them with the correct instruction given for the plaintiff it is not ground for reversal." To the same effect is the case of [illegible] v. [illegible], 118 Ill. App. [illegible], [illegible].

It is earnestly contended by counsel for the defendant, Kramrine, that a remark made by the plaintiff, from which it would be inferred by the jury that the defendant, Kramrine, was protected against loss by insurance, was prejudicial to the defendant, Kramrine, and constituted reversible error. The remark was this: "Mr. Kramrine's insurance company sent a man to see—" The remark was made when the plaintiff was being examined by counsel for the defendant as a witness on behalf of the defendant. The examination related to a release purporting to be a settlement which a representative of the defendant named Tryman had presented to the plaintiff and which she had signed. Part of the examination is as follows:

"Counsel for the defendant: Q. Shortly after you were injured did a gentleman come out to see you and show you a paper that Mr. Kramrine had signed?
Counsel for the plaintiff: Wait a minute, witness. I want to object to this. He has made her his own witness. It's a leading question.
Counsel for the defendant: Can't I cross-examine her as my own witness?
Counsel for the plaintiff: No, I object on the ground you are cross-examining your own witness."

The court ruled that the question could be repeated.

The examination then continued:

"Counsel for the defendant: Did Mr. Tryman come out to see you and show you a paper that he told you Mr. Kramrine had signed?
Counsel for the plaintiff: That's objected to.
The Court: She may answer.
Counsel for the plaintiff: Exception.
The Court: Do you know Mr. Tryman?
The Witness: I don't know him.
Counsel for the defendant: Well, did any gentleman—
The Witness: Mr. Kramrine's insurance company sent a man to see—
Counsel for the defendant: Now, if the court please, I ask—
The Court: Strike it out. Just answer the question.

Counsel for the defendant: I will ask the court, please, that a juror be withdrawn.
The Court: No.
Counsel for the defendant: Exception.
The Court: Just answer the question, please. Strike out.
Counsel for the defendant: Exception to the court's ruling on my motion to have a juror withdrawn and the case continued.
The Court: All right. Go ahead.
Counsel for the defendant: Mrs. Lundblad, did a gentleman come to see you and tell you, and show you a paper that he said Mr. Krumrine had signed?
The Witness: Well, Mr. Krumrine's insurance company--
Counsel for the defendant: Again I renew my motion."

The rule is well settled that the jury should not be informed directly or indirectly that the defendant is protected against loss by insurance. But even assuming that the only fair inference from the remark of the plaintiff is that the defendant Krumrine was insured against loss, we are of the opinion that no prejudicial error was committed.

It is contended by counsel for the defendant that although the remark was made in answer to a question put by counsel for the defendant, it was still prejudicial error. Counsel argue as follows: "The rule that when this idea gets to the jury, no matter how it gets there, it amounts to reversible error, is too well settled to necessitate further argument." We think that this is too broad a statement of the rule. Cases may arise in which remarks in regard to the defendant being insured are not necessarily always ground for reversal. City of Chicago v. Ogden, 227 Ill., 586, 594, 595; [illegible] v. [illegible], 243 Ill., 396, 404; Weinlander v. Volkman, 155 Ill. App., 137, 139. If, for example, the information should be intentionally brought out by the defendant, it is clear that the error cannot be complained of. Weinlander v. Volkman, supra.

It is asserted by counsel for the defendant that the answer of plaintiff was not innocently made, but was made with deliberate and "premeditated" intent to influence the jury. We do

Counsel for the defendant: I will ask the court, please, that a juror be withdrawn.
The Court: No.
Counsel for the defendant: Exception.
The Court: Just answer the question, Misses. [illegible]
Counsel for the defendant: Excepting to the court's ruling on my motion to have a juror withdrawn and the case continued.
The Court: All right. Go ahead.
Counsel for the defendant: Mrs. Loveland, did a gentleman come to see you and talk with you, and show you a paper that he said Mr. Kirkpatrick had signed?
The witness: Well, Mr. Kirkpatrick's insurance company--
Counsel for the defendant: Again I renew my motion."

The rule is well settled that the jury should not be informed directly or indirectly that the defendant is protected against loss by insurance. But even assuming that the only fair inference from the remark of the plaintiff is that the defendant Kirkpatrick was insured against loss, we are of the opinion that no prejudicial error was committed.

It is contended by counsel for the defendant that although the remark was made in answer to a question put by counsel for the defendant, it was still prejudicial error. Counsel argue as follows: "The rule that when this idea gets to the jury, no matter how it gets there, it amounts to reversible error, is too well settled to require further argument." We think that this is not a statement of the rule. Cases may arise in which remarks in regard to the defendant being insured are not necessarily ground for reversal. [illegible] 307 Ill., 152, 159; [illegible] v. [illegible] 341 Ill., 364, 366; [illegible] v. [illegible], 153 Ill. App., 537, 540. If, for example, the information should be intentionally brought out by the defendant, it is clear that the error would be waived by him. [illegible] v. [illegible], supra.

It is likewise argued by counsel for the defendant that the answer of plaintiff was not inadvertently made, but was made with deliberate and "premeditated" intent to influence the jury. It is

not think that the plaintiff had any idea of the legal effect of her remark. If some one from the insurance company in which the defendant, Krumrine, was insured, had been to see her in regard to the accident, it was natural for her to mention the fact when she was asked by counsel for the defendant whether a man came out to see her in reference to "a paper that he said Mr. Krumrine had signed." The fact that she repeated the remark in answer to a second similar question put by counsel for the defendant would seem to indicate that she did not understand the nature of the objection to the remark when first made, nor the purpose of the court's direction that the remark should be stricken out. Furthermore, she may have been confused by the objections and interruptions that occurred during this part of her examination. As we have state intimations and references which imply that a defendant is insured against liability do not always constitute reversible error. In City of Chicago v. Ogden Company, supra, in overruling an objection that questions had been asked by counsel for the plaintiff implying that the defendant was insured, the court said (pp. 594-595): "Since the verdict was rather below the usual amount awarded where the injury has been sustained such as the evidence shows here, and the case is reasonably clear on the facts, there is no reason to suspect that the jury were actuated by prejudice or passion."

In Kenny v. Marquette Cement Company, supra, the court held (p. 404) that it was improper to question prospective jurors as to whether they knew agents of a certain insurance company, but that "taking into consideration the entire record," the error was not reversible error.

In the case at bar, from a consideration of the entire record, we are of the opinion that the verdict is clearly warranted by the evidence, and we are reasonably certain that the jury were

not influenced by the remark. We do not think, therefore, that the remark constituted reversible error.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

373 - 28549

MARSHALL FIELD & COMPANY,
a Corporation,
Appellee,

vs.

JACOB GOLDSTEIN and DAVID
GOLDSTEIN, Doing Business
as Goldstein Brothers,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

283 I.A. 683

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The action in this appeal was brought in the Municipal court of the City of Chicago by the plaintiff, Marshall Field & Company, against the defendants, Jacob Goldstein and David Goldstein, doing business as Goldstein Brothers, to recover $327.10 for merchandise alleged to have been sold and delivered to the defendants. The trial court found for the plaintiff. The defendants prosecuted this appeal.

The only question involved is a dispute of fact whether the defendants authorized the purchase of the merchandise from the plaintiff. An employee of the defendants named Somers purchased the merchandise from the plaintiff. He signed a written order in the name of Goldstein Brothers directing the plaintiff to deliver the merchandise to "bearer;" the order was "O.K.'d" by the assistant to the chief salesman of the plaintiff; and the merchandise was delivered to Somers. The defendants deny that Somers was authorized to sign the order or to purchase the merchandise; and further deny that they ever received the merchandise.

According to the testimony of the plaintiff, Somers had been coming to the department from which the goods were purchased for two or three months and getting samples of different fabrics. He gave his card to a salesman in the department, and the card stated that Somers was a salesman from the defendants.

On the occasion in question Somers came in with samples, ordered the merchandise, and it was delivered to him. A bill was sent to the defendants and the defendants refused to pay, stating that they did not receive the merchandise. Subsequently the assistant to the chief salesman of the plaintiff had a conversation with Jacob Goldstein, one of the defendants, in which, according to the testimony of the salesman, Goldstein asked to see the order on which the merchandise was delivered, and said, when the order was shown to him, that he recognized the handwriting as that of an employee of his who had authority to issue such orders and get merchandise; that Goldstein also stated that on the day the merchandise was purchased the employee came in and laid the bill on his desk, but before he had time to ask the employee what he had done with the merchandise the employee went outside to a waiting automobile; that Goldstein said that all orders were signed as the one in question and that the order "was a legitimate order to get merchandise on."

The credit manager of the plaintiff testified that he had a conversation with Jacob Goldstein in regard to the transaction; that Goldstein "had repudiated the correctness of our bill and had called on us at our solicitation to pay the bill;" that Goldstein "acknowledged that the party signing this order had authority to sign orders for merchandise for their firm;" that he took Goldstein to the head credit man, told the latter the circumstances, also "told him that Mr. Goldstein did not dispute the correctness of the signature or the authority of the signature," and that the head credit man then told Goldstein "we should expect him to pay the bill."

An assistant credit man of the plaintiff testified that he had a conversation with "the defendant, Mr. Goldstein," in which Goldstein said that the order "was their order all right;"

that it "came from their house; that it was not his writing, but that he knew whose it was."

Jacob Goldstein testified that Somers had no authority to purchase merchandise for the firm of Goldstein Brothers; that he, Goldstein, did not, nor did any one for Goldstein Brothers, send Somers to the plaintiff to purchase the merchandise in question; that Goldstein Brothers did not receive the merchandise. Jacob Goldstein further testified that he did not state to the credit manager of the plaintiff nor to "any of the persons who had testified" for the plaintiff, that the order "was written by someone who had authority;" that when the order was shown to him he said "It didn't go out of my house;" that he said he didn't know who made out the order but that it was "on our letterhead;" that he never saw the assistant credit man or the assistant to the chief salesman of plaintiff "until now;" that he did not tell them that an invoice was left on his desk by Somers, and that he did not have a chance to talk to Somers; that Somers was not working for Goldstein Brothers when he got the merchandise.

David Goldstein testified that he did not authorize anyone to sign his name; that he talked to the salesman, and to the assistant credit man of the plaintiff, but that he did not tell either of them that the order was signed by somebody who was authorized to sign it.

Counsel for the defendant contends that a fraud was committed by Somers, and that "when one of two innocent persons must suffer by the fraud of a third, it must be the one who places it in the power of such third person to commit the fraud;" that the plaintiff made it possible for the fraud to be committed by failing to make the inquiry, which ordinary prudence required in the circumstances, as to Somers' authority. The question presented by counsel for the defendant does not, in our opinion, arise on the

that it "came from their hands; that it was not his writing, but that he knew whose it was."

Jacob Goldstein testified that Gamble had no authority to purchase merchandise for the firm of Goldstein Brothers; that he, Goldstein, did not, nor did any one for Goldstein Brothers, send Gamble to the plaintiff to purchase the merchandise in question; that Goldstein Brothers did not receive the merchandise. Jacob Goldstein further testified that he did not state to the credit manager of the plaintiff nor to "any of the persons who had testified for the plaintiff", that the order "was written by someone who had authority;" that when the credit man made the demand to him he said "it didn't go out of my hands;" that he told the credit man who made out the order but that it was "an individual;" that he never saw the assistant credit man of the plaintiff or the chief witness of plaintiff "until now;" that he did not tell them that so much was left in his desk by Gamble, but that he did not have a chance to talk to Gamble; that Gamble was not working for Goldstein Brothers when he got this merchandise.

Louis Goldstein testified that he did not authorize Gamble to sign his name; that he talked to Mr. Robinson, and to the assistant credit man of the plaintiff, but that he did not tell either of them that the order was signed by somebody who was authorized to sign it.

Counsel for the defendant contends that a fraud was committed by Gamble, and that "when one of two innocent persons must suffer by the fraud of a third, it must be the one who places it in the power of such third person to commit the fraud;" that the plaintiff made it possible for the fraud to be committed by failing to make the inquiry, which ordinary prudence required in the circumstances, as to Gamble's authority. The question presented by counsel for the defendant involves, in our opinion, solely an the

record. The precise question, as we view the record, is one of fact whether, after the merchandise had been obtained by Somers, the defendants acknowledged in conversations with the representatives of the plaintiff, that Somers was authorized to sign the order for the purchase of the merchandise. On this question the testimony is directly conflicting. In such a case the finding of the court should not be set aside if the testimony by fair and reasonable intendment will authorize the finding. Carney v. Sheedy, 295 Ill., 78, 83.

In our opinion the finding of the trial court is not manifestly against the weight of the evidence, and the judgment should be affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

rested. The precise question, as we view the record, is one of fact whether, after the merchandise had been obtained by Demers, the defendants acknowledged in conversations with the representatives of the plaintiff, that Demers was authorized to sign the order for the purchase of the merchandise. On this question the testimony is directly conflicting. In such a case the finding of the trial court will not be set aside if the testimony by fair and reasonable intendment will support the finding. [illegible], 208 Ill., 72, 80.

In our opinion the finding of the trial court is not manifestly against the weight of the evidence, and the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

139 - 28415

JOSEPH H. FLANAGAN, Surviving Partner of FLANAGAN AND BIEDENWEG, Appellee,

vs.

WILLIAM HENDERSON and ROBERT HENDERSON, Appellants.

Bill.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

WILLIAM HENDERSON, Appellant,

vs.

JOSEPH H. FLANAGAN, Surviving Partner of FLANAGAN AND BIEDENWEG and FLANAGAN AND BIEDENWEG COMPANY, a Corporation, Appellees.

Cross-Bill.

253 I.A. 638

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the cross-complainant, William Henderson, from a decree sustaining exceptions to the report of Master in Chancery Frank Hamlin, and finding that neither party is entitled in equity to affirmative relief, and ordering that the bill and all amendments thereto, and the cross-bill and all the amendments thereto, be dismissed. We are of the opinion that the decretal order was justified on the ground of laches.

A demand will be barred by laches where the party asserting it has, by neglect to prosecute it for a long period of time, allowed it to become stale. It must be asserted within a reasonable period of time. But laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in conditions or parties or in the nature of the demand asserted. Galliher v. Cadwell, 145 U. S. 368; Gray v. Hayhurst, 157 Ill. App. 455, and cases there cited.

40136

No arbitrary rule exists for determining when a demand

[illegible]

[illegible] Appellee,

v.

[illegible] Appellants.

[illegible] Appellant,

v.

[illegible] Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the cross-complainant, William [illegible], from a decree sustaining exceptions to the report of Master in Chancery [illegible], and finding that neither party is entitled in equity to affirmative relief, and ordering that the bill and all amendments thereto, and the cross-bill and all the amendments thereto, be dismissed. We are of the opinion that the decretal order was justified on the ground of laches.

A demand will be barred by laches where the party asserting it has, by neglect to prosecute it for a long period of time, allowed it to become stale. It must be asserted within a reasonably diligent time. But laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in conditions or parties or in the relations of the demand asserted. Galliher v. Cadwell, 145 U. S. 368; [illegible] v. [illegible], [illegible] Ill. App. [illegible], and cases there cited.

An arbitrary rule exists for determining when a demand

becomes stale and the question of laches must be decided upon the particular circumstances of each case. Unreasonable delay alone will often operate as a bar to relief. Wilcoxon v. Wilcoxon, 199 Ill. 244. Negligence in the prosecution of a suit after its commencement may bar relief. Bowers v. Cutler, 165 Mass. 141. The general nature of the proceeding is in itself a circumstance to be considered and with lapse of time is a controlling element. 16 Cyc., pp. 150-154, and cases cited.

The record shows an unexplained neglect and delay in prosecuting the demand of the cross-complainant Henderson for an unreasonable time. The complainants, Joseph E. Flanagan and William C. Biedenweg, partners as Flanagan and Biedenweg, filed their bill of complaint January 11, 1898. It sought the termination and cancellation of a contract between Henderson and themselves which seemed to call for weekly payments by them to him of a royalty during the life of certain patents. Henderson was duly served and filed an answer, and apparently, in 1898, the cause was referred to Master in Chancery Hiram Barber. January 5, 1899, Henderson filed his cross-bill asking for an accounting and payment of the amount found to be due for royalties under the contract. Answer to the cross-bill was filed by the complainants January 12, 1899, and apparently this also was referred to Master Barber. Considerable evidence was taken before the master, but at some time in 1898 or 1899 this hearing was suspended. Complainants' counsel asserts that after Henderson had testified in part he suddenly and without notice left the jurisdiction of the court.

40437

We next find a Report filed December 13, 1921, by Master in Chancery Frank Hamlin, although we do not find in the record any order of reference to him. Master Hamlin states in his report that a period of approximately twenty years intervened between the hearings before Master Barber and those before himself,

between Wolf and the trustee of Lahser must be decided upon the particular circumstances of each case. Unreasonable delay alone will since operate as a bar to relief. Williams v. Gilmore, 187 Ill., 246. Negligence in the prosecution of a suit after its commencement may bar relief. Morris v. Butler, 165 Penn. 411. The general nature of the proceeding is in itself a circumstance to be considered and with lapse of time is a controlling element. 21 Cyc., pp. 155-158, and cases cited.

The record shows an unexplained neglect and delay in prosecuting the appeal of the cross-complainant Henderson for an unreasonable time. The complainants, Joseph C. Grinnell and William H. Blakeley, partners as Grinnell and Blakeley, filed their bill of complaint January 11, 1898. It sought the cancellation and rescission of a contract between Henderson and themselves which seemed to call for yearly payments by them to him of a royalty during the life of certain patents. Henderson was duly served and filed an answer, and apparently, in 1898, the cause was referred to Master in Chancery Frank Parker. January 6, 1899, Henderson filed his cross-bill asking for an accounting and payment of the amount found to be due for royalties under the contract. Answer to the cross-bill was filed by the complainants February 16, 1899, and apparently this also was referred to Master Parker. Considerable evidence was taken before the master, but at some time in 1902 or 1903 this hearing was suspended. Complainants' counsel insists that since Henderson had instituted no suit in Michigan and without notice left the jurisdiction of the court.

40437

He next filed a report filed December 10, 1904, by Master in Chancery Frank Baker, although as it is not filed in the record any order of reference to him. Master Baker states in his report that a period of approximately twenty years intervened between the hearings before Master Parker and those before himself,

and that a very large number of exhibits introduced before Barber are lost. The decree was entered January 5, 1923, or twenty-five years after the filing of the bill. During much the larger part of this time nothing was done in the case. Pending the litigation one of the complainants, Biedenweg, died; Master Hamlin is also dead, and Master Barber ceased to be a Master in Chancery in 1911.

Under such circumstances a court of equity will not lend its aid in the enforcement of a demand so stale unless there is some cogent and weighty reason presented why it has been permitted to become so. "Good faith, conscience and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity. In the absence of these elements, the court remains passive and declines to extend its relief or aid. It has always been the policy to discountenance laches and neglect." McDearmon v. Burnham, 158 Ill. 55.

The lapse of time together with the general nature of this proceeding bars relief.

Prior to 1888 Henderson had been engaged in glass work and patented a method relating to metal strips in which are held pieces of art glass used in the construction of art or colored windows. The Wells Glass Company of Chicago commenced to manufacture art glass, using Henderson's device, and he commenced suit in the United States Circuit Court to prevent the alleged infringement of his patents, which were numbered, respectively, 412751 and 430610. Flanagan and Biedenweg wished to use these devices and entered into the contract in question April 1, 1891. This contract referred to the Henderson patents by their respective numbers and to the controversy over them pending in the United States Circuit Court. It was also recited that Henderson had made applications for three more letters patent relating to window sash bars, etc.; that Flanagan and Biedenweg wished to manufacture window sash bars under the

and that a very large number of suitable [illegible] being bought and sold. The decree was entered January 8, 1915, at least five years after the filing of the bill. During much the larger part of this time nothing was done in the case. Pending the litigation one of the complainants, Eickemeyer, died; Martin Baxter is also dead, and Austin Baxter ceased to be a partner in [illegible] in 1911.

Under such circumstances a court of equity will not lend its aid in the enforcement of a demand so stale unless there is some cogent and weighty reason presented why it has been permitted to become so. "Good faith, conscience and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity. In the absence of these elements, the court remains passive and declines to extend its relief at all. It has always been the policy of Chancery to discourage laches and neglect." Hitchcock v. Hutchins, 146 Ill., 88.

The lapse of time together with the general nature of this proceeding bars relief.

Prior to 1888 Henderson had been engaged in glass work and patented a method relating to metal strips in which are held pieces of art glass used in the construction of art or colored windows. The Walla Glass Company of Chicago commenced to manufacture art glass, using Henderson's device, and he commenced suit in the United States Circuit Court to prevent the alleged infringement of his patents, which were numbered respectively [illegible] and [illegible]. Flanagan and Biedenweg wished to use these devices and entered into the contract in question April 1, 1891. This contract referred to the Henderson patents by their respective numbers and to the controversy over them pending in the United States Circuit Court. It was also recited that Henderson had made application for three more letters patent relating to window sash bars, etc.; that Flanagan and Biedenweg wished to manufacture window sash bars under the

patents already issued and desired to be protected by Henderson in using these and any others he might afterwards procure in the same line of invention. Henderson granted to them the exclusive right in certain states to manufacture and sell said appliances and to use the patented processes under the letters patent already issued or subsequently procured; in consideration wherefor they agreed to pay Henderson $50 a week from the date of the contract until ninety days after the date of the final decree of the United States Circuit Court in the Wells Glass Company case, and if the decree was favorable to Henderson he would thereafter be paid $100 a week as royalty. There was a further provision for the payment of $50 a week pending any appeal by the Wells Company.

The record shows that while Henderson had a favorable decision in the Circuit Court, on appeal he was defeated, the Circuit Court of Appeals holding that one of the patents was void and that there was no infringement of the other. It was the contention of the complainants in their bill that by this decision invalidating the Henderson patent, the consideration for the contract failed, and that as they got nothing under the contract, their obligation to pay royalties terminated. As against this, the cross-complainant Henderson contended that the contract contemplated the application by him for new letters patent covering the same line of invention, and that Flanagan and Biedenweg were obligated to pay him royalties during the life of other patents which he procured.

What did the contract provide in the event of a final decree adverse to Henderson's claims for his alleged patents? The clause touching this reads:

40439

> "It is further agreed by and between the parties hereto that in the event of an adverse decision to said Henderson in the United States Circuit Court in the said litigation therein now pending, that then and in that event, if new letters patent applications for which in behalf of said Henderson are now pending, or for which he may make application, shall be issued to him, new actions shall be commenced by said Henderson under said new letters patent, against those who may be then engaged in infringing upon the same, to the end that said parties of the

patents already issued and applied for to be applied by Henderson in using these and any others he might afterwards procure in the same line of invention. Henderson granted to them the exclusive right [illegible] to use the [illegible] processes under the letters patent already issued or subsequently procured; in consideration whereof they agreed to pay Henderson [illegible] from the date of the contract until ninety days after the date of the final decree of the United States Circuit Court in the suits then pending, and if the decree was favorable to Henderson, to [illegible] a week as royalty. There was a further provision for the payment of the [illegible] pending any appeal by the [illegible] Company.

The record shows that while Henderson had a favorable decision in the Circuit Court, on appeal he was defeated, the Circuit Court of Appeals holding that one of the patents was void and that there was no infringement of the other. It was the contention of the appellants in their bill that by this decision invalidating the Henderson patent, the consideration for the contract failed, and that as they got nothing under the contract, their obligation to pay royalties terminated. On the other hand, the appellee Henderson contends that the contract contemplated the application by him for new letters patent covering the same line of invention, and that [illegible] were obligated to pay him royalties during the life of other patents which he procured.

What did the contract provide in the event of a final decree adverse to Henderson's claims for his alleged patents? The clause treating this reads:

60439

"It is further agreed by and between the parties hereto that in the event of an adverse decision to said Henderson in the United States Circuit Court in the said litigation therein now pending, then and in that event, if new letters patent [illegible] for which in behalf of said Henderson are now pending, or for which he may make application, shall be issued to him, new actions shall be commenced by said Henderson under said new letters patent, against those who may be then engaged in infringing upon the same, to the end that such parties of the

second part may be by such suits protected as to all their contract rights hereinbefore mentioned and contained."

This is not definite as to royalties, either as to any obligation for, or amount, or time. The contract is at least ambiguous on this point and it would not easily be construed to impose upon Flanagan and Biedenweg weekly payments to Henderson during the life of any and all patents he might procure subsequent to those specifically mentioned in the contract and upon which the contract was primarily based. The contract indicates confidence in the validity of the patents already issued, as the provisions for royalties conditioned thereon are definite and explicit, and their defeat seems to have been so little anticipated that whatever obligations as to royalties would arise in that event are obscurely expressed, uncertain, and can only be doubtfully inferred or implied.

Without attempting to construe the contract in this regard, it is sufficient to say that with this uncertainty, it would be unjust, after the great lapse of time during which Henderson apparently had abandoned his claim, for a court of equity now to impose on the other parties or their successors a money judgment not based on any benefit received by them through the contract, but based solely upon the passage of time.

40440

It is suggested that as the original bill was filed by Flanagan and Biedenweg, the neglect to proceed with the cause was theirs as much as Henderson's. But they were seeking only to terminate their contract, while Henderson was seeking a judgment for money. The apparent abandonment of the litigation was in line with the relief sought by the complainants, who are not questioning the dismissal of their bill. Upon Henderson was the obligation to proceed diligently to have the contract construed as he now claims it should be, and to obtain the payments demanded.

It is suggested that no exceptions to the Master's

ground rent may be at such rate prescribed as to eat their profits, their establishments monopolized and enriched.' --

This is not onerous as to royalties, either as to any obligation [illegible], or amount, or time. The contract is at least [illegible] upon this point and it would not easily be construed to impose upon Flanagan and Finlayson yearly payments to continue during the life of any and all patents he might procure subsequent to those specifically mentioned in the contract and upon which the contract was primarily based. The contract indicates conditions in the validity of the patents already issued, as the royalties for [illegible] [illegible] thereon are definite and certain, and their future [illegible] in them were so little anticipated that whatever obligations as to royalties would arise in such event are certainly uncertain, [illegible], and can only be [illegible] by implied.

Without attempting to construe the contract in this regard, it is sufficient to say that with this uncertainty, it would be unjust, after the great lapse of time [illegible] which Henderson apparently had abandoned his claim, for a court of equity now to impose on the other parties or their successors a money judgment not based on any benefit received by them through the contract, but based solely upon the passing of time.

It is suggested that as the original bill was filed by Flanagan and Finlayson, the neglect to proceed with the cause was theirs as much as Henderson's. But they were seeking only to terminate their contract, while Henderson was seeking a judgment for money. The apparent abandonment of the litigation was in line with the relief sought by the complainants, who were not prejudicing the dismissal of their bill. Upon Henderson was the obligation to proceed diligently to have the contract construed as he now claims it should be, and to obtain the payments demanded.

It is suggested that no exceptions to the Master's

report are filed, but the decree refers to them and we will assume they were filed, especially as we have only a praecipe record before us.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

40441

256 - 28532

In Re Petition of J. JANUCHOWSKI, Insolvent Debtor. On Appeal of L. JANUCHOWSKI, Appellant,	
vs.	APPEAL FROM COUNTY COURT OF COOK COUNTY.
PEOPLE OF THE STATE OF ILLINOIS, Appellee.	

233 I.A. 633

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a discharge under section 5 of the Insolvent Debtors Act, chapter 72, Illinois Statute (Cahill). An appeal from a similar order remanding the insolvent debtor, Januchowski, to the custody of the sheriff has heretofore been in this court and all the facts appear in the opinion filed December 11, 1922, in case number 27762, 228 Ill. App. 611. We then reviewed the evidence upon which a jury found the petitioner guilty of fraud and held that fraud was amply proven, and the judgment of the County court was affirmed and the cause was remanded to that court. Upon filing the mandate of this court, Januchowski was again remanded to the custody of the sheriff.

Without giving notice to creditors as required by section 6 of the Insolvent Debtors Act, he filed a second petition and schedule. The court refused to discharge him and again remanded him to the custody of the sheriff, and he appeals from that order.

The point now made seems to be that, although fraud was proven as the gist of the action, this is not the same as "malice," which, under section 5, must be the gist of the action to justify imprisonment. This statute has been construed to mean that malice is the intentional perpetration of an injury or wrong to another, and that where fraud is proven as the gist of the action, it is malicious in the statutory sense. First National Bank v.

Burkett, 101 Ill. 391. The term "malice" as used here applies to the class of wrongs that are inflicted with an evil intent or purpose. It implies that the guilty party was actuated by improper or dishonest motives. To entitle a defendant to be discharged from imprisonment it must appear that the wrong for which the action was brought was not of that character. Upon the first Januchowski's petition the issue was made as to whether the act charged was fraudulently done, and it was so found. That malice was the gist of the action is now res judicata. Lasky v. Knight, 292 Ill., 206, is in point.

The judgment of the County court is right and is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

270 - 28546

JACOB MAYERS,
Appellee,

vs.

CHARLES J. ZAK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 634

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant, upon a directed verdict in a forcible detainer action.

Defendant Zak and a former partner, Stayer, were lessees of the premises in question known as 904-8 West Fulton street, Chicago, under a lease from plaintiff dated January 23, 1920, for a period from May 1, 1920, to April 30, 1927. A number of questions of fact are presented touching the alleged failure of the defendants to deposit duplicate tax receipts with the lessor as required by the lease, the alleged failure of the defendants to keep the premises insured, and non-payment of rent for the quarter commencing November 1, 1922. Some, if not all, of these points might have been submitted to the jury, but for another reason we are of the opinion that the peremptory instruction to find for the plaintiff was proper. This is that the lessee Zak violated the lease, which forbids an assignment of the same and the occupancy of the premises by any other person without obtaining the written consent of the lessor.

The defendant here has not prepared his abstract so as to show the facts relating to this point, although it is of vital importance. His abstract refers to the clause in the lease relating to assignments as the "usual clause regarding assignment and subletting." Referring to the record we find a definite agreement by the lessee not to permit the premises to be occupied by any other person nor the lease assigned without "obtaining the

written consent of the party of the first part." November 20, 1922, Zak made an assignment to C. R. Golder as trustee for the benefit of creditors and this document of assignment is so abstracted as to make it appear that it excepted the lease to the premises in question. However, referring again to the record, we find the definite language whereby Zak assigned to said trustee "all benefits under said lease and all moneys to become due thereunder to said trustee." Moneys due thereunder referred to certain subleases.

The evidence shows that pursuant to the assignment Golder took possession of the premises and occupied the same and ran the business of the defendant there as trustee for the creditors. The same business name was retained and defendant Zak remainedin charge of the business.

A trustee has reasonable time in which to elect whether he will adopt a lease as being for the benefit of creditors, but must do this within a reasonable time and cannot take inconsistent positions. Smith v. Goodman, 149 Ill. 75.

The lessee here claims that he has made no assignment of the lease although he has assigned all the benefits therefrom and has given possession of the premises to another. Were this valid, any lessee under such a lease could give possession to another with all the benefits and income therefrom without the written consent of the lessor and the prohibitory provision would be in vain. The law will not countenance the avoidance of a clear contractual obligation by such an indirect method. The circumstances amounted to a violation of an important covenant of the lease and the breach justified a forfeiture by the lessor. The peremptory instruction to find for plaintiff was proper, and the judgment thereon is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

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benefit of creditors and this document of assignment is so ab-
breviated as to make it appear that it excepted the lease to the
premises in question. However, referring again to the record, we
find the explicit language whereby Lee assigned to said trustee
"all benefits under said lease and all moneys in hand and there-
under to said lessee." (Except the [illegible] in certain
instances).

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Keller took possession of the premises and accepted the rent and ran
the business of the defendant there as trustee for the creditors.
The same business then was operated under the supervision and
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violation of an important covenant of the lease and the breach justi-
fied a forfeiture by the lessor. The peremptory instruction to find
for plaintiff was proper, and the judgment thereon is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

270 - 28546

JACOB MAYERS,
Appellee,

vs.

CHARLES J. ZAK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 634

ADDITIONAL OPINION BY MR. JUSTICE McSURELY UPON REHEARING.

In his petition for rehearing defendant called our attention to a rider to the lease which purports to give permission to sublet the premises. This rider appears in the record but not in the abstract, where it should have been to receive consideration by us.

The rider gives the landlord's permission to one sub-letting of a part of the premises. The record shows that this was done, hence the right of the lessee was exhausted and he did not have the right to make other assignments or sub-leases to other persons. Hartford Deposit Co. v. Rosenthal, 192 Ill. App., 211; Kew v. Trainor, 150 Ill., 150. The right to sublet a part of the premises does not give the right to sublet other parts of the building. Wertheimer v. Circuit Judge, 83 Mich., 56; Fidelity Trust Co. v. Kohn, 27 Pa. Sup. Court, 374; Gude v. Farley, 58 N. Y. Sup. 1036.

Defendant re-argues the point as to the effect of the assignment to the trustee, but we see no reason to change our former opinion. While defendant claims that he did not assign the lease or sublet the premises to the trustee, he did put the trustee in possession. Both the language of the assignment conveying "all benefits under said lease and all moneys to become due thereunder to said trustee," and the conduct of the parties show either an assignment of the lease or a permission to a third party to occupy the premises

without obtaining the written consent of the lessor. This was a breach of the lease and gave the landlord a right to declare a forfeiture. *Medinah Temple Co.* v. *Currey*, 162 Ill., 441; *Smith* v. *Goodman*, 149 Ill., 75.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

42 - 28674

THE PEOPLE OF THE STATE OF ILLINOIS through ROBERT E. CROWE, State's Attorney, for the use of ROBERT and DOROTHY ENGLE, Plaintiffs,

vs.

NELLIE ENGLE, JOSEPH P. ENGLE, PATRICK COURTNEY, STANLEY ENGLE, ANNA COURTNEY and ANNA ENGLE, Defendants.

NELLIE ENGLE, (Petitioner).

WRIT OF CERTIORARI TO THE COUNTY COURT OF COOK COUNTY.

239 I.A. 634

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a proceeding brought by the State's attorney under the statute on Paupers, in which it was ordered by the County court that Joseph P. Engle, a grandfather, and Nellie Engle, a grandmother, each pay five dollars a week for the support of certain minor grandchildren, Robert Engle and Dorothy Engle. Upon petition of Nellie Engle this court issued the writ of certiorari and the record has been brought to this court for review.

> "The only office of the common-law writ of certiorari is to bring before the court the record of the proceedings of an inferior tribunal for inspection, and the only judgment to be rendered is, that the writ be quashed or that the record of the proceedings be quashed. (Chicago and Rock Island Railroad Co. v. Fell, 22 Ill. 333; People v. Lindblom, 182 id. 241.) The trial upon a return made in obedience to a writ of certiorari is upon the record, alone, as disclosed by the return, and not upon any allegation of the petition nor any issue of fact. (Lammon v. City of Chicago, 233 Ill. 63." Cass v. Duncan, 260 Ill. 235 - 236.

The statute on Paupers, chapter 107, section 1, provides that every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by certain relatives.

40475

THE PEOPLE OF THE STATE OF ILLINOIS [illegible], State's Attorney, for the use of [illegible], Appellee,

vs.

[illegible], Defendants.

NELLIE ENGLE, (Petitioner).

WRIT OF CERTIORARI TO THE COUNTY COURT OF [illegible] COUNTY.

[illegible] A. [illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is a proceeding brought by the State's attorney under the statute on paupers, in which it was ordered by the county court that [illegible] Engle, a grandfather, and Nellie Engle, a grandmother, each pay five dollars a week for the support of certain minor grandchildren, [illegible] Engle and [illegible] Engle. Upon petition of Nellie Engle this court issued the writ of certiorari and the record has been brought to this court for review.

"The only office of the common-law writ of *certiorari* is to bring before the court the record of the proceedings of an inferior tribunal for inspection, and the only judgment to be rendered is, that the writ be quashed or that the record of the proceedings be quashed. ([illegible]) The trial upon a return made in obedience to a writ of *certiorari* is upon the record alone, as disclosed by the return, and not upon any allegation of the petition nor any issue of fact. ([illegible])" [illegible]

The statute on paupers, chapter 107, section 1, provides that every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by certain relatives.

By section 2 the order in which relatives shall be called upon to support such poor person is stated: First the children to support parents; next parents of such poor person shall be called on if they be of sufficient ability; and if there be no such parents or children, then the brothers or sisters of such poor person shall next be called on, if they be of sufficient ability; but if there be no such brothers or sisters the grandchildren shall be next called on, and next the grandparents, if they be of sufficient ability.

Section 3 provides that upon failure of such relatives to support such poor person, the State's attorney may make complaint thereof to the County court against all the relatives of such pauper liable to his support.

The present petition is filed under this section. It alleges that Robert and Dorothy Engle are dependent children and unable to earn a livelihood in consequence of age and bodily infirmity; also that Nellie Engle, grandmother, Joseph P. Engle, grandfather, Anna Courtney, grandmother, and Anna Engle, mother, and Stanley Engle, father, and Patrick Courtney, grandfather, "are persons of sufficient ability to provide for and support said grandchildren." The evidence shows that the mother, Anna Engle, is supporting the children. The order of the court makes no adjudication that the children are paupers, nor does it find that either the father or mother are paupers or unable to support these children. There is just the simple order that the grandfather, Joseph P. Engle, pay five dollars a week, and the grandmother, Nellie Engle, pay a like amount for the support of the children. This seems to be based upon the theory that the court had jurisdiction to order any relative to support the dependent children without regard to the poverty or otherwise of the children or the ability of the parents to provide for their support. As we read the statute, especially section 2, these facts must be adjudicated

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before the court has jurisdiction to order the grandparents to support the children.

Furthermore, the complaint must proceed against "all the relatives of such pauper in this state, liable to his support." In this case the mother, father, and maternal grandfather were not served with process. It is primarily the duty of the father and mother to support their children. Steele v. The People, 88 Ill. App. 186; and this duty devolves primarily upon the father and then upon the mother. Plaster v. Plaster, 47 Ill. 290; The People v. Baker, 222 Ill. App. 451. The order entered herein by the court ignores these primary obligations and arbitrarily imposes the obligation of support upon two of the grandparents.

We are of the opinion that the court was without jurisdiction to enter such order, and it is reversed and the cause remanded with directions to quash the order and the record of proceedings in the County court.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Johnston, J., concur.

40477

56 - 28704

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HUGO WESTERDAHL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

233 I.A. 634

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by information was charged with having drawn and delivered a certain check with intent to defraud, knowing that he did not have sufficient funds in the bank to pay the same, and upon trial by the court was found guilty and sentenced to the House of Correction for six months and to pay a fine of $500. He seeks to have this reversed.

Prior to the transaction in question defendant, Westerdahl, had purchased from the Parkway Motor Sales Company an automobile which was not satisfactory to him and he had brought suit against said company, seeking damages for an alleged breach of warranty on account of this sale. The parties agreed to settle this controversy and to this end, November 4, 1922, Westerdahl and William Knudson, the agent for the Parkway Motor Sales Company, entered into an agreement whereby the company sold to Westerdahl a Hudson automobile for $1932.62, and Westerdahl agreed to turn in his old automobile, which he did, receiving therefor a credit of $1,000 towards the purchase price of the Hudson automobile. The balance of the purchase price he paid by giving his check for $932.62, which was dated November 6, 1922, drawn on the Pioneer State Savings Bank and payable to the order of the Parkway Motor Sales Company. Also as part of this agreement, the defendant executed a release to the Parkway Motor Sales Company and William Knudson of all claims against them which Westerdahl might have by reason of the sale of the first automobile. This

release recited the terms of the settlement and that $932.62 was to be paid in cash by Westerdahl to the Parkway Motor Sales Company, "which sum has this day been paid." Knudson testified that when the check was given him Westerdahl informed him that he had just made a loan of $4,000, and that the money was on deposit to his credit, and that the check was good. This is denied by defendant. Within a day or two defendant mortgaged his new automobile. The check was not deposited until November 12 or 13, and was returned unpaid and stamped, "Not sufficient funds." Defendant testified that he requested Knudson to carry the check for awhile as he had a job of work which would give him considerable money. This is denied by Knudson, who says that defendant telephoned him Monday morning to hold the check, but was told that he could not do so. After the check was returned unpaid, Knudson repeatedly saw defendant, who promised to pay it but never did so. Defendant admits that he never paid the check.

The evidence leads to the conclusion that defendant did not intend to pay this check when he delivered it to the Parkway Motor Sales Company, and that his motive was thereby to make good to himself the damages which he claimed to have suffered in the purchase of the first automobile. The check was clearly delivered to the Sales Company with the intention of defrauding it.

The information was substantially in the words of the statute, which is all that is required in charging a statutory offense. *McCracken* v. *People*, 209 Ill., 215; *People* v. *Cotton*, 250 Ill., 338. The statute, section 164 of the Criminal Code, provides that any person with the intent to defraud who shall draw a check upon any bank, thereby obtaining from any person personal property, knowing at the time of such making that the maker of the check "has not sufficient funds in or credit with such bank or other depositary for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor."

witness testified the terms of the settlement was that $592.05 was to be paid in cash by Westerfield to the Parkway Motor Sales Company, "which sum has this day been paid." Anderson testified that when the check was given him Westerfield informed him that he had just made a loan of $4,000, and that the money was on deposit to his credit, and thus the check was good. This is denied by defendant. Within a day or two defendant mortgaged his new automobile. The check was not deposited until November 12 or 13, and was returned unpaid and stamped, "Not sufficient funds." Defendant testified that he requested Anderson to carry the check for awhile as he had a job of work which would give him considerable money. This is denied by Anderson, who says that defendant telephoned him Monday morning to hold the check, but was told that he could not do so. After the check was returned unpaid, Anderson repeatedly saw defendant, who promised to pay it but never did so. Defendant admits that he never paid the check.

The evidence leads to the conclusion that defendant did not intend to pay this check when he delivered it to the Parkway Motor Sales Company, and that his motive was thereby to make good to himself the damages which he claimed to have suffered in the purchase of the first automobile. The check was clearly delivered to the Sales Company with the intention of defrauding it.

The information was substantially in the words of the statute, which is all that is required in charging a statutory offense. Aufdenkamp v. People, 308 Ill., 619; People v. [illegible], 299 Ill., 203. The statute, section 254 of the Criminal Code, provides that any person who with the intent to defraud shall draw a check upon any bank, thereby obtaining from any person personal property, knowing at the time of such making, that the maker of the check has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor."

The amended complaint filed follows the language of this statute except that it omits the words, "in full upon its presentation." The gist of the offense is drawing and delivering a check knowing there are not sufficient funds to pay it, and the words "in full upon its presentation" are superfluous, neither adding nor detracting from the material allegation. Barton v. People, 135 Ill. 405. The general rule is that if the information is so specific that the defendant is notified thereby of the charge which he is to meet and is able to prepare his defense and the offense may be easily understood by the court or the jury, the same is sufficient. Glover v. People, 204 Ill.,170; People v. Krause, 291 Ill., 64; People v. Love, 310 Ill., 558- 567. The amended complaint was sufficient in all respects.

The court found the defendant guilty in manner and form as charged in the information, and its judgment was entered "on said finding of guilty." This is all the recital that is necessary and is proper.

The evidence justified the finding, and as there is no error in the record the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

82 - 28710

MATTHEW J. KING et al.,
Appellees,

vs.

HENRY P. REGER,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

233 I.A. 634

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a decree awarding him $218.69 to be recovered from the complainants and giving him a lien on certain real estate for the same.

Complainants filed their bill alleging that they were owners of certain improved real estate in Chicago and that, relying on the false statements of defendant concerning the necessity for the installation of a new boiler therein, they made a contract with him for this; that defendant installed the new boiler carelessly and improperly so that it would not work; that they paid him certain money on the contract; that he removed and appropriated the old boiler to his own use, and that complainants, because of the insufficient heating system installed by defendant, lost tenants and were obliged to burn more coal; that they were compelled to install another boiler at a cost of $1500 and defendant took back the one he had installed; that they spent other moneys in attempting to make the boiler installed by defendant work, but without success; that the defendant had filed a claim for mechanic's lien which was claimed to be a cloud on complainants' title; the prayer was that this lien be declared null and void and that defendant be decreed to pay whatever amount be found due to complainants. Defendant's answer admitted a contract and asserted that the new boiler was installed properly and was sufficient to heat the building; that all the work was done in accordance with the contract. A lien was claimed for a balance due of $248.60 with interest.

other

The matter was referred to a master in chancery to take evidence and report. Neither the evidence nor the master's report is in the record before us.

The court entered a decree finding that defendant was entitled to a lien for an amount which, after making certain allowances and credits, he fixed at $316.60, but the defendant, not satisfied with this, has appealed to this court.

Complaint is made because the court awarded complainants credit for $40 for repairing and cleaning the boiler removed. Defendant had charged this item to the complainants but as the boiler became the property of defendant after it was removed, we see no equitable reason why complainants should pay for repairing it and cleaning it, and there is nothing in the contract authorizing such a charge against the complainants. We cannot say on the facts appearing in the decree that the chancellor improperly found that the complainants should stand this expense.

Criticism ismade also of an allowance of $30 charged against defendant for removing a partition from the chimney. The decree, however, particularly states that this amount is allowed and awarded by the stipulation and agreement of the parties made in open court. Defendant cannot now be heard to complain about it.

The special point of defendant's contention is that by the decree the court ordered the costs of the suit, including the master's fees, to be taxed one-half against each party, and that any party paying any part of the cost should be credited with such payment in satisfying the decree. The court entered an order adjusting the amounts as to the costs and the amount found due to defendant, and the balance was paid in to the clerk of the court and the decree satisfied.

It is said that there were 1482 pages of evidence taken before the master in chancery. Considering the comparatively small amount of money involved such a volume of testimony would

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The court entered a decree finding that defendant was entitled to a lien for an amount which, after making certain allowances and credits, he fixed at $[illegible], but the defendant, not satisfied with this, has appealed to this court.

Complaint is made because the court ordered complainants should pay for the repairing and cleaning the boiler removed. Defendant had charged this item to the complainants but as the boiler became the property of defendant after it was removed, we see no equitable reason why complainants should pay for repairing it and cleaning it, and there is nothing in the contract authorizing such a charge against the complainants. We cannot say on the facts appearing in the decree that the chancellor improperly found that the complainants should not bear this expense.

Criticism is made also of an allowance of $50 charged against defendant for removing a partition from the building. The decree, however, particularly states that this amount is allowed and granted by the stipulation and agreement of the parties made in open court. Defendant cannot now be heard to complain about it.

The crucial point of defendant's contention is that by the decree the court ordered the costs of the suit, including the master's fees, to be taxed one-half against each party, and that any party paying any part of the cost should be credited with such payment in satisfying the decree. The court entered an order adjusting the amounts as to the costs and the amount found due to defendant, and the balance was paid in to the clerk of the court and the decree satisfied.

It is said that there were 2400 pages of evidence taken before the master in chancery. Considering the comparatively small amount of money involved such a volume of testimony would

seem to be wholly unnecessary and must have been produced by hostility between the parties. The chancellor was evidently of the opinion that both parties were equally to blame for incurring so much expense, and so divided the costs. Distribution of the costs in a chancery case proceeding is largely a matter of discretion of the trial court, and a court of review will not interfere unless such discretion has been abused. Leigh v. National Hollow B. L. Co., 224 Ill., 76; Carroll v. Tomlinson, 192 Ill., 398. In the absence of the master's report and the evidence taken we cannot assume to pass upon the action of the chancellor with reference to costs, and his order will not be disturbed.

Defendant contends that complainants should have made a tender of the amount due. But complainants claimed in their bill to have been damaged by the defendant and asked that he be ordered to pay for this. Defendant, on the other hand, claimed a lien for a certain sum. The decree found that complainant was not entitled to damages and that defendant was not entitled to a lien for the amount he claimed. We know of no rule which requires the complainants, under such circumstances, to make a tender of payment to defendant.

The ordinary rule that in seeking to remove a cloud from a title a tender must be made, ordinarily relates to the removal of a cloud in the nature of a tax deed. The cases cited by defendant on this point are of this kind. The general rule is that equity will not deny relief to a complainant because he will not do something to which defendant is not entitled. Mentzrunch v. Studt, 240 Ill., 464.

We do not see the force of the criticism of the way the chancellor computed the interest. As shown by the decree, the chancellor found the amount due the defendant after adjusting the account and gave defendant interest thereon at the rate of 6% per annum, in accordance with the terms of the contract. Defendant

seem to be wholly unnecessary and must have been produced by hostility between the parties. The chancellor was evidently of the opinion that both parties were equally to blame for incurring so much expense, and so divided the costs. Distribution of the costs in a chancery case proceeding is largely a matter of discretion of the trial court, and a court of review will not interfere unless such discretion has been abused. Leigh v. National Hollow B. B. Co., 204 Ill., 70; Carroll v. Tomlinson, 192 Ill., 398. In the absence of the master's report and the evidence taken we cannot [illegible] upon the action of the chancellor [illegible], and his order will not be disturbed.

Defendant contends that complainants should have made a tender of the amount due. But complainants claimed in their bill to have been damaged by the defendant and asked that he be ordered to pay for this. Defendant, on the other hand, claimed a lien for a certain sum. The decree found that complainant was not entitled to damages and that defendant was not entitled to a lien for the amount he claimed. We know of no rule which requires the complainants, under such circumstances, to make a tender of payment to defendant.

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We do not see the force of the criticism of the way the chancellor computed the interest. As shown by the decree, the chancellor found the amount due the defendant after adjusting the account and gave defendant interest thereon at the rate of [illegible] per annum, in accordance with the terms of the contract. Defendant

seems to claim that he is entitled to interest on the items of $40 and $50 heretofore referred to. There would be no reason for allowing defendant interest upon amounts to which the decree holds he was not entitled.

We see no reason to disturb the decree. We are inclined to agree with the suggestion in the brief that this litigation should not have involved such large expenses. The cost of this appeal alone is manifestly larger than the amount involved.

The litigation should be terminated, and the decree is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

69 - 28719

GUS T. FLYNN,
Plaintiff in Error,

vs.

LEROY HOWLAND,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

235 I.A. 634

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant, a dentist, seeking to recover damages for alleged malpractice. Upon trial the court excluded certain evidence and apparently being of the opinion that after exclusion of this evidence there was nothing to submit to the jury, directed a verdict for defendant. Plaintiff seeks a reversal of the judgment.

As we are of the opinion that there must be a new trial we refer only briefly to the evidence. Plaintiff claimed that in January, 1921, he sought professional advice from defendant, who was a dentist practising his profession at Blue Island. Defendant advised that the plaintiff's second molar needed filling and offered to do this and other work for a fixed price, which was accepted. Defendant proceeded to treat the tooth and plaintiff claims that the evidence tends to support his allegation that defendant so unskillfully, negligently and improperly treated the tooth that serious damage resulted.

Plaintiff attempted to support this charge by the testimony of Dr. Willard testifying as an expert. A series of questions were asked to elicit an opinion as to whether a dentist exercising ordinary care and skill would, in pulling a second molar tooth, rupture the inferior dental artery. The question was asked in a variety of ways, but objections to each of them were sustained by the court.

The grounds of the objections seem to be (1) that there was no evidence that the inferior dental artery in this case was ruptured; (2) that the hypothetical questions did not contain all the facts; (and (3) that the answers to the questions would invade the province of the jury as determining the ultimate fact of malpractice.

There was some evidence tending to show that the inferior dental artery was ruptured by defendant when pulling the second molar teeth. A dentist who subsequently treated plaintiff stated in substance that the conditions of the teeth as he found them led him to assume that the artery was destroyed; that when in treating plaintiff he extracted teeth and dead bone no blood flowed from this artery, which would occur under normal conditions. There was other evidence, such as the protracted bleeding in the first instance, which tended to prove this fact. If there was any evidence tending to show this, counsel had the right to assume the existence of the fact in the hypothetical question. Betwinis v. Allgood, 113 Ill. App., 193; C. E. & I. Ry. v. Wallace, 202 Ill. 133; Howard v. People, 185 Ill., 552.

The objections to the questions on the trial were general and not upon the ground that they did not contain all the facts. Objections should specifically point out the alleged facts that are claimed to be omitted. Chicago Traction Co. v. Roberts, [illegible] Ill.,485; C.E. & I.Ry.Co. v Wallace, 202 Ill.,129. However, assuming that the inferior dental artery was ruptured, there were no other facts in evidence which would have any material bearing upon the question whether the usual careful and skillful treatment would cause this. Defendant contradicts the fact of the rupture and does not claim that the evidence discloses circumstances and conditions which would account for this on grounds consistent with skillful treatment. It is not necessary in a hypothetical question to include every fact in evidence wholly unrelated to the particular

point to be determined.

Would the answers to the questions tend to invade the province of the jury, which alone had the right to decide whether defendant was guilty of negligence or malpractice? We hold that they did not. Defendant impliedly contracted to treat plaintiff with the care and skill usual and customary in the district where he practiced, and it was the province of the jury to determine if this contract had been breached and, if so, to fix compensatory damages. The medical expert would testify touching the factors of care and skill in the treatment, which would be evidence on one of the facts in the series of facts to be considered by the jury in arriving at an ultimate conclusion. The evidence of an expert is like any other evidence of a fact, whether realized objectively by the witness or resting on opinion. It is a commonplace in trials to receive opinion evidence as to distances, weather, speed, and other matters, to be considered by the jury as elements entering into and forming an ultimate conclusion. The relative importance or weight of opinion evidence does not affect its admissibility.

It is also self-evident and established by a long line of decisions that evidence relating to professional or medical care and skill must be given by experts. Laymen are incompetent to testify upon the subject and the ordinary jurors are equally uninformed. So from the very necessities of the case plaintiff could only prove the allegations of his declaration touching the treatment by the testimony of experts. Fuhry v. C. C. Ry. Co., 239 Ill. 548; City v. Didier, 227 Ill., 571; Chicago Union Traction Co. v. Roberts, 229 Ill., 481.

The questions propounded in this case referred to dentists and cases generally, and the opinions called for were not binding upon the jury but merely advisory. Lafayette Bridge Co. v. Olsen, 47 U. S. C. C. A., 367.

The questions do not seem to have been objected to on

account of form.

It is unnecessary for us to decide whether under the evidence admitted the court erred in withdrawing the case from the jury. It was a case where the testimony of an expert physician or dentist was essential. Such evidence should be received and the case submitted to the jury.

For the errors above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and Johnston, J., concur.

77 - 33727

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

VICTOR PALMQUIST,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

233 I.A. 635

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, on information charging him with driving an automobile upon a public highway, while intoxicated, in violation of the law, section 41, chapter 121, Illinois statute, entered a plea of guilty and was sentenced to the House of Correction for thirty days and fined $50 and costs.

The record does not show that defendant was warned or admonished of the consequences of the plea of guilty, as required by section 4, division 13, of the Criminal Code.

It is a well established rule that where the record fails to show that the court fully explained to the accused the consequences of entering a plea of guilty before such plea is received and recorded, the judgment entered thereon cannot stand. People v. Fulimon, 308 Ill., 235; People v. Petrie, 294 Ill., 366; People v. Krolage, 224 Ill., 456; People v. Sweetland, 21? Ill. App., 432; People v. Benner, 224 Ill. App., 515; Sec. 4, Div. 13 of Criminal Code (J. & A.) Anno. Statute, vol. 2, sec. 4121.

For the failure indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

64 - 26735

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

JAMES LEDWELL,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT,
COOK COUNTY.

233 I.A. 635

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant asks the reversal of a judgment entered upon a verdict finding him guilty of keeping a common gaming house. Defendant criticises certain instructions given to the jury at the request of the State and the People reply that any errors therein are cured by other instructions given. The abstract contains only three instructions whereas the record shows that four instructions are given on behalf of the State and thirty on behalf of the defendant. None of defendant's instructions is abstracted.

Instructions are to be considered as a whole. If all instructions properly set forth the law which is applicable to the case the court will not single out any particular instruction and reverse the case because of some slight error therein. In the absence from the abstract of other given instructions we will assume that they cure any possible misunderstanding or error in those given.

The indictment charged that defendant, Ledwell, together with three others named, "did keep and maintained a certain common gaming house." From an examination of the evidence we are of the opinion that it is not sufficient to support the verdict of guilty with respect to the defendant Ledwell.

On the afternoon of February 17, 1931, the police raided a saloon at number 4183 South Halsted street. In the room was

[illegible]

vs.

[illegible]

[illegible] judgment [illegible]

[illegible] given to the jury [illegible]

[illegible] in controversy.

[illegible]

found a roulette wheel and other evidences indicating that the place was a gaming house. The officer found there about seventy or eighty men. A number of persons, including Ledwell, were arrested. Some officers testified that Ledwell was in his shirt sleeves near the roulette wheel. One officer testified that he asked Ledwell "how they were doing and he replied, 'Not very good.'" All this is reasonably consistent with the presence of Ledwell there as a bystander and it is not sufficient to show that he was the keeper of, or maintained or aided, abetted or assisted in maintaining the place as a gaming house. A general superintendent in charge or an employe may be regarded as a keeper. _Stevens_ v. _People_, 67 Ill. 587. A bystander is not a keeper. Aiding, abetting and assisting are affirmative acts and must be proven. _White_ v. _People_, 81 Ill. 333; _Lamb_ v. _People_, 96 Ill. 73; _White_ v. _People_, 1[illegible] Ill. 143.

Because of the insufficiency of the evidence the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Johnston, J., concur.

95 - 28746

FIDELITY COAL COMPANY,
a Corporation,
Appellant,

vs.

JAMES CHAGAROS and GEORGE PANAGOS, Trading and Doing Business by and under the Firm Name of BON HARBOR COAL COMPANY,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 635

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for the defendants entered upon a trial by the court in a suit brought to recover damages for an alleged breach of a contract between the plaintiff and defendants.

Plaintiff is engaged in buying and selling coal in Chicago, and defendants, under the name of Bon Harbor Coal Company, operate coal mines near Owensboro, Kentucky. May, 1922, plaintiff was buying coal from defendants on an open account, but May 26 they entered into a contract effective June 1, whereby plaintiff agreed to sell all of the coal produced at its mines (with an unimportant exception) for a period from June 1, 1922, to February 10, 1923. Defendants specifically agreed not to sell any of the coal produced to any other party. Plaintiff agreed to market and sell the same on a commission basis of 8% on all coal sold by it. It also was provided that plaintiff should remit to defendants on Thursday of each week 75% of the amount due for all coal shipped and sold and the balance to be paid on the 25th of each month for shipments for the preceding month, plaintiff deducting its commission from remittances. Time was made the essence of the contract.

40480

June 1, 1922, was on Thursday, and defendants made shipments in accordance with the contract up to June 12 and then

as they claimed that plaintiff defaulted in the payment due Thursday, June 8, they began shipping to other customers.

Plaintiff claims that it performed its part of the contract but that defendants breached the same by selling to other customers after June 12, and this suit was brought to recover the commissions which plaintiff says it would have made if defendants had continued to make shipments until the expiration of the contract.

June 8 plaintiff made a remittance to defendants of $1,000, and June 15 a remittance of $347.19. The amount of these remittances, $1,347.19, represented exactly the balance due from plaintiff on the May open account, and defendants applied these remittances to settling that balance. Plaintiff claims that the balance on the May open account was not due until the 25th of the following month, which would be June 25, and as plaintiff did not direct the application of these remittances the law is that the creditor must apply it to a debt that is due, which in this case would be the 75% due June 8, under the terms of the contract.

There are two sufficient answers to this: (1) The application of these remittances to the May open account was intended by plaintiff; and (2) it was not sufficiently proven that the May account was not due until June 25.

A statement was made and rendered by plaintiff to defendants, showing the condition of the May account. This shows that the remittance on June 8, 1922, of the $1,000 was to be applied on this account and that the remittance of $347.19, made June 15, paid the balance in full. Also, the remittance notice made by the plaintiff and sent to defendants June 15 contains the car numbers of the May account, the balance due thereon, $1,347.19, also a notation that $1,000 was paid thereon June 8 on account, leaving a balance of $347.19, which was therewith paid. It is clear that plaintiff intended these remittances to be applied on the May account, and it cannot now be heard to claim that

40481

as then claimed that plaintiff defaulted in the payment due Thursday, June 5, then began defaulting in other deliveries.

Plaintiff claims that it performed his part of the contract but that defendant breached the same by refusing to accept shipments after June 14, and this suit was brought to recover the commissions which plaintiff says it would have made if defendants had continued to make shipments until the expiration of the contract.

June 5 plaintiff sent a remittance to defendants of $1,000, and June 13 a remittance of $467.19. The amount of these remittances, $1,467.19, represented exactly the balance due from plaintiff on the hay sale account, and defendants applied these remittances to settling that balance. Plaintiff claims that the balance on the hay sale account was not due until the 20th of the following month, which would be June 20, and as plaintiff did not direct the application of these remittances the law is that the creditor must apply it to a debt that is due, which in this case would be the debt due June 5, under the terms of the contract.

There are two sufficient answers to this: (1) The application of these remittances to the hay sale account was intended by plaintiff; and (2) it was not satisfactorily proven that the hay account was not due until June 20.

A statement was made and verified by plaintiff in December, showing the condition of the hay account. This shows that the remittance on June 5, 1919, of the $1,000 was to be applied on this account and that the remittance of $467.19, made June 13, paid the balance in full. Also, the remittance as being made by the plaintiff and sent to defendants June 13 contains the notation of the hay account, the balance due thereon, $1,467.19, also a notation that $1,000 was paid thereon June 5 on account, leaving a balance of $467.19, which was therewith paid. It is clear that plaintiff intended these remittances to be applied on the hay account, and it cannot now be heard to claim that

no directions were given for their application.

The assertion that the balance due on the May account was not due until June 25 is based upon what is claimed to be proof of a custom to this effect. Only one witness attempted to give any testimony that there was any such custom - the vice president of plaintiff's company, Mr. Nathan Lickerman. It was held in Bissell v. Ryan, 23 Ill. 517, that the testimony of one witness is not sufficient to prove a usage or custom, and this was followed in Andelman v. Chicago & Northwestern Ry. Co., 165 Ill. App. 169; Kelly v. Carroll, 223 Ill. App. 309. In this latter case it was said: "It (the custom) should be established by the testimony of several witnesses, and if it is a well-established usage or custom, it ought not to be difficult of proof by a number of witnesses."

Even if this requirement should be relaxed in later decisions in other jurisdictions it is uniformly the rule that evidence must establish clearly and convincingly a usage as can fairly be presumed to have entered into the intentions of the parties. Vague and unsatisfactory testimony is not sufficient. 29 Am. & Eng. Enc. of Law, 414; C. C. C. & St. L. Ry. Co. v. Jenkins, 174 Ill. 398-407. Lickerman testified that "on the 25th of the following month for all shipments made the previous month on all orders is the payment of open account. That is customary in the coal business," and that this was the practice in doing business in Chicago in the year 19[illegible]. This does not meet the requirement that usage must be shown to be so uniformly well established and generally acquiesced in and so well known as to induce the belief that parties contracted with reference to it, if nothing is stated to the contrary, and that the failure to conform to it would be an exception. C.C.C.& St.L.Ry. Co. v. Jenkins, supra.

Plaintiff was in default in failing to remit on the contract on Thursday, June 8, and a party who is in default under

no instructions were given for their qualification.

The assertion that the [illegible] was not [illegible] is based upon what is claimed to be proof of a [illegible] to take effect. Only one witness attempted to give any testimony that [illegible] - [illegible] of [illegible]. It was held in [illegible] 157, that the testimony of one witness is not sufficient to prove a usage or custom, [illegible] [illegible] [illegible] [illegible]. In this [illegible] it was held [illegible] by the evidence of several witnesses, and if it is a well-established usage or custom, it ought not to be difficult of proof by a number of witnesses."

[illegible]

[illegible]

[illegible]

a contract cannot maintain an action for damages for its breach by the other party. Chicago Yashei Coal Co. v. Whitsett, 278 Ill. 623; Purcell v. Sage, 200 Ill. 342; Pennsylvania Coal Co. v. Ryan, 107 Ill. 226; Consumers Mutual Oil Co. v. Western Petroleum Co., 216 Ill. App. 382. Plaintiff must first prove its own compliance with the contract, and if both parties are alike in default neither can maintain an action on the contract for its breach by the other. Harber Bros. v. Moffat Cycle Co., 151 Ill. 84; Chicago Yashei Coal Co. v. Whitsett, 278 Ill. 623.

The judgment of the trial court was right and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

40483

138 - 28790

CHARLES E. PECK,
Appellee,

vs.

[illegible],
Appellant.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

233 I.A. 695

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against him for $87 entered upon the verdict of a jury. The action was brought to recover for damages to plaintiff's automobile struck by defendant's automobile truck, alleged to be negligently driven by him. Liability is not questioned here, but it is claimed that the damages were not proven.

It is in evidence that defendant's truck was going about thirty miles an hour when it struck plaintiff's Ford in the center, knocking it some feet away, breaking or denting its side and breaking spokes and knocking off the battery.

Plaintiff had his automobile repaired and his son testified that he saw the repair bill paid. Apparently two bills were rendered, one for $124.20, and one for $34.75. This witness testified that the bill for repairs which he saw paid was to repair damages to plaintiff's automobile received in the accident in question.

Defendant's argument is that there was no proof as to the reasonable cost of these repairs. In Travis v. Pearson, 43 Ill., 579, the court said:

> "In ordinary business transactions, nothing appearing to cast suspicion on the fairness thereof, good faith is presumed, and the evidence of what one has actually paid for necessary repairs is admissible to show what the reasonable cost of such repairs is. Atchison v. Steamboat, 14 Mo., 63-69; Hildreth v. Fitts, 53 Vt., 684-690."

This was cited with approval in Peabody v. Lynch, 134

[illegible]

[illegible], Appellee,

v.

[illegible], Appellant.

[illegible]

Mr. Justice [illegible] delivered the opinion of the court.

This is an appeal by defendant from a judgment against him [illegible] entered upon the verdict of a jury. The action was brought to recover for damage to plaintiff's automobile caused by defendant's automobile truck, alleged to be negligently driven by him. [illegible] is not questioned here, but it is claimed that the damages were not proved.

It is in evidence that defendant's truck [illegible] [illegible]

[illegible]

[illegible]

[illegible]

Ill. App. 78. The instant case is one for the application of this rule. The fairness and good faith of the bill is not questioned. Defendant introduced no evidence touching the matter. As the jury allowed the plaintiff only $67, whereas the bills were for much more, it would be unjust to require another trial because of some failure to introduce all the evidence which might have been produced. There was sufficient introduced to raise a presumption of reasonableness and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

151 - [illegible]

CHICAGO GERMAN HOD CARRIERS
UNION and BENEVOLENT SOCIETY,
a corporation,

Appellee,

vs.

SECURITY TRUST & DEPOSIT COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

238 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff deposited certain moneys and bonds in a safety deposit box rented from defendant which owned and operated safety deposit vaults in the Masonic Temple building in Chicago. On the night of August [illegible], 1921, robbers rifled some of the boxes including the one rented by plaintiff and made away with the contents. Plaintiff brought suit alleging that defendant did not exercise ordinary care and diligence to keep safely the money and securities so deposited, so that they were lost. Upon trial before a jury plaintiff had a verdict for $[illegible] and from the judgment thereon defendant appeals.

It is argued the evidence fails to prove that plaintiff, "Chicago German Hod Carriers Union and Benevolent Society, a corporation," was the owner of the contents of the box. The suit was first commenced by the "German Hod Carriers Union and Benevolent Society, August Fisch, Edward Richter, Charles Engel, Gustav [illegible], the trustees of said society." Upon the trial it was shown that March 14, [illegible], a corporation was formed named "Chicago German Hod Carriers Union and Benevolent Society," and plaintiff's counsel, claiming that this was the same organization, moved and leave was granted, to amend plaintiff's name so as to read as it now stands, "Chicago German Hod Carriers Union and

40496

[illegible] - [illegible]

[illegible]
[illegible]
[illegible],

[illegible] | [illegible],
[illegible], | [illegible]
[illegible]. | [illegible]
| [illegible]
| [illegible],
| [illegible].

[illegible].

[illegible]

[illegible]

[illegible]

Benevolent Society, a corporation," the names of the trustees being stricken.

It is argued that there is no evidence of a legal transfer of the property of the original society to this corporation and that as it was the society which originally rented the safety deposit box, the contents still belong to this society and not to plaintiff, the corporation.

There are two sufficient answers to this. There is some evidence tending to show that the original society and the present corporation are one and the same organization. One of the witnesses, Carl Engel, testified that he was one of the trustees of the German Hod Carriers Union and Benevolent Society and had been for twenty-seven years, which would be a period before and after the incorporation. It is conclusive from his testimony that he was acting during this period for the one organization under the different names. This witness also testified that this organization rented a box from defendant for twenty-seven years. This box was latterly known by those concerned, including defendant's employes, as the box of the Chicago German Hod Carriers Union and Benevolent Society, the corporate name. There was other evidence tending to show that this corporation was originally the voluntary organization which first rented the box.

40497

The other answer to this point of variance in the identity of plaintiff is that after plaintiff had closed its case and a motion was made by defendant to direct a verdict in its favor on the ground of variance, and denied by the court, defendant proceeded to introduce testimony in defense and did not renew the point of variance or its motion for a directed verdict at the conclusion of the evidence. Defendant thereby waived its right to assign as error the alleged variance and as it therefore does

Spiritualist Society, a corporation," the names of the trustees being stricken.

It is argued that there is no evidence of a legal identity of the grantee in the original society in this Association and that as it was the society which originally rented the safety deposit box, the contents still belong to that society and not to plaintiff, the corporation.

There are two sufficient answers to this. There is ample evidence tending to show that the original society and the present corporation are one and the same organization. One of the witnesses, [illegible], testified that he was one of the founders of the Society and [illegible] and had been for [illegible] years, which would be a period before and after the incorporation. It is conclusive from this testimony that it was nothing during this period but the one organization under two different names. This witness also testified that this organization rented a box from defendant for [illegible] years. This box was latterly known by those members, including defendant's employees, as the box of the [illegible] which was [illegible] Society, the corporate name. There was other evidence tending to show that this corporation was primarily the religious organization which first rented the box.

41307

The other answer to this point of variance is the [illegible] of plaintiff is that after plaintiff had closed its case and a motion was made by defendant to direct a verdict in its favor on the ground of variance, and denied by the court, defendant proceeded to introduce testimony in its behalf and did not renew the point of variance at its motion for a directed verdict at the conclusion of the evidence. Defendant thereby waived its right to assign as error the claimed variance and it is therefore [illegible]

not arise on this record it cannot be availed of in this court. Harris v. Shebek, 151 Ill. 287; Ferrara v. Knights and Ladies of Security, 309 Ill. 476.

Defendant's vaults were in the basement of the Masonic Temple in Chicago; they were well built with steel bars and gates usual in such vaults; beyond the bars were the deposit boxes rented to customers; there is no claim of deficiency in the construction. The vaults were kept open for business at night.

On the night of the robbery, August 25, two persons only were in charge of the vaults; one of them, Ernest Weber, was in charge of the desk outside the bars. About eight or nine o'clock four men entered and asked Weber if they could rent a box and he answered in the affirmative and gave them a ticket to admit them through the gate. The men presented the ticket to Milton Jonas, the other man on duty, who admitted them and walked back to the end of the vault showing them the way. When they were out of Weber's sight two of the men pulled guns on Jonas and he was seized and tied up. Apparently the robbers then spent about forty minutes in breaking open a number of safety deposit boxes and taking the contents. Among these boxes broken open and robbed was box number 714, leased to plaintiff. The robbers then left the vault and escaped with the plunder.

40498

Jonas had worked for the defendant company for about five months prior to the time and had never worked as a watchman before; he was the only guard there that night and had been the only one for about five nights before. Weber testified that all he had to do was to rent the boxes, he had no gun; that when he thought the men intended to come out he went to open the gate when "they stood me up with the guns and tied me back to the bars." He says he finally got loose and called for help and a bunch of policemen came down. He further stated that he had worked there

about six months prior to this time and before that was a brick layer.

It was for the jury, in determining whether defendant exercised due care for the safety of the valuables committed to its care, to consider the circumstances that although the property in the deposit boxes must have been of great value only two men were on duty at night, one of them at the desk, and apparently neither of them armed; that they were comparatively recent employees without previous experience as watchmen; that the four strangers were given access to the boxes without any inquiry as to their identity or responsibility and were permitted to go behind the gates out of view of Weber at the desk, alone with Jensen the guard, where it was a simple matter to overpower him and proceed to break open and rob the boxes with little chance of interruption. The degree of care required of a safety deposit company is such that arises from the nature of the business. When a bailee receives property and fails to return it there is a presumption that the loss is due to his negligence and he must show that he exercised the degree of care required by the nature of the bailment. Schaefer v. Washington Safety Deposit Co., 281 Ill. 43; Mayer v. Brensinger, 180 Ill. 110; Mesh v. Glenbeam Safe Deposit Co., 220 Ill. App. 357.

Applying this rule to the facts in evidence, the jury could properly find that the loss was caused by the lack of proper care on the part of defendant.

40499

The amount of money and bonds in plaintiff's box which were stolen is questioned but there was sufficient evidence in this respect. It seems to have been the custom for four of the trustees or directors of the plaintiff company to go to the vaults together and they did so on the night of August 23, prior

to the robbery. Some of these, if not all, testified that at this time they deposited $5,000 in cash in plaintiff's box; that there was already $4,500 in cash in the box which with this deposit made $9,500 in cash; that there were also twenty-four $1,000 Liberty Bonds, also $1,000 in war stamps, and bank books and papers. There is no testimony tending to contradict the testimony of these witnesses so that the amount of the loss must be considered as sufficiently proven.

There was no reversible error upon the trial and as the evidence justified the verdict, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

40500

193 - 28850

GEORGE R. JOHNSON, Appellee, vs. HARRY WEISSMAN, MORRIS WEISSMAN and LEON WEISSMAN, Copartners, trading as SOUTH CHICAGO AUTO SALES, Appellants.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 586

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff in his statement of claim alleges that he gave defendant $25 and a Ford truck at $300 on the purchase price of a Buick truck which defendants agreed to deliver to plaintiff; that defendants failed to deliver the Buick truck, obliging plaintiff to hire one at an expense of $171; that defendants had retained the $25 and refused to pay $300 for the Ford truck and the cost of hiring one, making a total damage to plaintiff of $496. Defendants filed an affidavit of merits and claim of set-off, claiming $121 for storage of plaintiff's car in defendants' garage. The court found against the set-off and for plaintiff, assessing his damages at $325.

Counsel for defendants in his brief has so far departed from the rules of this court (No. 19) as to make the points urged for reversal somewhat obscure.

The case seems to hinge upon the credibility of the witnesses. Plaintiff testified that on August 14, 1922, he had dealings with E. R. Maxfield, a salesman for defendants, in which it was agreed that he would trade in his Ford car for $300 and pay $25 extra for a Buick truck to be delivered September 14, and that a written agreement to this effect was made. This paper is in evidence, signed by H. J. Hanson, sales manager for defendants. It tends to support plaintiff's story. At the same time plaintiff

was given a written receipt acknowledging the delivery to defendants of the Ford truck to be applied on the new Buick truck "as per his order to us dated August 14, 1922." This was signed by the South Chicago Auto Sales, by R. J. Hanson. Plaintiff also testified that he executed a bill of sale conveying the Ford truck to defendants and that in this plaintiff was described as vendor and defendants as vendees. Thereupon plaintiff's Ford truck was delivered to defendants and placed in their garage. Upon the trial defendants were notified to produce not only a copy of the order of August 14, but also the bill of sale, but counsel refused to produce the bill of sale but did produce a copy of the order. The Buick truck was not delivered on September 14. Plaintiff testifies that until January 2, 1923, he made numerous requests and demands of defendants for the delivery of the truck but the defendants failed to deliver it. Thereupon plaintiff notified defendants that he could not wait longer and purchased another truck and commenced this suit.

Plaintiff's story is supported by the testimony of both Maxfield and Hanson, Hanson testifying that at the time he signed the order of August 14, Harry Weissman, one of the defendants, was present and instructed the witness, Hanson, to sign the order; that the bill of sale executed by plaintiff conveying the Ford truck to defendants was filed in defendants' safe; that he had told Harry Weissman of this bill of sale directly it was made out.

As opposed to this, Harry Weissman and Morris Weissman, defendants, testified in substance that plaintiff's Ford truck was put in their garage for sale; that they did not authorize Hanson to sign the order; that in November plaintiff took out his truck, saying that if $300 could not be realized on it he would take it and use it; that Hanson never mentioned the payment of $25, and that plaintiff never asked for the return of this sum.

29135

CELIA DUKES and I. M. DUKES, Complainants,

vs.

WASYL DICHO and JULIANO DICHO, Defendants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

233 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunction restraining defendants from prosecuting certain suits in forcible detainer and for rent in the Municipal court, and from collecting or receiving any rents from the tenants of the property in controversy until the further order of the Circuit court.

Complainants move to dismiss the appeal on the ground that the appeal bond was not filed in this Appellate court within thirty days from the entry of the order appealed from, and assert that in McCarthy v. City of Chicago, 197 Ill. App. 544, it was decided that the statute on interlocutory appeals required this to be done. Even a casual reading of this opinion shows that it did not so hold. The point was not involved, but, as dictum, the opinion correctly said, with reference to the statute: "It has been uniformly held that under this provision the appellant must file a bond in the court entering the order or decree, said bond to be approved by the clerk of said court." In the instant case the bond was properly approved and filed and the motion to dismiss is denied.

40503

The primary purpose of the bill is to remove, as a cloud on the title, a contract for the sale of certain improved real estate. Complainants allege that they are the owners of the premises improved with stores and flats; that the complainant Celia Dukes acquired title by a deed dated January 23, 1923, from

[illegible] and [illegible],
Complainants,

vs.

[illegible] and [illegible],
Defendants.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunction restraining defendants from prosecuting certain suits in [illegible] against one [illegible] in the municipal court, and from continuing or prosecuting [illegible] until the further order of the Circuit Court.

Complainants move to dismiss the appeal on the ground that the appeal bond was not filed in this Appellate court within [illegible] days from the entry of the order appealed from, and assert that in [illegible] v. City of Chicago, 197 Ill. App. [illegible], it was held that the statute on interlocutory appeals required this to be done. Upon a second reading of this opinion [illegible] that it did not so hold. The point was not involved, but, as dictum, the opinion incorrectly said, with reference to the statute: "It has been uniformly held that under this provision the appellant must file a bond in the court entering the order or decree, said bond to be approved by the clerk of said court." In the instant case the bond was properly approved and filed and the motion to dismiss is denied.
DENIED.

The ultimate purpose of the bill is to remove, as a cloud on the title, a contract for the sale of certain improved real estate. Complainants allege that they are the owners of the premises [illegible] with [illegible]; that the complainants [illegible]

Stanley Cholewinski and his wife, which deed was recorded May 17, 1923; that prior thereto, in April, 19[illegible], Cholewinski made a contract with Wasyl Dicko, one of the defendants, whereby Cholewinski agreed to convey to Dicko said premises upon Dicko paying a certain amount in monthly installments, and assuming certain mortgages, paying the interest thereon; that the contract provided that no right, title or interest in the premises should vest in Dicko until a deed was delivered and that neither the contract nor any copy thereof should be recorded, and, if recorded, the contract, at the option of Cholewinski, should become absolutely null and void; that in case of failure to make the payments provided by the contract, at the option of Cholewinski, the contract should be declared forfeited and determined and he should have the right to re-enter and take possession.

The bill further alleges defaults on the part of Dicko in his monthly payments on the contract and his failure to pay interest on the prior mortgages as agreed upon, also that he filed a duplicate of his contract in the Recorder's office of Cook County, and by reason of all these things Cholewinski elected and declared the contract forfeited and determined; and complainants say that thereby the contract became null and void and a cloud on the title.

40504

The bill alleges that said defendants have commenced actions in forcible detainer and for rent against certain tenants of the premises and are demanding rent from the tenants and otherwise interfering with the rights of complainants. Complainants ask that the aforesaid contract be decreed to be null and void, a cloud on the title, and to be delivered up to be cancelled, and that the judgment for possession in the forcible detainer suit obtained by defendants in the Municipal court be declared null and void, and that they be restrained from prosecuting suits against the tenants and from collecting and receiving rents from the building.

The bill gives sufficient justification for the interlocutory injunction. Its primary purpose, as we have said, was to nullify Dicke's contract and to remove the same as a cloud on the title. The court having properly acquired jurisdiction for the purpose of determining whether complainants were entitled to the relief sought, and the bill on its face having made a prima facie case entitling complainants to relief, it was entirely proper to restrain defendants from interfering with the tenants by attempting to exercise rights of ownership and possession. Taking the allegations of fact in the bill as true, as the chancellor must upon the motion for an interlocutory injunction, defendants had no right to pursue the tenants either for possession or for rent, or in any way, and the temporary injunctional order restraining them from doing this was entirely proper.

We are expressing no opinion as to the ultimate result of the case. See Atchison, T. & S. F. Ry. Co. v. Stamp, 290 Ill. 428; Leigh v. National Hollow Brake Beam Co., 104 Ill. App. 438; Lambert v. Alcorn, 144 Ill. 313.

It was not necessary to allege insolvency of the defendants. Their suits for possession and rent and their actions in otherwise interfering with the tenants would work irreparable harm to the premises. It was well within the discretion of the chancellor, regardless of the fact of the solvency or insolvency of the defendants, to maintain the status quo of the subject-matter of the litigation. Lambert v. Alcorn, supra.

40505

There is no merit in the criticism of the verification of the bill in which the affiant swears that "he has read the above and foregoing bill of complaint and knows the contents therein, and that the same is true." By the words, "the same is true," affiant clearly means the bill of complaint and not any one "content" therein.

The interlocutory injunction was properly issued and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

The bill gives sufficient jurisdiction for the interlocutory injunction. Its primary purpose, as we have said, was to nullify Pirie's contract and to remove the same as a cloud on the title. The court having properly acquired jurisdiction for the purpose of determining whether complainants were entitled to the relief sought, and the bill on its face having made a prima facie case entitling complainants to relief, it was entirely proper to restrain defendants from interfering with the tenants by attempting to exercise rights of ownership and possession. Taking the allegations of fact in the bill as true, as the chancellor must upon the motion for an interlocutory injunction, defendants had no right to harass the tenants either for possession or for rent, or in any way, and the temporary injunctional order restraining them from doing this was entirely proper.

We are expressing no opinion as to the ultimate result of the case. See C. I. & L. Ry. Co. v. Stamp, [illegible] Ill. [illegible]; Lalor v. [illegible] Co., [illegible] Ill. App. [illegible]; Lambert v. Alcorn, 144 Ill. 313.

It was not necessary to allege insolvency of the defendants. Their suits for possession and rent and their actions in otherwise interfering with the tenants would work irreparable harm to the premises. It was well within the discretion of the chancellor, regardless of the fact of the solvency or insolvency of the defendants, to maintain the status quo of the subject-matter of the litigation. Lambert v. Alcorn, supra.

There is no merit in the criticism of the verification of the bill in which the affiant avers that "he has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true." By the words, "the same is true," affiant clearly means the bill of complaint and not any one "content" thereof.

The interlocutory injunction was properly issued and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

40 - 28671

THE FAIRBANKS COMPANY,
a corporation,
Appellant,

vs.

UNITED STATES FIDELITY AND
GUARANTY COMPANY, a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

233 I.A. 636

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In this case the Circuit Court sustained defendant's general demurrer to the second amended bill of complaint, and dismissed the bill at complainant's costs, and this appeal followed.

In said amended bill, complainant, a New Jersey corporation, - licensed to do business in Illinois, alleges in substance that "prior to September 1, 1921, the exact date being unknown to your orator," defendant, for a valuable consideration, executed and delivered to complainant its bond, whereby it agreed to reimburse complainant to the extent of $10,000 for any money or property that one Timmons, its employee, would embezzle or otherwise convert to his own use while in its employ; that complainant does not know the exact terms of the bond as the same is now in defendant's possession; that Timmons, during the years 1920 and 1921, stole divers sums of money and property from it; that during an examination of complainant's books in April, 1921, by a certified public accountant, the latter informed complainant that Timmons had stolen various sums aggregating $2,724.81; that complainant relied on the accountant's report and believed it was correct and complete, and, under that belief, notified defendant, in August, 1921, of said defalcations "to the extent of said foregoing sum only," and delivered to defendant a true copy of the

itemized list of said defalcations prepared by said accountant; that, thereupon, defendant, relying upon said list and believing it to be correct and complete, on or about September 1, 1921, paid to complainant said sum, and complainant delivered up the bond to defendant, who "thereupon cancelled it;" that defendant saw the records that contained all the embezzlements, but "overlooked undisclosed and additional defalcations that existed at the time," and "agreed with your orator that the total embezzlement of Timmons amounted to $2,724.81;" that on or about April 1, 1922, a general audit of complainant's books was "commenced," and complainant learned that both it and defendant were "mutually mistaken" in deeming said sum to be the total amount that Timmons had stolen; that complainant, immediately upon ascertaining said "mutual mistake," notified defendant thereof, and, during "such additional examination," on June 7, 1922, further notified defendant that it (complainant) "rescinded the release settlement" of September 1, 1921, and at the same time tendered back to defendant the sum of $2,724.81, and demanded said bond, but defendant failed to deliver it or to inform complainant of the terms thereof; and that said additional examination was completed about July 1, 1922, and disclosed that Timmons had stolen, in addition to the $2,724.81, divers sums, that "had been overlooked through the miscalculation and mutual mistake" of complainant and defendant at the time of the settlement of September 1, 1921, as follows:

"July, 1920, Check of Continental Supply Co., St. Louis, Mo. $1,142.20
Sept., 1920, Check of G. T. O'Malley, Kansas City, Mo., 3,889.75
1920, Check of Morris & Co., Chicago, Ill. 363.
1920-1921, Checks unknown as to identity, but specifically admitted by Timmons to have been converted by him 550.
1920-1921, Checks received and possibly diverted by Timmons 25,638.17"

That on July 7, 1922, complainant notified defendant by a sworn statement of said additional defalcations and "demanded that the defendant rescind said settlement of September 1, 1921, because of said mutual mistake of fact," and reimburse complainant for said

lustment list of said deficiencies prepared by said accountant; that, thereupon, defendant, relying upon said list and believing it to be correct and complete, on or about September 1, 1921, paid to complainant said sum, and complainant delivered up the bond to defendant, who "thereupon cancelled it;" that [illegible] not the records that contained all the embezzlements, but "concealments, particulars and additional deficiencies that existed at the time," and "agreed with your auditor that the total embezzlement of Timmons amounted to $3,734.61;" that on or about April 1, 1922, a general audit of complainant's books was "commenced," and complainant learned that both it and defendant were "mutually mistaken" in fixing said sum to be the total amount that Timmons had stolen; that complainant, immediately upon ascertaining said "mutual mistake," notified defendant thereof, and, having "made additional examination," on June 7, 1922, further notified defendant that it (complainant) "rescinded the release settlement" of September 1, 1921, and at the same time tendered back to defendant the sum of $2,734.81, and demanded said bond, but defendant failed to deliver it or to inform complainant of the terms thereof; and that said additional examination was completed about July 7, 1922, and disclosed that Timmons had stolen, in addition to the $3,734.61, divers sums, that "had been overlooked through the misapprehension and mutual mistake" of complainant and defendant at the time of the settlement of September 1, 1921, as follows:

"July, 1920, Check of Continental Supply Co., St. Louis, Mo. $2,141.06
Sept., 1920, Check of C. W. O'Malley, Kansas City, Mo., 2,359.75
1920, Check of Morris & Co., Chicago, Ill. 165.
1920-1921, Checks unknown as to identity, but specifically admitted by Timmons to have been converted by him 150.
1920-1921, Checks received and secretly diverted by Timmons $5,336.17"

That on July 7, 1922, complainant notified defendant by a sworn statement of such additional deficiencies and "demanded that the defendant rescind said settlement of September 1, 1921, because of said mutual mistake of fact," and [illegible]

additional money so stolen, both of which demands defendant refused.

The prayer of the bill is that the settlement of September 1, 1921, be rescinded and held to be binding only to the extent of $9,784.81; that the original bond be deemed to be in full force and effect; and that complainant may obtain a money decree against defendant, to the extent of the bond, for the entire amount of money so stolen by Timmons.

The relief prayed for is predicated on the theory of a mutual mistake of fact at the time the alleged settlement of September 1, 1921, was made and the bond surrendered and cancelled. The bill is noticeable for the fact that neither a copy of the bond is set forth, nor its stipulations and conditions alleged under which defendant would be liable for defalcations by Timmons. Although it is alleged that the exact terms of the bond, for the reason stated, are unknown to complainant, yet it is not alleged that a copy, showing what were those terms, was not available to complainant. Even the time of the execution of the bond is not stated more definitely than that it was "prior to September 1, 1921," the day said alleged settlement was made. In that portion of the bill referring to Timmons' additional defalcations (stated to have been discovered during the making by complainant of a general audit of its books, commenced about seven months after said settlement was made) three of said defalcations are alleged to have occurred in 1920, but it is not alleged that the bond was then in force. As to the fifth item of the additional defalcations, alleged to have happened in "1920-1921," and being "for checks received and possibly diverted by Timmons," no facts are stated showing that, even if said settlement had not been made and the bond not cancelled, defendant would be liable therefor to the extent of the alleged penalty of the bond. And in our opinion, the bill does not allege facts sufficiently

additional money so stolen, all of which Thomas defalcated pre-
fixed.

The prayer of the bill is that the settlement of September 1, 1921, be rescinded and held to be binding only to the extent of $1,788.21; that the original bond be decreed to be in full force and effect; and that complainant may obtain a money decree against defendant, to the extent of the bond, for the entire amount of money so stolen by Thomas.

The relief prayed for is predicated on the theory of a mutual mistake of fact at the time the alleged settlement of September 1, 1921, was made and the bond surrendered and cancelled. The bill is defective for the fact that neither a copy of the bond in any form, nor its stipulations and conditions alleged under which defendant would be liable for defalcations by Thomas. Although it is alleged that the exact terms of the bond, for the reason stated, are unknown to complainant, yet it is not alleged that a copy, showing what were their terms, was not available to complainant. Even the time of the execution of the bond is not stated more definitely than that it was "prior to September 1, 1921," the day said alleged settlement was made. In that portion of the bill referring to Thomas' additional defalcations (stated to have been discovered during the making by complainant of a general audit of its books, commenced about seven months after said settlement was made) three of such defalcations are alleged to have occurred in 1920, but it is not alleged that the bond was then in force. As to the fifth item of the additional defalcations, alleged to have happened in "1920-1921," and being "in smaller amounts not possible [illegible] by Thomas," no facts are stated showing that, even if said settlement had not been made and the bond not cancelled, defendant would be liable thereafter to the extent of the alleged liability of the bond. And in our opinion, the bill does not allege facts sufficiently

showing that said settlement of September 1, 1921, was made under such "mutual" mistake of fact as would entitle complainant to rescind said settlement and have restored to it the original bond which was then surrendered and cancelled. (Duff v. Hutchinson, 10 N. Y. Supp. 857, 859; Brooks v. Hall, 36 Kan. 697, 700.) It rather appears from the bill that the mistake was alone complainant's, or that of the accountant employed by it, in carelessly checking up the defalcations of Timmons prior to the settlement. And it is the law that relief will not be granted in equity on the ground of a mistake of fact to a party where that mistake was induced or caused by his own carelessness or negligence. (13 Corpus Juris, p. 383, Sec. 51; Dambmann v. Schulting, 75 N. Y. 55, 64; Steinmeyer v. Schroeppel, 226 Ill. 9, 13.)

In our opinion the court was fully warranted in sustaining the demurrer to complainant's second amended bill and in dismissing the bill, and, accordingly, the decree is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

50 - 28698

MAYNARD G. RANKIN, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
CHARLES A. STEWART, Appellant.	)	COOK COUNTY.

233 I.A.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The complainant, Maynard G. Rankin, by his amended bill filed in the Circuit Court of Cook County, asked the court to set aside and remove as a cloud upon his title to certain real estate a contract for the conveyance of the same by him to the defendant, Charles A. Stewart, upon the performance by the parties of the conditions prescribed in the contract. After defendant had answered the amended bill there was a hearing before the chancellor, at which complainant introduced evidence, and finally a decree was entered in complainant's favor on January 3, 1923, in accordance with the prayer of the bill. Defendant was allowed an appeal to the Supreme Court on the ground that a freehold was involved, which appeal was duly perfected. On June 20, 1923, the Supreme Court (208 Ill. 498) adjudged that the cause had been wrongfully appealed to that court and ordered that the record be transferred to this appellate court, which was done and the cause here docketed.

The original bill was filed on December 20, 1920, and Stewart's demurrer thereto being sustained, an amended bill was filed on March 29, 1921. In the amended bill, to which Stewart filed his said answer, it is alleged that the complainant is the owner in fee simple of the premises in question (being about 40 acres of land in Cook County); that he derived title thereto by a master's deed, duly recorded, given in pursuance of a decree

No. [illegible]

[illegible] O. [illegible],
Appellee,

vs.

[illegible],
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

[illegible]

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

The complainant, [illegible], by his amended bill filed in the Circuit Court of Cook County, asked the court to set aside and remove as a cloud upon his title to certain real estate a contract for the conveyance of the same by him to the defendant, Charles [illegible] Stewart, upon the performance by the latter of the conditions prescribed in the contract. After defendant had answered the amended bill there was a hearing before the chancellor, at which complainant introduced evidence, and finally a decree was entered in complainant's favor on January [illegible], in accordance with the prayer of the bill. Defendant was allowed an appeal to the Supreme Court on the ground that a freehold was involved, which appeal was [illegible]. On June [illegible], the Supreme Court [illegible] adjudged that the cause had been erroneously appealed to that court and ordered that the record be transferred to this appellate court, which was done and the cause here docketed.

The original bill was filed on December [illegible], and Stewart's demurrer thereto being sustained, an amended bill was filed on March [illegible]. In the amended bill, to which Stewart filed his said answer, it is alleged that the complainant is the owner in fee simple of the premises in question (being about [illegible] acres of land in Cook County); that he derived title thereto by a [illegible]'s deed, duly recorded, given in pursuance of a decree

of said Circuit Court entered on October 20, 1911; that ever since he obtained said deed he has been, and is now, in possession of the land; and that the same has been, and is now, vacant and unoccupied. The contract in question, signed and sealed by the parties and dated May 17, 1916, is then set out in full. By it the receipt of $100 from Stewart is acknowledged by complainant "as part payment towards the purchase of the following real estate" (describing it) "which is hereby bargained and sold" to Stewart "for $2,100, -- $400, more or less, to be paid on the delivery of a good and sufficient warranty deed of conveyance for the same within 30 days from this date, or as soon thereafter as the deed is ready for delivery, after the title has been examined and found good, and the balance to be paid as follows: $1,600 on or before May 17, 1917, to be secured by trust deed and note or mortgage on the property." The contract further provided that should the title not prove good the $100 was to be refunded to Stewart, but that in the event Stewart should fail to perform the contract on his part "promptly at the time and in the manner above specified * * then the above $100 shall be forfeited by him as liquidated damages, and the above contract shall be and become null and void." It is further alleged in the bill that complainant furnished an abstract of title to Stewart, and subsequently tendered to him a good and sufficient warranty deed of conveyance and demanded that he accept the same and perform his part of the contract, but that Stewart failed to do so; that, in the interim, Stewart caused a copy of the contract to be recorded in the recorder's office of Cook County and that by reason thereof there is a cloud upon complainant's title; and that the contract should be declared null and void and removed as a cloud and the $100 should be declared forfeited to complainant.

All of the above allegations are sufficiently established by complainant's evidence, we think, with two exceptions. Com-

of said Circuit Court numbered as Chancery No. 1771; that ever since he obtained said deed he has been, and is now, in possession of the land; and that the same has been, and is now, vacant and unoccupied. The contract in question, signed and sealed by the parties and dated May 17, 1916, is set out in full. By it the receipt of $100 from Stewart is acknowledged by complainant "as part payment towards the purchase of the following land which" (describing it) "which is hereby bargained and sold" to Stewart "for $4,100. -- $900, more or less, to be paid on the delivery of a good and sufficient warranty deed of conveyance for the same within 30 days from this date, or as soon thereafter as the deed is ready for delivery, after the title has been examined and found good, and the balance to be paid as follows: $1,600 on or before May 17, 1917, to be secured by buyer's deed of trust or mortgage on the property." The contract further provided that should the title not prove good the $100 was to be refunded to Stewart, but that in the event Stewart should fail to perform the contract on his part "promptly at the time and in the manner above specified * * then the above $100 shall be forfeited by him as liquidated damages, and the above contract shall be and become null and void." It is further alleged in the bill that complainant furnished an abstract of title to Stewart, and subsequently tendered to him a good and sufficient warranty deed of conveyance and demanded that he accept the same and perform his part of the contract, but that Stewart failed to do so; that, in the meantime, Stewart caused a copy of the contract to be recorded in the recorder's office of said county and that by reason thereof there is a cloud upon complainant's title; and that the contract should be declared null and void and removed as a cloud and the $100 should be declared forfeited to complainant.

All of the above allegations are sufficiently established by complainant's evidence, as shown, with two exceptions. One

plainant failed, probably inadvertently, to introduce any testimony showing either that complainant was in possession of the land or that it was vacant or unoccupied. It appears from a copy of an opinion of title which was rendered to Stewart by the Chicago Title & Trust Company on August 26, 1916, that title in the land was stated to be in complainant, but subject, together with other property, to a mortgage of $3,884; that this mortgage was released in August, 1918; that subsequently, about August, 1920, complainant's agents called on Stewart and first tendered back to him the $100, originally paid by Stewart when the contract was signed, and requested a cancellation of the contract; that Stewart refused to receive the money or to cancel the contract; that thereupon said agents informed Stewart that the mortgage had been released and tendered to him a warranty deed for the premises and demanded that he comply with the terms of the contract; that Stewart examined the tendered deed, and said it was "all right" and that he would "go through with the deal" on the following Monday; but that he failed thereafter to accept the deed or to comply with the contract on his part.

At the conclusion of complainant's evidence, defendant's solicitor stated that he desired to "demur to the evidence," and asked for a dismissal of the bill, upon the ground, as stated, that "the bill says this property is vacant and unoccupied and they have not proved the title from the United States Government down, as they are required to do." No evidence was offered on behalf of defendant, except the copy of said opinion of title, which was offered and received in evidence as defendant's exhibit 1, during the hearing of complainant's evidence.

The court in the decree found in substance that the property in question is vacant and unimproved; that defendant paid complainant $100 when the contract was signed and according to

plainant failed, neglected and refused, to purchase any title away showing either that complainant was in possession of the land or that it was vacant or unoccupied. It appears from a copy of an opinion of title which was rendered to Stewart by the Chicago Title & Trust Company on March 6, 1915, that title to the land was stated to be in complainant, but subject, together with other property, to a mortgage of $1,500; that this mortgage was released in August, 1915; that subsequently, about August, 1917, complainant's agents called on Stewart and first tendered back to him the $100, originally paid to Stewart when the contract was signed, and requested a cancellation of the contract; that Stewart refused to receive the money or to cancel the contract; that thereupon said agents informed Stewart that the mortgage had been released and tendered to him a warranty deed for the premises and demanded that he comply with the terms of the contract; that Stewart examined the tendered deed, and said it was "all right" and that he would "go through with the deal" on the following Monday, but that he failed thereafter to tender the balance or to comply with the contract on his part.

At the conclusion of complainant's evidence, defendant's solicitor stated that he desired to "demur to the evidence," and asked for a dismissal of the bill, upon the ground, as stated, that "the bill says this property is vacant and unoccupied and they have not proved the title from the United States Government down, as they are required to do." No evidence was offered on behalf of defendant, except the copy of said opinion of title, which was offered and admitted in evidence as defendant's exhibit 1, during the hearing of complainant's evidence.

The court in its decree found as conclusions that the property is vacant and unoccupied; that defendant well ascertained that when the contract was signed and delivered by

its terms, but has refused to make any further payment thereunder and without any valid excuse; that when in 1920 he was tendered a good and sufficient deed he refused to accept it or to comply with the contract on his part, which he had caused to be recorded, and that he has lost and forfeited all rights which he may have had under said contract.

The main contention here made by counsel for defendant is that the demurrer to the evidence should have been sustained and the bill dismissed because complainant failed to prove either that he was in possession of the premises or that they were vacant and unoccupied. (Citing Glos v. Goodrich, 175 Ill. 20, 23; Glos v. Kemp, 192 id. 72, 73; Bieber v. Porter, 248 id. 516, 518, and other cases.) We do not think under the facts and circumstances disclosed, that the contention has any merit. In Hise v. Hise, 228 Ill. 414, 421, it is said: "Where issues of fact in a chancery case are tried by the chancellor, the parties not being entitled to a trial by jury as a matter of right, a demurrer to complainant's evidence is anomalous to the practice. * * The demurrer of that character interposed in this case should not have received the consideration of the court." And the ground stated for said demurrer to the evidence in the present case, viz., that complainant had not proved his title to the premises from the Government down, is of no force because the title to the premises was not put in issue by the pleadings but was admitted to be in complainant, as stated in the opinion of the Supreme Court (302 Ill. 598, 599). Furthermore, counsel's present contention is here raised for the first time. The certificate of evidence does not disclose that defendant, at the hearing, made any point before the entry of the decree that complainant had failed to prove possession of the premises in him or that the land was vacant and unoccupied, and such being the case the present contention must be deemed to have

its terms, but has refused to make any further payment thereunder and without any valid excuse; that when in 1930 he was tendered a good and sufficient deed he refused to accept it or to comply with the contract on his part, which he had agreed to be required, and that he has lost and forfeited all rights which he may have had under said contract.

The main contention here made by counsel for defendant is that the demurrer to the evidence should have been sustained and the bill dismissed because complainant failed to prove either that he was in possession of the premises or that they were vacant and unoccupied. (Citing King v. Gourley, 177 Ill. 70, 82; King v. Kerr, 222 Ill. 71, 76; [illegible] v. [illegible], 248 Ill. 186, 216, and other cases.) As we read and interpret the facts and circumstances disclosed, that the contention has no merit. In King v. Hill, 183 Ill. 616, 621, it is said: "Where issues of fact in a chancery case are tried by the chancellor, the parties not being entitled to a trial by jury as a matter of right, a demurrer to complainant's evidence is unknown to the practice. * * The demurrer of this character interposed in this case could not have required the consideration of the court." And the ground stated for said demurrer to the evidence in the present case, viz., that complainant had not proved his title to the premises from the Government down, is of no force because the title to the premises was not put in issue by the pleadings but was admitted to be in complainant, as stated in the opinion of the Supreme Court (308 Ill. 489, 499). Furthermore, counsel's present contention is here raised for the first time. The certificate of evidence does not disclose that defendant, at the hearing, made any point before the entry of the decree that complainant had failed to prove possession of the premises in him or that the land was vacant and unoccupied, and such being the case the present contention must be deemed to have

been waived. (Stout v. Cook, 41 Ill. 447, 449; Decker v. Stansberry, 249 id. 487, 491; Smith v. Love, 286 id. 370, 372; Hart v. Oliver, 296 id. 209, 214.) In the Decker case, supra, it is said "While it is contended that this bill will not lie to remove a cloud, by reason of the fact that the land was not vacant or the complainant was not in possession of the land at the time he filed his bill, these questions do not seem to have been raised in the trial court, so they will therefore be deemed to have been waived and will not be considered by this court."

And, under the terms of the contract and the facts disclosed, we do not think that the fact that during the hearing complainant did not again tender back to defendant the $100 paid by defendant when the contract was signed, warrants a reversal or any modification of the decree.

For the reasons indicated the decree of the Circuit Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur

60 - 28708

GORDON A. RAMSAY, administrator of the estate of HENNING HARD, deceased,
Appellee,

vs.

DOMINIC MUSCHAL,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 637

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, Dominic Muschal, seeks to reverse a judgment against him for $5,000, rendered after verdict by the Superior Court of Cook County, in an action for damages for negligently causing the death of Henning Hard, plaintiff's intestate, on January 25, 1919. The accident occurred about 5:30 o'clock A. M. at or near the southwest corner of Ashland avenue, a north and south street, and Marquette road, an east and west street, in the city of Chicago. It appears that Marquette road is a boulevard and is "really 67th Street," being one block south of 66th street.

Hard, a pedestrian, was attempting to cross Ashland avenue from west to east and was struck by a south-bound auto-truck, owned by defendant and operated by his son and employee, and received severe injuries from which he died on the same day. He left him surviving a widow and six children, four of age and two under age. He was 52 years old, was employed in a foundry and was in excellent health. His eyesight and hearing were good, and he "worked steady." He had shortly before left his home, dressed in his working clothes, and was on his way to his work, as usual, when the accident happened. Dawn had not come and it was very dark.

Plaintiff's declaration consisted of five counts, to

which defendant pleaded the general issue. During the trial three of the counts were dismissed. In one of the remaining counts general negligence in the operation of the motor vehicle is charged; in the other the negligent violation of the statute in failing "to carry on his motor vehicle two lighted lamps showing white lights visible at least 200 feet in the direction toward which said motor vehicle was proceeding" is charged. In both counts plaintiff alleged that Hard, in the act of crossing Ashland avenue, a public highway, at Marquette road, was then and there in the exercise of due care for his own safety.

Plaintiff called only one witness, August M. Kaross, as to the accident, and he (Kaross) did not see Hard immediately before or at the very time he was struck by the auto-truck. Two witnesses testified for defendant, viz: Gustav Kuschal, defendant's son, 27 years of age, and employed by the latter as the driver of the truck at the time of the accident and for six years prior thereto, and Arthur May, employed by defendant at the time as a helper on the truck to assist the driver in making early morning deliveries of bakery goods.

Kaross testified in substance that he lived at 6605 Justine street, east of Ashland avenue; that shortly before 5:30 o'clock on the morning mentioned he was standing in front of a bakery store, on the east side of Ashland avenue and the second store north of Marquette road, waiting for it to open; that by the aid of the light which came from certain stores on the west side of Ashland avenue he saw an automobile, "without any lights on," going south on the west side of Ashland avenue at about 18 or 20 miles per hour; that it did not stop at the boulevard, Marquette road, but continued south across it at the same rate of speed; that there was a boulevard light burning

which defendant filed the general issue. During the trial three of the counts were dismissed. In one of the remaining counts general negligence in the operation of the motor vehicle is charged; in the other the negligent violation of the statute in failing "to carry on his motor vehicle two lighted lamps showing white lights visible at least 200 feet in the direction toward which said motor vehicle was proceeding" is charged. In both counts plaintiff alleges that Nunn, in the use of Ashland avenue, a public highway, at Marquette road, was then and there in the exercise of due care for his own safety.

Plaintiff called only one witness, August [illegible], as to the accident, and he (Karras) did not see [illegible] immediately before or at the time that he was struck by the auto-truck. Two witnesses testified for defendant, viz. [illegible], defendant's son, 17 years of age, and employed by the latter as the driver of the truck at the time of the accident and for six years prior thereto, and [illegible], employed by defendant at the time as a helper on the truck to assist the driver in making early morning deliveries of bakery goods.

Karras testified in substance that he lived at 6836 Justine street, south of Ashland avenue; that shortly before 5:30 o'clock on the morning mentioned he was standing in front of a bakery store, on the east side of Ashland avenue and the second store north of Marquette road, waiting for it to open; that by the aid of the light which came from certain stores on the west side of Ashland avenue he saw an automobile, "without any lights on," going south on the west side of Ashland avenue at about 15 or 20 miles per hour; that it did not stop at the boulevard, Marquette road, but continued south across it at the same rate of speed; that there was a boulevard light burning

about 10 or 15 feet from the corner; that about when the automobile had reached the south cross-walk over Ashland avenue, he heard somebody yell "Oh!"; that he started to run towards the southwest corner of the intersection and as he was running he noticed that the automobile continued going in a south-easterly direction, crossed the street car tracks and stopped alongside of the east curb of Ashland avenue, about 100 feet south of the boulevard; that he found Hard lying unconscious in the street, about three to five feet south of said cross walk and between the west curb of Ashland avenue and the street car tracks; that the driver of the automobile came back and the witness helped to pick up Hard and place him on the sidewalk; that the witness asked the driver, "Where are your lights?"; and the latter replied, "This man must have knocked them out," and thereupon requested the witness "not to go hard on him;" that the witness ran for a physician, who came and administered first aid; and that subsequently a police ambulance arrived and Hard was taken to a hospital. Kaross did not at the time give the police his name and did not testify before the coroner. The first he heard about the present law suit was sometime in 1921, about two years before the trial, when Mrs. Hard called on him and asked about the accident. Mrs. Hard testified that she learned Kaross' name and address on making inquiries at said bakery store.

The testimony of defendant's witnesses is to the effect that, as the auto-truck approached and crossed Marquette road and at the time it struck Hard and thereafter, its headlights were burning; that just as it reached Marquette road the driver brought it to a full stop and then immediately started it again and propelled it at a speed not to exceed 12 miles per hour; that the accident did not happen at the south cross-walk of Marquette road, but "forty or fifty feet south of the boulevard" in Ashland avenue,

about 10 or 15 feet from the curb; that about then the auto-mobile had reached the south cross-walk near Oakland avenue, he heard somebody yell "Hey!"; that he started to run towards the southeast corner of the intersection and as he was running he noticed that the automobile continued going in a south-easterly direction, crossed the street car tracks and stopped alongside of the east curb of Oakland avenue, about 150 feet south of the boulevard; that he found Hurd lying unconscious in the street, about three to five feet south of said cross-walk and between the west curb of Oakland avenue and the street car tracks; that the driver of the automobile came back and the witness helped to pick up Hurd and place him on the sidewalk; that the witness asked the driver, "Where are your lights?", and the latter replied, "This accident never knocked them out," and thereupon suggested the witness said "put it up here on him;" that the witness ran for a physician, who came and administered first aid; and that subsequently a police ambulance arrived and Hurd was taken to a hospital. Farona did not at the time give the police his name and did not testify before the coroner. The first he heard about the present law suit was sometime in 1933, about two years before the trial, when Mrs. Hurd called on him and asked about the accident. Mrs. Hurd testified that she learned Farona's name and address on making inquiries at said bakery store.

The testimony of defendant's witnesses is to the effect that, as the auto-truck approached and crossed Bernstein road and at the time it struck Hurd and thereafter, its headlights were burning; that just as it reached crosswalk the driver brought it to a full stop and then immediately started it again and propelled it at a speed not to exceed 15 miles per hour; that the accident did not happen at the south cross-walk of Oakland avenue, but "forty or fifty feet south of the boulevard" in Oakland avenue.

when the truck was travelling south at said speed about three feet east of the west curb; that Hard came from behind a tree or post and stepped into the street in front of the moving truck; that the driver instantly put on the brakes and turned the truck sharply to the right, but not over the curb, and the "left front fender struck him in the leg and he fell facing northeast;" and that the truck was brought to a stop, alongside of the west curb, within "a foot and a half or two feet after striking the man," and remained standing there until the police ambulance came, when it (the truck) was driven to the opposite side of the street "to make room for the ambulance." On cross-examination Muschal, the driver of the truck, testified: "He was struck at the first iron post opposite the boulevard; that post is just inside of where the two sidewalks intersect at 67th and Ashland on the southeast corner; * * I must have been about two feet from him when I first saw him and he was about two steps away from the curb; * * an object like an automobile without any lights could not be seen at that time." Both of defendant's witnesses denied that plaintiff's witness, Karose, was present on the scene after the accident, or that they had ever seen him or talked with him.

It is contended by counsel for defendant that the judgment should be reversed because the verdict is manifestly against the evidence on the question of the negligence of the driver of the truck. We do not think so.

It is further contended that plaintiff did not sufficiently prove the necessary allegations contained in each count of the declaration that Hard, at and immediately before the time of the accident, was in the exercise of due care for his own safety. It is argued that due care on his part cannot be presumed from the happening of the accident, the negligence of defendant and a consideration of the human instinct of self-

when the truck was travelling south at said speed about three feet east of the west curb; that Hand came from behind a tree or post and stepped into the street in front of the moving truck; that the driver instantly put on the brakes and turned the truck sharply to the right, but not over the curb, and the "left front fender struck him in the leg and he fell facing southward;" and that the truck was brought to a stop, alongside of the west curb, within "a foot and a half or two feet after striking the man," and remained standing there until the police ambulance came, when it (the truck) was driven to the opposite side of the street "to make room for the ambulance." On cross-examination [illegible], the driver of the truck, testified: "He was struck at the first tree post opposite the boulevard; that post is just inside of where the two sidewalks intersect at 47th and Oakland on the southwest corner; * * I must have been about two feet from him when I first saw him and he was about two steps away from the curb; * * an object like an automobile without any lights could not be seen at that time." Both of defendant's witnesses denied that plaintiff's witness, Larson, was present on the scene after the accident, or that they had ever seen him or talked with him.

It is contended by counsel for defendant that the judgment should be reversed because the verdict is manifestly against the evidence on the question of the negligence of the driver of the truck. We do not think so.

It is further contended that plaintiff did not sufficiently prove the necessary allegations contained in each count of the declaration that Hand, at and immediately before the time of the accident, was in the exercise of due care for his own safety. It is argued that due care on his part cannot be presumed from the happening of the accident, the negligence of defendant and a consideration of the human instinct of self-

preservation. Several decisions of our Supreme Court are cited, wherein it is held in substance that, were there are no eyewitnesses to the occurrence and the necessary allegations of due care on the part of plaintiff's intestate cannot be proven by any direct testimony, it still devolves upon plaintiff to establish the exercise of ordinary care on the part of said intestate by the highest proof of which the case is capable. (See Newell v. Cleveland, etc. R. Co., 261 Ill. 505, 508, and cases there cited.) But this is not a case where there were no eyewitnesses to the occurrence. In Petro v. Hines, 299 Ill. 236, 239, it is said: "Where there is an eyewitness who saw the infliction of the injury, the jury must then determine from the testimony of this witness and from the facts and circumstances surrounding the injury whether deceased was careful or negligent, and in such case evidence of the habits of deceased as to care and prudence is not admissible." (Citing Chicago R. I. & P. R. R. Co. v. Clark, 108 Ill. 113.) Both of defendant's witnesses saw the accident and testified concerning it, and plaintiff's witness, Kaross, although he did not see the deceased actually struck, testified as to certain happenings and conditions both immediately before and immediately after the accident. The credibility of the testimony of each of these witnesses, taken in connection with other facts and circumstances in evidence, was for the jury, as was also the question whether, under all the facts and circumstances, the deceased was guilty of contributory negligence. Kaross' testimony flatly contradicted that of defendant's witnesses as to the speed of the truck, whether it stopped at the boulevard, whether its headlights were burning, and as to the place where the deceased was when struck. Kaross' testimony, together with the fact disclosed that deceased was on the way to his work, tended to show that deceased was struck on the south cross walk while attempting to cross Ashland avenue when it was very dark. The jury evidently believed Kaross' testimony as against that of the defendant's

presumptions. Several decisions of our Supreme Court are cited, wherein it is held in substance that, where there are no eyewitnesses to the occurrence and the necessary allegations of due care on the part of plaintiff's intestate cannot be proved by eye witness testimony, it still devolves upon plaintiff to establish the exercise of ordinary care on the part of said intestate by the highest proof of which the case is capable. (See Russell v. Cleveland, etc. Ry. Co., 314 Ill. 426, 429, and cases there cited.) But this is not a case where there were no eyewitnesses to the occurrence. In Mills v. Hines, 279 Ill. 252, 259, it is said: "Where there is an eyewitness who saw the infliction of the injury, the jury must then determine from the testimony of this witness and from the facts and circumstances surrounding the injury whether deceased was careful or negligent, and in such case evidence of the habits of deceased as to care and prudence is not admissible." (Citing Chicago, R. I. & P. Ry. Co. v. Clark, 108 Ill. 113.) Both of defendant's witnesses saw the accident and testified concerning it, and plaintiff's witness, Karnes, although he did not see the deceased actually struck, testified as to certain happenings and conditions seen immediately before and immediately after the accident. The credibility of the testimony of each of these witnesses, taken in connection with other facts and circumstances in evidence, was for the jury, as was also the question whether, under all the facts and circumstances, the deceased was guilty of contributory negligence. Karnes' testimony flatly contradicted that of defendant's witnesses as to the speed of the train, whether it stopped at the crossing, whether its headlights were burning, and as to the place where the deceased was struck. Karnes' testimony, together with the fact disclosed that deceased was on the way to his work, tended to show that the deceased was struck on the south cross walk while attempting to cross railroad tracks when it was very dark. The jury evidently believed Karnes' testimony as against that of the defendant's

witnesses on the question where deceased was when struck and whether the headlights on the automobile were burning, and, so believing, we think that they were warranted in concluding that the deceased was not guilty of contributory negligence, on the theory that the deceased had a right to assume that, at the time he attempted to cross the street, an automobile would not approach said cross walk from the north without its headlights burning, in violation of the statute. The driver of the truck testified that "an object like an automobile without any lights could not be seen at that time." While it may be that, if deceased had stopped and listened before stepping off the sidewalk, he might have heard the approaching automobile, yet "it cannot be said, as a matter of law, that a person is in fault in failing to look and listen if misled without his fault or where the surroundings may excuse such failure." (Chicago & Alton R. Co. v. Pearson, 184 Ill. 386, 391.) And in Gibbons v. Aurora, E. & C. R. Co., 263 Ill. 266, 272, it is said: "In order to hold that, as a matter of law, the deceased was guilty of contributory negligence it must appear that there was no evidence fairly tending to prove that he was in the exercise of such care and caution for his own safety as a person of ordinary prudence would exercise under the same circumstances." And in Schaffner v. Massey Co., 270 Ill. 207, 214, it is said: "While the burden of proving the deceased was in the exercise of due care for his own safety was on the defendant in error, that fact need not be established by direct and positive testimony, but may be infered from all the facts and circumstances shown to exist prior to and at the time of the injury." On the evidence contained in the present record we are unable to say that due care on the part of the deceased for his own safety was not sufficiently proved.

For the reasons indicated we think that the judgment of the Superior Court should be affirmed, and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

witnesses on the question whether deceased was seen struck and whether the headlights on the automobile were burning, and, so believing, we think that they were warranted in concluding that the deceased was not guilty of contributory negligence, on the theory that the deceased had a right to assume that, at the time he attempted to cross the street, no automobile would not approach said cross walk from the north without its headlights burning, in violation of the statute. The driver of the truck testified that "an object like an automobile without any lights could not be seen at that time." While it may be that, if deceased had stopped and listened before stepping off the sidewalk, he might have heard the approaching automobile, yet "it cannot be said, as a matter of law, that a person is in fault in failing to look and listen if struck without his fault or where the surroundings may render such failure." ([illegible] v. [illegible], 264 Ill. 386, 391.) And in Kelleher v. [illegible] Co., 323 Ill. 362, 374, it is said: "In order to hold that, as a matter of law, the deceased was guilty of contributory negligence it must appear that there was no evidence fairly tending to prove that he was in the exercise of such care and caution for his own safety as a person of ordinary prudence would exercise under the same circumstances." And in [illegible] v. [illegible] Co., 279 Ill. 347, 354, it is said: "While the burden of proving the deceased was in the exercise of due care for his own safety was on the defendant in error, that fact need not be established by direct and positive testimony, but may be inferred from all the facts and circumstances shown to exist prior to and at the time of the injury." On the evidence contained in the present record we are unable to say that due care on the part of the deceased for his own safety was not sufficiently proven.

For the reasons indicated we think that the judgment of the superior Court should be affirmed, and it is so ordered.

AFFIRMED.

Fitch and Wilson, JJ., concur.

71 - 28721

THOMAS CUSACK COMPANY, a corporation, Appellant, vs. J. R. MYERS COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 637

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 2, 1923, the plaintiff corporation filed in the Municipal Court of Chicago a complaint in forcible detainer, alleging that it is entitled to the possession of premises in the City of Chicago, viz: the "vacant property, 5961-63 and 6001-17 Broadway, having a frontage of 235 feet on Broadway and being 230 feet deep," which defendant unlawfully withholds. Defendant was duly served, but did not file an affidavit of merits or plea, the same not being required. There was a trial before the court without a jury. The finding and judgment were in favor of defendant, and this appeal followed.

It appears that the owner of the premises, Daniel G. Marks, "by S. J. Richman, his attorney," on January 24, 1922, executed and delivered to defendant a written lease of the premises for a term of three years, expiring January 24, 1925, at a rental of $1200 per year, payable in monthly installments in advance at Richman's office, in Chicago, "for the purpose of erecting and maintaining bill boards, advertising signs, sign boards and bulletin boards thereon;" that defendant took possession and was in possession of the premises at the time of the filing of the complaint. It further appears that on January 16, 1923, Marks individually executed and delivered to plaintiff a similar written lease of

the premises, and for the same purpose, for a term of two years, from January 25, 1923 to January 25, 1925, at a rental of $3,000 per year, payable in monthly installments. On February 20, 1923, Marks caused to be served on defendant a sixty days notice in writing notifying it that its tendency under the first mentioned lease would terminate on April 25, 1923, and ordering it to vacate the premises on that date.

Plaintiff called Richman as a witness and he identified the signature of Marks on said last mentioned lease, and plaintiff introduced the same in evidence. On cross-examination Richman was shown the first mentioned lease to defendant, and he testified that he had executed and delivered it for Marks under the latter's <u>verbal</u> authority; that under the lease defendant had paid to him all accrued rents to and including April 25, 1923; and that he in turn had paid said rents to Marks, who had accepted them. Plaintiff also introduced in evidence said 60 days notice of February 20, 1923, which had been served on defendant. On behalf of defendant the first mentioned lease to it was introduced in evidence, and thereupon plaintiff's attorney stated in substance that he desired to plead the Statute of Frauds thereto, on the ground that Richman, who had executed and delivered it to defendant for Marks, had no <u>written</u> authority from Marks so to do; that because of this defendant's tenancy amounted to one from month to month only, which had been legally terminated by said notice, and that under the law plaintiff was entitled to possession of the premises.

Section 2 of our Statute of Frauds and Perjuries (Cahill's Stat., 1923, Chap. 59) provides: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged

the premises, and for the same purpose, for a term of one year, from January 31, 1934 to January 31, 1935, at a rental of $1,200 per year, payable in monthly installments. On February 28, 1934, Harris caused to be served on defendant a thirty days notice in writing notifying it that its tenancy under its first written lease would terminate on April 1, 1934, and requiring it to vacate the premises on that date.

Plaintiff called Harris as a witness and he identified the signature of Burke on said last mentioned lease, and plaintiff introduced the same in evidence. On cross-examination Harris was shown the first mentioned lease to defendant, and he testified that he had executed and delivered it for Burke under the latter's signed authority; that while the lease defendant had paid to him all accrued rents up to and including April 1, 1934; and that he at once had paid said rents to Burke, who had accepted them. Plaintiff also introduced in evidence said 30 days notice of February 28, 1934, which had been served on defendant. On behalf of defendant the first mentioned lease to it was introduced in evidence, and thereupon plaintiff's attorney stated in substance that he desired to plead the Statute of Frauds thereto, on the ground that Harris, who had executed and delivered it to defendant for Burke, had no written authority from Burke so to do; that because of this defendant's tenancy amounted to one from month to month only, which had been legally terminated by said notice, and that under the law plaintiff was entitled to possession of the premises.

Section 2 of our Statute of Frauds and Perjuries (Cahill's Stat., 1933, chap. 59) provides: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged

therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." Prior to 1869 the statute did not require the authority of an agent to be in writing, but that requirement was then added. (Kelly v. Fischer, 263 Ill. 184, 187.) Under the present statute it is necessary, not only that the contract made by an agent by virtue of his authority shall be in writing, but the authority of the agent must also be in writing. (Kelly v. Fischer, supra; Fletcher v. Underwood, 240 Ill. 554, 559; Kasner v. Miesch, 204 Ill. 320, 324.) And it has been held that, in legal contemplation, a leasehold is "an interest in or concerning" lands; and that, in suits between landlord and tenant, the statute includes leases of terms for more than a year. (Chicago Attachment Co. v. Davis Sewing Machine Co., 142 Ill. 171, 180; Bear v. Moore, 178 Ill. App. 351, 356.) And it has also been held that a contract within the condemnation of the statute "cannot be made the ground of a defense, any more than of a demand." (Wheeler v. Frankenthal, 78 Ill. 124, 126; McGinnis v. Fernandes, 126 Ill. 228, 232.) It is the law that a tenant, entering into possession and paying rent monthly under a lease, which is voidable under the statute of frauds and is afterwards sought to be treated as void by the landlord, is a tenant from month to month and entitled to the statutory notice to quit. (Northwestern University v. Hughes, 183 Ill. App. 336; La Belle v. Grand Central Market Co., 172 Ill. App. 583, 586; Warner v. Hale, 65 Ill. 395, 396.) It appears that such notice was given in the present case. It is well settled the part performance of the contract or lease, such as the payment of the stipulated monthly rent for a time, will not, in an action at law, avoid the statute. (Wheeler v. Frankenthal, 78 Ill. 124, 127; Creighton v. Sanders, 89 Ill. 543, 544; Barr v. Hay, 151 Ill. 340, 344; Northwestern University v. Hughes, supra.) While it has been held that a stranger to the voidable contract cannot object to the parties being bound by it and that the Statute can only be relied

thereof, or some other person thereunto by him lawfully authorized in writing, signed by such party." Prior to 1869 the statute did not require the authority of an agent to be in writing, but that requirement was then added. ([illegible] v. [illegible], [illegible] Ill. [illegible], [illegible].) Under the present statute it is necessary, not only that the contract made by an agent on behalf of his principal shall be in writing but the authority of the agent must also be in writing. ([illegible] v. [illegible], supra; [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible].) And it has been held that, in legal contemplation, a leasehold is "an interest in or concerning" lands, and that, as between landlord and tenant, the statute includes leases of lands for more than a year. ([illegible] Co. v. [illegible] Co., [illegible] Ill. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible], [illegible].) And it has also been held that a contract within the contemplation of the statute "cannot be made the ground of a defense, any more than of a demand." ([illegible] v. [illegible], [illegible] Ill. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible].) It is the law that a tenant, entering into possession and paying rent monthly under a lease, which is void under the statute of frauds and is afterwards sought to be treated as void by the landlord, is a tenant from month to month and entitled to the statutory notice to quit. (Northwestern University v. [illegible], [illegible] Ill. App. [illegible]; La Salle v. [illegible] Market Co., [illegible] Ill. App. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible].) It appears that such notice was given in the present case. It is well settled that part performance of the contract or lease, such as the payment of the stipulated monthly rent for a time, will not, in an action at law, avoid the statute. ([illegible] v. [illegible], [illegible] Ill. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible]; Northwestern University v. [illegible], supra.) While it has been held that a stranger to the voidable contract cannot object to the parties thereto being bound by it and that the [illegible] can only be relied

upon by the parties thereto or their privies (Chicago Dock Co. v. Kinzie, 49 Ill. 289, 293; Kelly v. Kendall, 118 Ill. 650, 654; Pasquay v. Pasquay, 235 Ill. 48, 57); yet under the facts disclosed we do not think that plaintiff in this forcible detainer proceeding can be considered as such a stranger, or as not being in sufficient privity with Marks, as prevents him from claiming the benefit of the statute. (George J. Cooke Co. v. Kaiser, 163 Ill. App. 210, 212; Best v. Davis, 44 Ill. App. 624; Grundies v. Kelso, 41 Ill. App. 200; Folrath v. Hutchin, 145 Ill. App. 434.) In the Kaiser case, supra, an action of forcible detainer was commenced on May 3, 1909, by plaintiff to recover the possession of a store and basement, which was then in the possession of the Best Brewing Co. (through Kaiser, its sub-tenant) under a lease from one Godenrath, owner of the premises, expiring April 30, 1909. On March 20, 1909, Godenrath executed a lease of the premises to the plaintiff for the term of one year beginning May 1, 1909. Kaiser and the Best Brewing Co. claimed that by a verbal contract, made prior to the execution of plaintiff's lease, Godenrath had agreed to extend their lease for another year from May 1, 1909. They being still in possession on May 1, 1909, plaintiff served on them a demand for immediate possession, and, they not yielding possession, plaintiff commenced the forcible detainer proceeding. On the trial without a jury judgment for possession of the premises was rendered in favor of plaintiff. In the appellate court it was contended that plaintiff was a stranger to the verbal contract of Godenrath, extending the time of the lease of the Best Brewing Co., that such verbal contract was only voidable, that no one except the parties to it could avoid it, and that plaintiff could not successfully plead the Statute of Frauds to it. But the reviewing court held, assuming that the claimed verbal contract had in fact been made, that the trial court did not err in entering the judgment, as plaintiff had an equal right with Godenrath to claim the benefit of the Statute.

upon by the parties thereto or their privies (Illinois Trust Co. v. [illegible], 40 Ill. 309, 313; [illegible] v. [illegible], 148 Ill. 264, 269; [illegible] v. [illegible], 166 Ill. Ap. 479) but where the facts disclosed as it was taken that plaintiff is only seeking to [illegible] something can be maintained by such a stranger, it is not being in sufficient privity with either, to interpose the [illegible] claiming the benefit of the Statute. ([illegible] v. Kaliski, 123 Ill. App. 118, 121; [illegible] v. [illegible], 44 Ill. App. 431; [illegible] v. [illegible], 41 Ill. App. 303; Talcott v. [illegible], 149 Ill. 420, 424.) In the Kaliski case, supra, an action of forcible detainer was commenced on May 2, 1905, by plaintiff to recover the possession of a store and basement, which was then in the possession of the Best Brewing Co. through Kaliski, its sub-tenant under a lease from one Goldsmith, owner of the premises, expiring April 30, 1905. On March 20, 1904, Goldsmith executed a lease of the premises to the plaintiff for the term of two years beginning May 1, 1905. Kaliski and the Best Brewing Co. claimed that by a verbal contract, made prior to the execution of plaintiff's lease, Goldsmith had agreed to extend their lease for another year from May 1, 1905. They were still in possession on May 1, 1905, plaintiff served on them a demand for immediate possession, and, they not yielding possession, plaintiff commenced the forcible detainer proceeding. On the trial without a jury judgment for possession of the premises was rendered in favor of plaintiff. In the Appellate court it was contended that plaintiff was a stranger to the verbal contract of Goldsmith, extending the term of the lease of the Best Brewing Co., that such verbal contract was only voidable, that no one except the parties to it could avoid it, and that plaintiff could not successfully plead the statute of frauds to it. But the Appellate court (p. 121), assuming that the alleged verbal contract had in fact been made, held that the trial court did not err in entering the judgment, as plaintiff had an equal right with defendants to claim the benefit of the Statute.

In view of the foregoing decisions, and the facts in evidence in the present case, we are of the opinion that the trial court should have entered a judgment for possession in favor of plaintiff. And we cannot agree with the contention of defendant's counsel as to the application to this case of the principle that the Statute of Frauds, passed to prevent frauds, cannot be resorted to for the purpose of perpetrating a fraud. (Northwestern University v. Hughes, supra.) Accordingly, the facts not being disputed, the judgment of the Municipal Court will be reversed for error of law, and judgment will be entered here in favor of plaintiff for the possession of the premises.

REVERSED AND JUDGMENT HERE.

Fitch and Barnes, JJ., concur.

82 - 28733

CHARLES GOLD, doing business as Fullerton Plumbing & Heating Co., Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT OF CHICAGO.
DAVID SAUL KLAFTER, Appellant.	)	

233 I.A. 637

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover for certain plumbing repairs made at defendant's request, the reasonable prices of which repairs, it is alleged, amounted to the total sum of $188.22. Plaintiff further alleged that said prices were figured at the actual cost to him, and that he was entitled, in addition, to 25% of said sum for overhead expenses, profit, etc., making a total claim of $235.27. The main defense was that after the work had been done a dispute arose between the parties with respect to the labor and material, and the amount and character thereof, performed and furnished, and that it was agreed that defendant should pay, and plaintiff would receive, $100 for the work. Plaintiff denied that any agreement for a settlement of his claim was made. There was a trial before the court without a jury, at which each party testified, resulting in a finding and judgment for plaintiff in the sum of $188.22.

Plaintiff has not assigned any cross-errors. Counsel for defendant urges that the finding is against the evidence, and that the court should have found for the plaintiff only in the sum of $100. After reading the conflicting evidence, as shown in the abstract, we are unable to say that the finding is not sufficiently sustained by the evidence, or that the judgment should be disturbed. Accordingly, the judgment will be affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

[illegible], doing business as [illegible] Plumbing & Heating Co.,
Appellee,

vs.

[illegible],
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

283 I.A. 637

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant to recover for certain plumbing repairs made at defendant's request, the reasonable prices of such repairs, it is alleged, amounted to the total sum of $[illegible]. Plaintiff further alleges that said prices were figured at the actual cost to him, and that he was entitled, in addition, to 10% of said sum for overhead expenses, profit, etc., making a total claim of $[illegible]. The main defense was that after the work had been done a dispute arose between the parties with respect to the labor and material, and the amount and character thereof, performed and furnished, and that it was agreed that defendant should pay, and plaintiff would receive, $[illegible] for the work. Plaintiff denied that any agreement for a settlement of his claim was made. There was a trial before the court without a jury, at which each party testified, resulting in a finding and judgment for plaintiff in the sum of $[illegible].

Plaintiff has not assigned any cross-errors. Counsel for defendant urges that the finding is against the evidence, and that the court should have found for the plaintiff only in the sum of $[illegible]. After reading the conflicting evidence, as shown in the abstract, we are unable to say that the finding is not sufficiently sustained by the evidence, or that the judgment should be disturbed. Accordingly, the judgment will be affirmed.

AFFIRMED.

Wilson and Barnes, JJ., concur.

102 - 28753

CELIA LASMAN and
MARKS LASMAN,
Appellants,

vs.

JOSEPH CONNELL and
ALFRED PATTEN, Trustees,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

233 I.A. 637

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of debt on a foreign judgment, commenced in the Circuit Court of Cook County on April 6, 1922, and tried before the court without a jury, there was a finding and judgment in favor of defendants, and plaintiffs appealed.

In the declaration plaintiffs alleged that on May 28, 1919, in the Superior Court for the State of Washington, for King County, being a court of general jurisdiction created and organized under the laws of said State, they recovered a judgment against defendants, in an action of fraud and deceit, for $3,000, and costs, taxed at $184.65, as will more fully appear by the record of the judgment which still stands in full force, and that there is still due to plaintiffs the amount thereof and costs, and interest thereon, which defendants have refused to pay.

Defendants filed a plea alleging that neither defendant was served with process in the suit in Washington, or appeared therein in person or by attorney, or was a resident of the State or within the jurisdiction of the Washington court during the pendency of said suit. Plaintiffs filed a replication alleging that defendants had appeared by attorney, which appearance had been previously authorized or subsequently ratified by them.

On the trial plaintiffs introduced in evidence a copy

No. [illegible]

[illegible] and [illegible],
Appellants,

vs.

[illegible] and [illegible], [illegible],
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

[illegible] I.A. [illegible]

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

In an action of debt on a foreign judgment, commenced in the Circuit Court of Cook County on April 4, [illegible], and tried before the court without a jury, there was a finding and judgment in favor of defendants, and plaintiffs appeal.

In the declaration plaintiffs alleged that on [illegible], in the Superior Court for the State of Washington, for King County, being a court of general jurisdiction created and organized under the laws of said state, they recovered a judgment against defendants, in an action of fraud and deceit, for [illegible], and costs, taxed at [illegible], as will more fully appear by the record of the judgment which still stands in full force, and that there is still due to plaintiffs the amount thereof and costs, and interest thereon, which defendants have refused to pay.

Defendants filed a plea alleging that neither defendant was served with process in the suit in Washington, or appeared therein in person or by attorney, or was a resident of the State or within the jurisdiction of the Washington court during the pendency of said suit. Plaintiffs filed a replication alleging that defendants had appeared by attorney, which appearance had been previously authorized or subsequently ratified by them.

On the trial plaintiffs introduced in evidence a copy

or transcript of the judgment and of the execution docket entry, exemplified in the usual manner, of the Washington Court, entitled in the cause, "Celia Lesman and Marks Lesman, her husband, plaintiffs, vs: Joseph Connell and Alfred Patten, Trustees, and Calhoun, Denny & Ewing, a corporation, defendants, No. 131,567," and rested their case.

The transcript of the judgment recites that the cause having come on for hearing on May 28, 1919, and the defendants appearing by their attorneys, and a jury having been impaneled and evidence received, and the jury having returned a verdict for plaintiffs and against all defendants in the sum of $8,000, and the defendants and each of them having filed motions for judgment notwithstanding the verdict, and the court having denied the motions except that of defendant, Calhoun, Denny & Ewing, which was granted, it is ORDERED and ADJUDGED that judgment be entered against defendants, Joseph Connell and Alfred Patten, Trustees, in the sum of $8,000 and costs and disbursements to be taxed, and that the cause be dismissed as against Calhoun, Denny & Ewing. The judgment order is signed by "Clay Allen, Judge." The transcript of the execution docket entry shows that the costs were taxed in the sum of $384.65. Then follow the usual certificates of the clerk and the judge of the court, all dated December 1, 1920, and to which is annexed the seal of said Superior Court. The certificate of the judge is signed "J. T. Ronald, Judge."

Joseph Connell, called in his own behalf and that of his co-defendant, testified on direct examination that both had been residents of Cook County, Illinois, for many years past; that neither were ever residents of Washington; that neither had been personally served with process in said suit in the Washington Court, but that he had received a notice in Chicago of the pendency thereof; and that the defendant in said suit, Calhoun, Denny and

an transcript of the judgment and of the execution issued thereon, introduced in the usual manner, of the Washington Court, entitled in the cause, Thelia Duncan and Birtie Duncan, her husband, plaintiffs, vs: Joseph Connell and Alfred Patton, Trustees, and William Henry B. Tabor, a stockholder, defendants, No. 111,497, [illegible] thereof there.

The transcript of the judgment recites that the cause coming on for hearing on May 28, 1897, and the defendants appearing by their attorneys, and a jury having been impaneled and evidence received, and the jury having returned a verdict for the plaintiffs and against all defendants in the sum of $2,000, and the defendants and each of them having filed motions for judgment notwithstanding the verdict, and the court having denied the motions except that of defendant, Tabor, which was granted, it is ordered and adjudged that judgment be entered against defendants, Joseph Connell and Alfred Patton, Trustees, in the sum of $2,000 and costs and disbursements to be taxed, and that the cause be dismissed as against William Henry B. Tabor. The judgment which is signed by "Oscar Allen, Judge." The transcript of the execution docket entry shows that the costs were taxed in the sum of $162.85. There follows the usual certificates of the clerk and the judge of the court, all dated December 2, 1897, and to which is annexed the seal of said Superior Court. The certificate of the judge is signed "J. T. Ronald, Judge."

Joseph Connell, called in his own behalf and that of his co-defendant, testified on direct examination that both had been residents of Cook County, Illinois, for many years past; that neither were ever residents of Washington; that neither had been personally served with process in said suit in the Washington Court, but that he had received a notice in January of the pendency thereof; and that the defendant in said suit, Patton, never had

Ewing, was a resident of Washington and had been served with process therein. On cross-examination he was shown the original answer of Patten and himself, as trustees, entitled and filed in said Washington suit, and, he testified that the signatures to the affidavit thereto were his and Patten's signatures.

In rebuttal plaintiffs introduced said original answer. It sets forth the defense of said defendants in the Washington suit and is signed by the attorneys for the "answering defendants," and, following the signature is said affidavit, sworn to before a notary public in Cook County, Illinois. The document is exemplified in the usual manner - the certificates being dated February 9, 1923, and annexed is the seal of said Superior Court. The certificate of the judge is signed "Otis W. Brinker, Judge." In the first clerk's certificate it is stated that the annexed and foregoing is the <u>original</u> separate answer of said defendants, Connell and Patten, Trustees, in said cause, No. 121,987, "as the same appears on file under date of February 21, 1916, and ordered by this court withdrawn this day."

At the conclusion of the hearing of the foregoing evidence plaintiffs' motion for a finding in their favor was denied, but defendants' similar motion was allowed, and the entry of the judgment appealed from followed. No propositions of law were submitted to the court, nor were any of the statute laws of the State of Washington, applicable to the case, read in evidence.

In <u>Welch</u> v. <u>Sykes</u>, 3 Gilm. 197, 199, it is said:

> "Under the constitution of the United States and the laws of Congress made in pursuance thereof, the judgments <u>in personam</u> of the various states are placed on the footing of domestic judgments; and they are to receive the same credit and effect, when sought to be enforced in different states, as they by law or usage have in the particular states where rendered. A judgment, fairly and duly obtained in one State, is conclusive between the parties when sued on in another

Eding, was a resident of Washington and had been served with process therein. On cross-examination he was shown the original answer of Patton and himself, as trustees, entitled and filed in said Washington suit, and, he testified that the signatures to the affidavit thereto were his and Patton's signatures.

In rebuttal plaintiffs introduced said original answer. It sets forth the defense of said defendants in the Washington suit and is signed by the attorneys for the "answering defendants," and, following the signatures is said affidavit, made before a notary public in Cook County, Illinois. The document is exemplified in the usual manner - the certificates being dated February [illegible], 1930, and attested by the seal of said superior court. The certificate of the judge is signed "[illegible], Judge." In the first clerk's certificate it is stated that the annexed and foregoing is the original separate answer of said defendants, Connell and Patton, trustees, in said cause, No. [illegible], "as the same appears on file under date of February [illegible], 19[illegible], and ordered by this court withdrawn this day."

At the conclusion of the hearing of the foregoing evidence plaintiffs' motion for a finding in their favor was denied, but defendants' similar motion was allowed, and the entry of the judgment appealed from followed. No propositions of law were submitted to the court, nor were any of the statute laws of the State of Washington, applicable to the case, read in evidence.

In Welch v. Sykes, 3 Gilm. 197, 200, it is said:

"Under the constitution of the United States and the laws of Congress made in pursuance thereof, the judgments in personam of the various states are placed on the footing of domestic judgments; and they are to receive the same credit and effect, when sought to be enforced in different states, as they by law or usage have in the particular states where rendered. A judgment, fairly and duly obtained in one state, is conclusive between the parties when sued on in another

State. The defendant may show, in bar of an action on the record of a judgment of another State, that the judgment was fraudulently obtained, or that the court pronouncing it had neither jurisdiction of his person nor of the subject matter of the action. If he succeed in establishing any one of these defenses, the judgment is entitled to no credit, and the plaintiff is driven to his suit on the original cause of action. Bimeler v. Dawson, 4 Scam. 536, and the cases there cited. The defendant may admit the existence of the record, and set up by special plea any of these matters of defense in avoidance of the judgment. * * The plaintiff may traverse the allegations of the plea, or reply new matter in avoidance. The record of the judgment is to be used as evidence in the trial of the issue; and, when introduced, affords conclusive evidence of the facts stated in it. * * If the record states that the defendant appeared by attorney, it is conclusive proof that the attorney appeared for him, but only prima facie evidence of the authority of the attorney to appear, and which latter fact the defendant is at full liberty to disprove."

In the present case the plea of defendants was to the effect that the Washington court had wrongfully entered the judgment because of lack of jurisdiction of the persons of defendants. To this plea plaintiffs replied that defendants had appeared by attorneys. On the trial, the record of the Washington judgment, introduced by plaintiffs, disclosed the recital therein that defendants had appeared by attorneys, and this recital was prima facie evidence of the authority of the attorneys to so appear. Defendants introduced no evidence questioning that authority, and, furthermore, defendants' original answer in said Washington suit clearly showed that their appearance by attorneys was authorized. After reviewing the record we are of the opinion that the Circuit Court erred in entering a judgment for defendants, and should have entered a judgment for plaintiffs for the amount of said Washington judgment, including interest and said costs.

The main contention relied upon by counsel for defendants for an affirmance of the judgment, is that the declared public policy of Illinois is opposed to the enforcement of the Washington judgment in this State. Counsel cites in support of the conten-

State. The defendant may show, in bar of an action on the record of a judgment of another State, that the judgment was fraudulently obtained, or that the court pronouncing it had neither jurisdiction of his person nor of the subject matter of the action. If he succeed in establishing any one of these defenses, the judgment is entitled to no credit, and the plaintiff is driven to his suit on the original cause of action. *Kimmler v. Haynes*, 9 Conn. 219, and the cases above cited. The defendant may assail the jurisdiction of the court, and set it up by special plea as of these matters of defense in avoidance of the judgment. * * The plaintiff may traverse the allegations of the plea, or reply new matter in avoidance. The record of the judgment is to be used as evidence in the trial of the issue, and, when introduced, affords conclusive evidence of the facts stated in it. * * If the record states that the defendant appeared by attorney, it is conclusive proof that the attorney appeared for him, but only *prima facie* evidence of the authority of the attorney to appear, and which latter fact the defendant is at full liberty to disprove."

In the instant case the plea of defendants was to the effect that the Washington court had unlawfully entered the judgment because of lack of jurisdiction of the persons of defendants. To this plea plaintiffs replied that defendants had appeared by attorneys. On the trial, the record of the Washington judgment, introduced by plaintiffs, disclosed the recital therein that defendants had appeared by attorneys, and this recital was *prima facie* evidence of the authority of the attorneys to so appear. Defendants introduced no evidence controverting that authority, and, furthermore, defendants' original answer in said Washington suit clearly showed that their appearance by attorneys was authorized. After reviewing the record we are of the opinion that the Circuit Court erred in entering a judgment for defendants, and should have entered a judgment for plaintiffs for the amount of said Washington judgment, including interest and said costs.

The main contention relied upon by counsel for defendants for an affirmance of the judgment, is that the declared public policy of Illinois is opposed to the enforcement of the Washington judgment in this State. Counsel state in support of the conten-

tion section 6 of the Illinois Practice Act, which provides:

> "It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions in law where there is more than one defendant, the plaintiff commencing his action where either of them resides, may have his writ or writs issued directed to any county or counties where the other defendant, or either of them, may be found: Provided, that if a verdict shall not be found or judgment rendered against the defendant or defendants, resident in the county where the action is commenced, judgment shall not be rendered against those defendants who do not reside in the county, unless they appear and defend the action, nor then if the action is dismissed as to the defendant or defendants resident in the county."

This section of the Practice Act has been recently construed by our Supreme Court in the case of Ohmside v. Brewerton, 306 Ill. 365, wherein it was held in substance that where a defendant, a non-resident of the county in which the suit is pending, is joined with defendants residing in said county in an action on the case for personal injuries, the giving of a peremptory instruction to find all the resident defendants not guilty is, within the meaning of said section, such a dismissal of the case as deprives the court of jurisdiction to proceed against said non-resident defendant on the original process. And counsel argues, inasmuch as it appears that Connell and Patten, both residents of Illinois and not served with process in Washington in said Washington suit, were joined as parties defendant with Calhoun, Denny and Ewing, (which was a resident of Washington and served with process in that State) and before judgment said suit was dismissed as to Calhoun, Denny and Ewing notwithstanding the verdict, that the Washington judgment against said Connell and Patten should not be enforced in Illinois courts because of the declared public policy of this State as disclosed by said statute and decision. We do not think that there is any merit in the contention or argument. We fail to see that the statute or decision has any application to the present case. Apparently the statute applies only to actions commenced within

tion section 8 of the Illinois Practice Act, which provides:

> "It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions in law where there is more than one defendant, the plaintiff commencing his action, where either of them resides, may have his writ or writs issued directed to any county or counties where the other defendants, or either of them, may be found: *Provided*, that if a verdict shall not be found or judgment rendered against the defendant or defendants, residing in the county where the action is commenced, judgment shall not be rendered against those defendants who do not reside in the county, unless they appear and defend the action, nor then if the action is dismissed as to the defendant or defendants resident in the county."

This section of the practice act has been recently construed by our Supreme Court in the case of [illegible] v. [illegible], 306 Ill. 358, wherein it was held in substance that where a defendant, a non-resident of the county in which the suit is pending, is joined with defendants residing in said county in an action on the case for personal injuries, the giving of a peremptory instruction to find all the resident defendants not guilty is, within the meaning of said section, such a dismissal of the case as deprives the court of jurisdiction to proceed against said non-resident defendant on the original process. And counsel argue, inasmuch as it appears that Connell and Patton, both residents of Illinois and not served with process in Washington in said Washington suit, were joined as parties defendant with Holloway, Young and DeLong, (which was a resident of Washington and served with process in that state) and before judgment said suit was dismissed as to Connell, Young and DeLong notwithstanding the verdict, that the Washington judgment against said Connell and Patton should not be enforced in Illinois courts because of the declared public policy of this State as disclosed by said statute and decision. We do not think that there is any merit in the contention or argument. We fail to see that the statute or decision has any application to the present case. Apparently the statute applies only to actions commenced within

this State, and has no bearing upon the credit to be given to a judgment rendered in an action commenced in a foreign State against defendants, who, though non-residents of the foreign State and not there served with process, voluntarily entered their appearance by attorney in said action.

Defendants' counsel also contends that the declaration is fatally defective in that it failed to allege service of process on defendants, or their appearance, in the Washington suit. Such an allegation was unnecessary. In 23 Cyc. 1567 it is said: "In suing on a judgment from another State, if the declaration shows that the court rendering it was a court of record or a court of general jurisdiction, it is not necessary to aver in terms that the court had juridiction of the parties or the subject matter, or to set out the facts conferring jurisdiction, as this will be presumed until disproved." (See, also, Rae v. Hulbert, 17 Ill. 572, 577; Dunbar v. Hallowell, 34 Ill. 168, 170.)

Defendants' counsel further contends that plaintiffs' failure to introduce in evidence the laws of Washington, on the question whether under those laws the Washington court had jurisdiction of the persons of the defendants because of the filing of their sworn answer to the merits by their attorneys, warranted the judgment in favor of defendants. We do not think so. The only question raised by the pleadings was whether the Washington court had acquired jurisdiction of defendants by their said appearance and answer. The proof showed that defendants' appearance and the filing of their answer was authorized by them, and was their voluntary act. Under Illinois laws such acts would confer jurisdiction upon their persons. (Abbott v. Semple, 25 Ill. 107, 108; Finch v. Zenith Furnace Co., 245 Ill. 586, 591; People v. Chicago Title & Trust Co., 261 Ill. 392, 396.) And, although

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Defendants' counsel also contends that the declaration is fatally defective in that it failed to allege service of process on defendants, or their appearance, in the Washington suit. Such an allegation was unnecessary. In 23 Cyc. 1587 it is said: "In suing on a judgment from another State, if the declaration shows that the court rendering it was a court of record or a court of general jurisdiction, it is not necessary to aver in terms that the court had jurisdiction of the parties or the subject matter, as in such cases jurisdiction will be presumed until disproved." (See, also, Rae v. Hulbert, 17 Ill. 572, 579; Dunbar v. Hallowell, 34 Ill. 168, 170.)

Defendants' counsel further contends that plaintiff's failure to introduce in evidence the laws of Washington, on the question whether under those laws the Washington court had jurisdiction of the persons of the defendants because of the filing of their sworn answer in the suit by their attorneys, warranted the judgment in favor of defendants. We do not think so. The only question raised by the pleadings was whether the Washington court had acquired jurisdiction of defendants by their said appearance and answer. The proof shows that defendants' appearance and the filing of their answer was authorized by them, and was their voluntary act. Under Illinois laws such acts would confer jurisdiction upon their persons. (Abbott v. Semple, 25 Ill. 107, 109; [illegible] v. [illegible] Insurance Co., [illegible] Ill. [illegible], [illegible]; People v. Chicago Title & Trust Co., 261 Ill. 593, 596.) And, although

no court will take judicial notice of the laws of a foreign country or State but the same must be proved as facts (Shannon v. Wolf, 173 Ill. 253, 260), yet it is to be presumed in the absence of a contrary showing either that the common law obtains in Washington or else that the laws of that State are similar to the laws which prevail in this State. (Julliard & Co. v. May, 130 Ill. 87, 97.)

Defendants' counsel finally contends that the record of the Washington judgment was not properly authenticated. It is provided in the Statutes of the United States (Vol. 1, U. S. Comp. Stat. 1901, Sec. 905):

> "The records and judicial proceedings of the courts of any State or Territory * * shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Counsel's argument, as we understand it, is that a certificate of "the judge, chief justice, or presiding magistrate" (certifying that the attestation of the clerk is in due form) is required by the statute; that Congress had in mind courts in which only one judge sits, and also courts composed of several judges presided over by a chief justice or presiding magistrate, in which latter case the certificate must be made by the chief justice or presiding magistrate; that the certification, dated December 1, 1920, of the judges as to said Washington judgment is made by "J. T. Ronald, Judge," whereas it appears that said judgment order, entered May 28, 1919, is signed "Clay Allen, Judge," and it further appears that the certification to the answer of Connell and Patton, filed in said Washington suit, is made by "Otis W. Brinker," as "Judge" of said Superior court, and is dated February 5, 1923; that it is to be inferred from this that said Superior Court is

no court will take judicial notice of the laws of a foreign country or state but the same must be proved as facts (Kinney v. [illegible], 175 Ill. 283, 289), yet it is to be presumed in the absence of a contrary showing either that the common law obtains in such state or else that the laws of that State are similar to the laws which prevail in this State. ([illegible] & Co. v. [illegible], 150 Ill. 87, 97.)

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Counsel's argument, as we understand it, is that a certificate of "the judge, chief justice, or presiding magistrate" (certifying that the attestation of the clerk is in due form) is required by the statute; that Congress had in mind courts in which only one judge sits, and also courts composed of several judges presided over by a chief justice or presiding magistrate, in which latter case the certificate must be made by the chief justice or presiding magistrate; that the certification, dated December 1, 1909, of the judge as to said Washington judgment is made by "A. W. Frater, Judge," whereas it appears that said judgment order, entered May 26, 1909, is signed "[illegible], Judge," and it further appears that the certification to the answer of [illegible] and [illegible], filed in said Washington suit, is made by "[illegible]," as "Clerk of said Superior Court," and is dated February 1, 1910; that it is to be inferred from this that said Superior Court is

composed of more than one judge; and that, hence, it follows that said certificate to the attestation of the clerk as to said Washington judgment, not purporting to be that of the chief justice or presiding magistrate, is faulty, and there was no proper authentication of the judgment. We do not think either that counsel's inference is correct or that his conclusion follows. In view of the uncertainty of life, no inference can properly be drawn, from the fact that three judges presided over said Superior Court at different times during a period of four years, that said court is composed of more than one judge. In addition to the certificate of Judge Ronald stating that he was the judge of the court on December 1, 1920, there is also the certificate of the clerk to that effect.

Our conclusion is that the Circuit Court should have rendered judgment against defendants for the amount of the Washington judgment, $8,000, and said costs, $384.65, together with interest at the legal rate on the amount of said judgment from the date of its rendition, May 28, 1919. As the cause was tried without a jury we can here render such a judgment as the Circuit Court should have rendered. No proof was made in the Circuit Court as to what was the legal rate of interest on judgments in the State of Washington. The legal rate on judgments in Illinois is 5 per cent per annum (Cahill's Stat. Chap. 74, Sec. 3). And in the absence of proof as to the legal rate of judgments in the State of Washington the interest may be computed at the Illinois rate. (Globe Indemnity Co. v. Kesner, 203 Ill. App. 405.) Interest at the rate of 5 per cent per annum on $8,000 for four years and nine months is $1,900. Adding this sum, together with said costs, $384.65,

composed of more than one judge; and this being so, it follows that said certificate of the attestation of the clerk as to said Washington judgment, not purporting to be that of the chief justice or presiding magistrate, is faulty, and there was no proper authentication of the judgment. We do not think either that counsel's inference is correct or that his conclusion follows. In view of the uncertainty of life, no inference can properly be drawn, from the fact that three judges presided over said Washington court at different times during a period of four years, that said court is composed of more than one judge. In addition to the certificate of Judge [illegible] showing that he was the judge of the court on [illegible], there is also the certificate of the clerk to that effect.

Our conclusion is that the Circuit Court should have rendered judgment against defendants for the amount of the Washington judgment, $[illegible], and said costs, $[illegible], together with interest at the legal rate on the amount of said judgment from the date of its rendition, May [illegible], [illegible]. As the cause was tried without a jury we can here render such a judgment as the Circuit Court should have rendered. No proof was made in the Circuit Court as to what was the legal rate of interest on judgments in the State of Washington. The legal rate on judgments in Illinois is 5 per cent per annum (Cahill's Stat., Chap. 74, sec. 3). And in the absence of proof as to the legal rate of judgments in the State of Washington the interest may be computed at the Illinois rate. (Crane Lumber Co. v. Bremer, [illegible] Ill. App. [illegible].) Interest at the rate of 5 per cent per annum on $[illegible] for four years and nine months is $[illegible]. Adding this sum, together with said costs, $[illegible],

to the amount of said Washington judgment, makes the total sum of $10,234.65. Accordingly, the judgment of the Circuit Court is reversed with a finding of facts and judgment is entered here against said defendants, Joseph Connell and Alfred Patten, Trustees, for the sum of $10,234.65.

REVERSED AND JUDGMENT HERE.

Fitch and Barnes, JJ., concur.

102 - 28753

FINDING OF FACTS.

We find as facts in this case that, in said suit in the Superior Court of the State of Washington for King county against the defendants and in which suit said Superior Court entered judgment against them, the general appearance of said defendants was entered, and their answer to the merits was filed, by attorneys with defendants' consent and authority.

111 - 28763

JOSEPH F. LARKIN, Appellee, vs. BENJAMIN F. BUSH, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 638

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $7,072.50, entered against him by the Municipal Court of Chicago on March 31, 1923, upon a directed verdict in plaintiff's favor, in an action on a promissory note for $6,000, dated March 6, 1920, signed by defendant and payable on demand to the order of C. W. White with interest at 6% per annum. The note bore the endorsement of said White, and plaintiff claimed in his statement of claim, filed May 24, 1921, that the amount of the note and accrued interest was due him, as endorsee of the note before demand made upon defendant, and which demand, he further claimed, was made on May 23, 1920, and refused.

In defendant's second amended affidavit of merits several defenses are set forth, viz: (1) that plaintiff was not a holder in due course of the note; (2) that there was no consideration for the note; and (3) that the note had been "fully paid and discharged" by the delivery by defendant of a certain mentioned deed. In that portion of the affidavit relating to the third defense, and which also bears upon the second, it is alleged in substance that the note was delivered by defendant to White at the latter's request but was not given for any present consideration; that White and defendant were both interested in a piece of property situated on the northeast corner of 61st

121 - 8093

[illegible], Appellee,

vs.

[illegible], Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 553

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $[illegible], entered against him by the Municipal Court of Chicago on March [illegible], upon a directed verdict in plaintiff's favor, in an action on a promissory note for $5,000, dated March 6, 1920, signed by defendant and payable on demand to the order of H. F. Thide with interest at 6% per annum. The note bore the endorsement of said Thide, and plaintiff claimed in his statement of claim, filed May 14, [illegible], that the amount of the note and accrued interest was due him, as endorsee of the note before demand made upon defendant, and which demand, he further claimed, was made on May [illegible], and refused.

In defendant's second amended affidavit of merits several defenses are set forth, viz: (1) that plaintiff was not a holder in due course of the note; (2) that there was no consideration for the note; and (3) that the note had been "fully paid and discharged" by the delivery by defendant of a certain quitclaim deed. In that portion of the affidavit relating to the third defense, and which also bears upon the second, it is alleged in substance that the note was delivered by defendant to Thide at the latter's request but was not given for any payment consideration; that Thide and defendant were both interested in a piece of property situated on the northwest corner of 51st

street and Harper avenue, Chicago, the title to which was in defendant; that White requested that defendant deliver to him (White) the note in question for the reason that defendant might die before said property was disposed of and the note could be used to protect White's interest in the property; that after the delivery of the note the property, on April 6, 1921, at White's request, was transferred by deed of defendant and wife to the State Bank of Chicago, as trustee; that said transfer was made to close a deal made between White and Lackner, Butz & Co.; that when said transfer was made, through White, the latter stated to defendant that he would return the note in question to defendant but he never did so; that plaintiff had knowledge of all the facts and circumstances concerning the transactions between defendant and White, and knew that White had no interest whatever in the note after said transfer; and that the note has been fully paid and discharged by the delivery by defendant of said deed.

On the trial plaintiff introduced the note in evidence and rested his case. Defendant, to sustain his defenses as pleaded, called Francis A. Lackner and J. M. Hammer as witnesses and they testified. Defendant also testified in his own behalf and he was cross-examined at length. Certain documentary evidence was introduced, but the court refused to admit in evidence White's written receipt (given to Lackner, Butz & Co. in January, 1922, several months after the present suit was commenced) for a certain warranty deed, and also refused to admit in evidence White's partially unpaid note for $5,000, dated April 10, 1920 (delivered after the giving of the note sued upon) and payable on demand to the order of defendant. At the conclusion of defendant's evidence the court, on plaintiff's motion, directed the jury to return a verdict for plaintiff for $7,072.50, being the face of the note, $6,000, and accrued interest of $1072.50. Such a verdict was

street and Kenyon avenue, Chicago, the title to which was in defendant; that White requested that defendant deliver to him (White) the note in question for the reason that defendant might die before said property was disposed of and the note could be used to protect White's interest in the property; that after the delivery of the note the property, on April 6, 1921, at White's request, was transferred by deed of defendant and wife to the State Bank of Chicago, as trustee; that said transfer was made to close a deal made between White and Lechner, Roth & Co.; that when said transfer was made, through White, the latter stated to defendant that he would return the note in question to defendant but he never did so; that plaintiff had knowledge of all the facts and circumstances concerning the transactions between defendant and White, and knew that White had no interest whatever in the note after said transfer; and that the note has been fully paid and discharged by the delivery by defendant of said deed.

On the trial plaintiff introduced the note in evidence and rested his case. Defendant, to sustain his defense as pleaded, called Francis A. Lechner and J. H. Kenney as witnesses and they testified. Defendant also testified in his own behalf and he was cross-examined at length. Certain documentary evidence was introduced, but the court refused to admit in evidence White's written receipt (given to Lechner, Roth & Co. in January, 1922, several months after the present suit was commenced) for a certain warranty deed, and also refused to admit in evidence White's partially unpaid note for $5,000, dated April 15, 1920 (delivered after the giving of the note sued upon) and payable on demand to the order of defendant. At the conclusion of defendant's evidence the court, on plaintiff's motion, directed the jury to return a verdict for plaintiff for $7,072.50, being the face of the note, $6,000, and accrued interest of $1072.50. Such a verdict was

returned and the judgment followed.

Among the points urged by counsel for defendant for a reversal of the judgment are (1) that the court erred in directing a verdict for plaintiff, and (2) in refusing to admit in evidence White's said written receipt and White's said $5,000 note to defendant.

After a careful examination of the evidence we have reached the conclusion that the court erred in directing a verdict for plaintiff and that the judgment should be reversed and the cause remanded. Inasmuch as the cause must be submitted to another jury we will not enter into a full discussion of the evidence. It sufficiently appears, we think, that defendant's evidence tended to show that plaintiff was not a holder in due course of the note, and that the question is whether there was any evidence tending to prove defendant's plea of no consideration for the note. We think there was some evidence of no consideration and that the court should have allowed the case to go to the jury on that issue. In Frazer v. Howe, 106 Ill. 563, 573, it is said: "If there is no evidence before the jury, on a material issue, in favor of the party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative; but when there is such evidence before the jury, it must be left to them to determine its weight and effect." In Bechtel v. Marshall, 283 Ill. 486, 490, it is said: "The court, in giving the instruction as to the verdict, probably considered that the evidence in question was not competent, but it was not stricken out, and with that evidence still in the record before the jury we do not think the court, under the decisions in this State, was authorized to direct a verdict for the plaintiff. This court has said that the fact that the

reversed and the judgment followed.

Among the points urged by counsel for defendant for a reversal of the judgment are (1) that the court erred in directing a verdict for plaintiff, and (2) in refusing to admit in evidence Hilbe's said written receipt and Shibe's said [illegible] note to defendant.

After a careful examination of the evidence we have reached the conclusion that the court erred in directing a verdict for plaintiff and that the judgment should be reversed and the cause remanded. Inasmuch as the cause must be submitted to another jury we will not enter into a full discussion of the evidence. It sufficiently appears, we think, that defendant's evidence tended to show that plaintiff was not a holder in due course of the note, and that the question is whether there was any evidence tending to prove defendant's plea of no consideration for the note. We think there was some evidence of no consideration and that the court should have allowed the case to go to the jury on that issue. In Frazer v. Howe, 106 Ill. 563, 573, it is said: "If there is no evidence before the jury, on a material issue, in favor of the party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative; but when there is such evidence before the jury, it must be left to them to determine its weight and effect." In Mitchell v. Marschall, 251 Ill. 425, 430, it is said: "The court, in giving the instruction as to the verdict, probably considered that the evidence in question was not competent, but it was not stricken out, and with that evidence still in the record before the jury we do not think the court, under the decisions in this state, was authorized to direct a verdict for the plaintiff. This court has said that the fact that the

court, upon weighing all the evidence, may be of the opinion that a verdict against the plaintiff would have to be set aside if returned, does not justify the directing of a verdict for the plaintiff if there is any evidence tending to support the defendant's contentions with reference to the controverted questions of fact material to the right of recovery." (Citing Bailey v. Robison, 233 Ill. 614.)

As to counsels' second point, while we think that White's written receipt for said deed was properly refused admission in evidence as having no bearing upon the issue of no consideration for the note sued upon, we are inclined to think that, in view of defendant's testimony and other evidence, the fact that White gave his demand note for $5,000 to defendant, for money loaned, at a date subsequent to the making of defendant's note sued upon, had some bearing upon the question at issue, and that said White note should have been admitted in evidence. It seems somewhat strange, White having in his possession defendant's demand note for $6,000, now claimed to be a valid note, that when White borrowed $5,000 from defendant, he did not credit defendant with $5,000 as a payment on defendant's said note rather than give his demand note for $5,000. It is of course possible that there was a reason for this somewhat unusual action, which the present record does not disclose and which can be made to appear on the new trial.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

court, upon weighing all the evidence, may be of the opinion that a verdict against the plaintiff would have to be set aside if returned, does not justify the directing of a verdict for the plaintiff if there is any evidence tending to support the defendant's contentions with reference to the controverted questions of fact material to the right of recovery." (citing Bailey v. Robison, 233 Ill. 614.)

As to counsels' second point, while we think that White's written receipt for said deed was properly refused admission in evidence as having no bearing upon the issue of no consideration for the note sued upon, we are inclined to think that, in view of defendant's testimony and other evidence, the fact that White gave his demand note for $3,000 to defendant, for money loaned, at a date subsequent to the making of defendant's note sued upon, had some bearing upon the question at issue, and that said White note should have been admitted in evidence. It seems somewhat strange, White having in his possession defendant's demand note for $3,800, now claimed to be a valid note, that when White borrowed $3,000 from defendant, he did not credit defendant with $3,000 as a payment on defendant's said note rather than give his demand note for $3,000. It is of course possible that there was a reason for this somewhat unusual action, which the present record does not disclose and which can be made to appear on the new trial.

For the reasons indicated the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Brown, JJ., concur.

124 - 28776

BOSTON J. PRINCE,
Appellee,

vs.

KATHERINE J. PRINCE,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 638

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 17, 1922, complainant filed his bill for divorce in the Superior Court of Cook County against defendant, alleging that the parties were married at Newport, Kentucky, in May, 1905; that for several years prior to the filing of the bill they, as husband and wife, resided at Chicago, Illinois; and that on January 30, 1922, and on two previous occasions, defendant committed adultery at Chicago with a man named Smith. Defendant filed an answer, denying the adultery charges, and also filed a cross-bill, praying for the annulment of the marriage upon the ground, as alleged, that prior thereto complainant had been married in the State of Texas to one Fannie Prince, who was still living and undivorced from complainant at the time of the Kentucky marriage, and of which facts defendant was not informed until about January 30, 1922. Complainant, in his answer to the cross-bill, denied that he had ever been married to Fannie Prince. On the two issues there was a somewhat protracted trial before a jury, resulting in the return of verdicts finding defendant guilty of adultery as charged in the bill, and also finding complainant not guilty as charged in the cross-bill. After defendant's motion for a new trial had been overruled the court, on June 12, 1923, entered a decree dismissing the cross-bill, and granting a divorce to complainant upon the ground of defendant's adultery. This appeal followed.

It appears from the evidence that on January 30,1922,

and for several years prior thereto, complainant was the pastor of a colored Baptist church on North Leavitt street, Chicago, and the co-respondent was the chairman of the board of trustees thereof.

The main point urged by counsel for defendant is that the verdicts and decree are manifestly against the weight of the evidence. We do not think so. As to the verdict concerning defendant's alleged adultery we think that the same was amply sustained by the evidence and that complainant was entitled to a divorce upon that ground. As to the charge in defendant's cross-bill that, when the parties were married at Newport, Kentucky, on May [illegible], 1903, complainant had another wife living and undivorced, we do not think that the charge was sufficiently sustained by the evidence. The court allowed in evidence certain documents, offered by defendant, purporting to show that on November [illegible], [illegible], one "B. J. Prince" was united in marriage to one Fannie Smith in Guadalupe county, Texas; that on May 25, 1904, in the district court of said Guadalupe county, one Fannie Prince, on her petition filed October 23, 1903, was granted a divorce from one "B. J. Prince" upon the ground of desertion; that in January, [illegible], in the district court of Gonzales county, Texas, one "Benjamin J. Prince" filed his petition for the annulment of his marriage "on January 10, 1902" with one Fannie Prince; and that in January, 1906, said last mentioned petition was dismissed at plaintiff's costs. But it was not shown either that the "B. J. Prince" or the "Benjamin J. Prince," mentioned in said proceedings, was the same person as the complainant, Boston J. Prince, in the present case.

It is also urged that the court erred in refusing to allow defendant to testify to certain admissions claimed to have been made by complainant in a conversation had with her during their cohabitation concerning complainant's alleged prior marriage. This ruling was made after defendant had given her testimony denying

and the several years prior thereto, complainant was the pastor of a [illegible] church on North [illegible] street, Chicago, and the co-respondent was the daughter of one of [illegible] [illegible].

The main point urged by counsel for defendant is that the verdict and decree are manifestly against the weight of the evidence. We do not think so. As to the charge concerning defendant's alleged adultery we think that the same was amply sustained by the evidence and that complainant was entitled to a decree upon that ground. As to the charge [illegible] [illegible], that, when the parties were married at [illegible], [illegible], on May 26, 1907, complainant had another wife living and undivorced, we do not think that the charge was sufficiently sustained by the evidence. The court allowed in evidence certain documents, offered by defendant, purporting to show that on December [illegible], 1899, one "[illegible]" was united in marriage to one [illegible] with [illegible] county, [illegible]; that on May [illegible], 1900, in the circuit court of said [illegible] county, one [illegible], on her petition filed October [illegible], 1899, was granted a divorce from one [illegible] upon the ground of desertion; that in January, 1907, in the circuit court of [illegible] county, [illegible], one "Benjamin F. [illegible]" filed his petition for the annulment of his marriage on January [illegible], 1900, with one [illegible], and that in January, 1907, said last mentioned petition was dismissed at plaintiff's costs. But it was not shown either that the "[illegible]" or the "Benjamin F. [illegible]," mentioned in said proceedings, was the same person as the complainant, [illegible], in the present case.

It is also urged that the court erred in refusing to allow defendant to testify to certain statements claimed to have been made to complainant in a conversation [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

the charges of adultery, but before any attempt had been made by her attorney to show by evidence aliunde complainant's alleged prior marriage to said Fannie Smith, and that she was still living and undivorced when the Kentucky marriage was performed. As defendant had admitted the Kentucky marriage in her pleadings and while testifying as a witness, every presumption was to be indulged in favor of its validity, and the burden was upon her to show its invalidity by competent proof of complainant's prior marriage to Fannie Smith and that the latter was living and undivorced from complainant when the Kentucky marriage was performed. (Schmisseur v. Beatrie, 147 Ill. 210, 214; Potter v. Clapp, 203 Ill. 592, 600.) And said prior marriage was required to be first clearly established by other evidence before defendant could properly testify to any admission claimed to have been made by complainant as to said marriage or as to said Fannie Smith being living and undivorced when the Kentucky marriage was performed. (Cole v. Cole, 153 Ill. 585, 589; Lowery v. People, 172 Ill. 466, 471; Hoch v. People, 219 Ill. 265, 279.) In our opinion the court did not commit any prejudicial error in the ruling complained of.

The decree of the Superior Court should be affirmed, and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

179 - 28761

EDWARD GEHRING,
Appellee,

vs.

CHARLES HALLMAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A. 638

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment against him for $[illegible] rendered by the Municipal Court of Chicago, in an action for damages to plaintiff's automobile, occasioned by its collision with defendant's automobile in the intersection of North Leavitt street, a north and south street, and Eastwood avenue, an east and west street, in the City of Chicago. The accident happened about dusk on the evening of August 7, 1920. The amount of the damage done to plaintiff's car was not in dispute. Plaintiff sued defendant to recover for that damage, and shortly thereafter defendant sued plaintiff in the same court for the damage done to defendant's car. By agreement the two suits were consolidated for trial, and evidence was heard by a jury on February 6, 1922, resulting in a verdict in plaintiff's favor for $[illegible] and the entry of the judgment appealed from.

The only point made and argued by defendant's counsel is that the evidence clearly shows such contributory negligence on the part of plaintiff in the driving of his car at and before the time of the collision as bars any recovery for the damage done to his car. The evidence is conflicting as to the details of the accident. Plaintiff was a witness in his own behalf and his testimony was corroborated in essential particulars by that of Albert F. Schmidde, plaintiff's brother-in-law and a passenger in his car at the time. Defendant's son, about 24 years of age, was driving

defendant's car, and defendant and his two younger sons were passengers therein, and all testified in defendant's behalf. Plaintiff testified in substance that he was driving his car in an easterly direction on the south side of Eastwood avenue at a speed not exceeding 15 miles per hour; that as he approached North Leavitt street he reduced his speed to about 8 or 10 miles per hour; that just as he reached the intersection he noticed defendant's car a short distance north of the intersection and moving south on the east side of North Leavitt street; that, having reached the intersection first and believing he had the right of way (as he had), he continued going east and across North Leavitt street at said diminished speed, when suddenly defendant's car, travelling south very rapidly in the east half of said intersection, was upon him and he endeavored to avoid a collision by turning quickly towards the south, but was unable to do so; and that the two cars "sideswiped," or collided "on the slant," near the southeast corner of the two streets, and defendant's car came to a stop, south of where his car stopped, and partly on the sidewalk east of the east curb of North Leavitt street and south of the south curb of Eastwood avenue. All of defendant's witnesses testified that the collision occurred near the southwest corner of the two streets, and that plaintiff's car, immediately following the impact, pushed defendant's car across North Leavitt street and to the southeast corner, although the latter car was much heavier than plaintiff's. Alfred Hallman, the driver of defendant's car, testified in substance that he was moving south on the west side of North Leavitt street; that when he reached the intersection he slowed down to a speed of about 8 miles per hour, and, not noticing plaintiff's car approaching from the west, "just coasted" south across Eastwood avenue; that when he was just a little south of the center of Eastwood avenue he first noticed plaintiff's car, then about 10 feet away and moving

defendant's car, and testified that his two younger sons were passengers therein, and all testified to defendant's benefit. Plaintiff testified in substance that he was driving his car in an easterly direction on the south side of Oakwood Avenue at a speed not exceeding 25 miles per hour; that as he approached North Lincoln street he reduced his speed to about 8 or 10 miles per hour; that just as he reached the intersection he noticed defendant's car a short distance north of the intersection and moving south on the west half of North Lincoln street; that, having reached the intersection first and believing he had the right of way (as he had), he continued going east and crossed North Lincoln street at said reduced speed, when suddenly defendant's car, travelling south very rapidly in the west half of said intersection, ran upon him and he endeavored to avoid a collision by turning sharply toward the south, but was unable to do so; and that the car was "telescoped," or pinned "on the stand," near the southwest corner of the two streets, and defendant's car came to a stop, part of which was upon the sidewalk, and partly on the sidewalk west of the west curb of North Lincoln street and north of the south curb of Oakwood Avenue. All of defendant's witnesses testified that the collision occurred near the southwest corner of the two streets, and that plaintiff's car, then slowly following the impact, pushed defendant's car nearly three lengths across and on the southwest corner, although the impact did not cause [illegible] occupants. Lloyd Dalland, the driver of defendant's car, testified in substance that he was driving south on the west side of North Lincoln street; that when he reached the intersection he was going at a speed of about 8 miles per hour, and, not noticing plaintiff's car approaching from the west, [illegible]; that when he was just a little north of the [illegible] of Oakwood Avenue he first noticed plaintiff's car, [illegible]

at a speed of about 15 miles per hour; and that immediately thereafter the collision occurred near the southwest corner of the two streets. Schmudde, plaintiff's witness, testified in rebuttal that immediately after the collision he spoke to Alfred Hallman about plaintiff's car having the right of way, and that Hallman said: "We were going north and south; I don't have to stop for anyone going east or west."

In view of the foregoing testimony we are unable to say that the verdict is manifestly against the weight of the evidence on the question of fact whether plaintiff was guilty of contributory negligence at and before the time of the collision, and, hence, we are not disposed to disturb the verdict and judgment. Contributory negligence is usually a question of fact for the jury (*Mueller* v. *Phelps*, 252 Ill. 630, 634); and "only becomes one of law where the undisputed evidence establishes that the accident resulted from the negligence of the injured party." (*Heidenreich* v. *Bremner*, 260 Ill. 439, 452.) In the present case, under the conflicting evidence, the question was one of fact.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Fitch, J., concurs.

MR. JUSTICE BARNES DISSENTING:

I think the preponderance of evidence is for defendant's claim that the collision took place at or near the southwest corner of the intersection and that plaintiff's car ran into defendant's at that point, and that plaintiff would not have run his car into defendant's so close to that corner had he observed reasonable care as he came to the crossing.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

63 - 28712

FRANK OLSEWSKI, a Minor, by Frank Olesewski, his next friend, Defendant in Error,

vs.

NICK KWASNIEWSKI and WILLIAM DAVIDAITIS, Defendants.

WILLIAM DAVIDAITIS, Plaintiff in Error.

ERROR TO THE SUPERIOR COURT OF COOK COUNTY.

233 I.A. 638

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was one of two defendants found jointly liable in an action on the case for injuries sustained by plaintiff, a minor, from collision with an automobile at the intersection of Ashland avenue and 17th street, Chicago.

The automobile was of the type called a limousine car, having closed doors, glass windows, and three seats. It was being driven south on the west side of Ashland avenue by Nick Kwasniewski, the other defendant. Davidaitis, plaintiff in error, and his wife were riding in the back seat, she at his right, and a witness for him in the middle seat. The boy, about nine years old, was going west on the south crossing of 17th street with two other boys about the same age. There were double street car tracks on Ashland avenue. The evidence tends to show that as the boys approached the car tracks a street car and a lumber team ahead of it were going north, that the boys waited for them to pass, that plaintiff's companions stopped for the automobile also to pass, but that plaintiff ran ahead and came into collision with the automobile near the southwest corner of the intersection.

The declaration is in four counts, the first charging general negligence in propelling, operating and maintaining the automobile; the second, wilful and wanton negligence in so propelling, etc., and the third and fourth, a violation of the statute with

respect to speed.

Each defendant pleaded the general issue and specially denied ownership and operation of the car.

It is not questioned that Nick was hired to drive Davidaitis on the trip when the accident happened. While the testimony is conflicting as to whether the car belonged to the former or the latter, we think there is a clear preponderance of evidence that it belonged to the former and that he was specially hired to drive his own car on the occasion in question. On that state of facts the relation between the driver and plaintiff in error not being that of master and servant, there was no liability of plaintiff in error under the doctrine of respondeat superior. There is, therefore, no basis for the charge of negligence against him unless the evidence shows he was chargeable with the duty of warning the driver against an apparent danger or an unreasonable and dangerous rate of speed in view of the time, place and circumstances. There was no evidence tending to disclose a dangerous situation to plaintiff in error except as to speed of the car. That testimony was fragile. While one of the boys said the automobile was going "fast," yet he also said that he did not see it before it struck plaintiff. Only one other witness for plaintiff testified to the speed of the car, and he was not in a good position to judge of it. He was attending to business in a vacant lot at the southwest corner of the intersection, standing about twenty-five feet south of the south line and about ten feet west of the west line of the intersection if each line were extended. He testified that he saw an automobile coming from the north, and so almost directly toward him, at a speed of twenty to twenty-five miles an hour, and also that it slowed down a little. There was also a discrepancy in the testimony as to how far the automobile ran after the collision, most of the testimony being to the effect that it ran only a few feet. The three men in the automobile also testified to circumstances which caused the

automobile to stop in the intersection and that it proceeded slowly across the street thereafter. While plaintiff's said witness failed to notice the street car or horse and wagon, one of the boys testifying for plaintiff said that they waited for a street car to pass from the south, and both defendants testified that there was a street car coming from the south, and that in front of it were a horse and a wagon loaded with lumber, which turned to the west in the intersection across the west car tracks and then back into them. Owing to this movement the automobile stopped, the driver testifying that he was uncertain whether the horse and wagon were to continue going west. The three men in the automobile testified to its stopping for a wagon to get out of the way, and that it then went slowly across the intersection, and that the boy came running from the east. Nearly all of the witnesses testified to his running, and plaintiff's said witness and all four of the inmates of the automobile said he ran into the left side or fender of the car. Only one witness, who was going south on the west side of Ashland avenue and was behind the automobile, testified otherwise.

We think the testimony tended strongly to show that when the automobile passed the wagon it was about half way across the intersection, and that while the other two boys stopped for it to pass, plaintiff ran quickly ahead of them and into the automobile just as it reached the south side of the crossing, and that while the driver sounded his horn the moment the boy was visible, and turned his car to the curb, it was too late to avoid the accident. Whether or not there was any negligence on the part of the driver, who does not seek a review of the judgment, there is a clear preponderance of evidence against negligence on the part of plaintiff in error. He was not only sitting in the back seat, in no position to direct or control the driver on a moment's notice, but under the circumstances and the preponderant evidence as to the speed of the car, he had no occasion to caution the driver. It is highly improbable

that in the distance from where the car stopped to the point of collision the car attained a speed of twenty to twenty-five miles an hour. As the evidence does not support liability on the part of Davidaitis, and the judgment is against both defendants, being a unit, and erroneous as to one, it must be reversed as to both. (Valley v. Illinois Tunnel Co., 173 Ill. App. 33[illegible], 336, and cases there cited.)

Defendant in error says the question of joint liability can not be raised because no issue was formed thereon. But as is said in Purington-Kimball Brick Co. v. Eckman, 107 Ill. App. 1[illegible], an error alleging joint negligence in the declaration can be reached neither by demurrer nor by plea in abatement. The truth or falsity of the allegation must be determined by the facts shown on the trial, and the proper plea for those not guilty is the general issue, the reason being that a tort may be treated as joint or several. As we understand it, a defendant in a tort case unconnected with a contract does not admit joint liability by not specially pleading misjoinder. Where torts may be committed by several it is familiar law that they may be sued jointly or severally, and that judgment may be taken against one or more, but that the proof must sustain the charge as to those found guilty. Even where notice of misjoinder is required to be given by statute, it has been held that the plaintiff is not entitled to a verdict against all defendants, unless such verdict is warranted by the evidence, but only against such as are proved to be liable. (Patterson v. Loughbridge, 42 N. J. L. 21.)

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

85 - 28736

FASHION AUTOMOBILE STATION,
a Corporation,
Appellee,

vs.

LIONEL A. SHERWIN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 638

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover for storage of defendant's automobile from October, 1921, to April, 1922, inclusive, and for supplies and labor furnished in repairs of the same, itemizing each charge and the credits in his statement of claim. From a judgment for $135.50, the balance of the amount so claimed, defendant appeals. Defendant denied generally any indebtedness, claiming a set-off of $150. The affidavit also sets forth that defendant paid all charges in full for the months of October, 1921, to February, 1922, inclusive, and that the car was not in plaintiff's garage during the months of March and April, and only for a few days during October, 1921.

A monthly charge of $50 for storing the car was not disputed. Nor were any of the items for repairs and supplies as set forth in the statement of claim, and in like manner in plaintiff's ledger, by which charges seem to have been settled, disputed or questioned. The only points at issue were whether there should be any charge for storage during the months of March and April, and for more than eight days in October, and whether defendant was entitled to a set-off. The proof on these points was more or less unsatisfactory, plaintiff's president testifying that there was an agreement for $50 a month for storage, without stating when storage began, and that he merely agreed to send for plaintiff's car and sell it for him, but never agreed to buy it,

and defendant testifying that the car was in storage only eight days in October and not at all in March and April, and that plaintiff agreed to buy his car at the price of $150. It appeared, however, that plaintiff sent for the car but that the people at the garage where it was stored refused to surrender it, claiming that there was a charge against it. It does not appear that defendant ever delivered or made a legal tender of delivery of the car to the plaintiff, and that upon his own theory of the sale he had never carried out his part of the executory contract. There seems to be no valid basis for the claim of set-off. There was, on the other hand, no specific proof that the car was in storage longer than eight days in October or during the months of March and April. However, it appears there were undisputed charges for repairs made in March and April, and the proof with regard to them had some tendency to show that the car was still kept in the garage during these months. On such evidence we are not satisfied to affirm the judgment or to render a new one. Accordingly the judgment will be reversed and the cause remanded for a new trial and the presentation of satisfactory proof upon these disputed points.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

105 - 28756

LEE KLINE,
Plaintiff in Error,

vs.

H. C. BAY COMPANY,
a corporation,
Defendant in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

238 I.A. 63

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ brings for review the dismissal of a bill in equity filed by plaintiff in error for an accounting, based upon a contract whereby he was to sell upon commission piano players manufactured by defendant in error.

The only item in controversy is for a commission of six per cent claimed by complainant as due him for the sale of 1941 players to Rudolph Wurlitzer & Company of Cincinnati. The master to whom the cause was referred found that there was due him as commission for such sales $19,365.90, and recommended a decree therefor with interest from April 1, 1919, when the contract by its terms expired. The chancellor sustained defendant's exceptions to the report and dismissed the bill for want of equity except as to a small account not in controversy.

The contract between the parties was in writing and entered into March 30, 1917. Its provisions, so far as pertinent to the matters in controversy are that complainant was to market the entire product of the defendant company, devote his entire time thereto, turn over to defendant daily all orders for approval and all money, notes or leases received by him, and was to receive six per cent of the gross amount of the accepted orders. He was to pay certain expenses, and defendant office rent and certain other expenses. The agreement was to run for two years from April 1, 1917, unless otherwise mutually agreed upon.

[illegible] - [illegible]

[illegible], Plaintiff in Error,	)	ERROR TO
vs.	)	CIRCUIT COURT,
[illegible] COMPANY, a corporation, Defendant in Error.	)	COOK COUNTY.

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This suit brings for review the dismissal of a bill in equity filed by plaintiff in error for an accounting, based upon a contract whereby he was to sell upon commission piano players manufactured by defendant in error.

The only item in controversy is for a commission of six per cent claimed by complainant as due him for the sale of [illegible] players to [illegible] a company of Cincinnati. The master to whom the cause was referred found that there was due him as commission for such sales $[illegible], and recommended a decree therefor with interest from April 1, 1919, when the [illegible] the [illegible]. The chancellor sustained defendant's exceptions to the report and dismissed the bill for want of equity except as to a small amount not in controversy.

The contract between the parties was in writing and entered into March [illegible], 1917. Its provisions, so far as pertinent to the matters in controversy, are that complainant was to market the entire product of the defendant company, devote his entire time thereto, turn over to defendant daily all orders for material and all money, notes or leases received by him, and was to receive six per cent of the gross amount of the accepted orders. He was to pay certain expenses, and defendant [illegible] office rent and certain other expenses. The agreement was to run for two years from April 1, 1917, unless otherwise expressly agreed upon.

No trouble seems to have arisen prior to 1918. Early in that year defendant needed money, and complainant who had sold a few players to the Wurlitzer Company suggested that he might obtain a loan from the latter company and sell them more players, which he undertook to do. Going to Cincinnati he obtained from said company on March 21, 1918, an order for 2000 of defendant's players, subject to cancellation on or before April 1, 1918, but no arrangement for a loan of money was consummated. On March 30 the Wurlitzer Company telegraphed its cancellation of the agreement made on March 21, but saying it was willing to renew the same with cancellation clause extended to July 1. Complainant claimed, and defendant's president, M. C. Hay, expressly denied, that such extension was given. There was no other evidence than their verbal statements pertaining to the matter, simply the word of one against the other. A few days later Hay went to Cincinnati and negotiated a new contract in writing with the Wurlitzer Company on April 10, 1918, providing for a loan to defendant of $75,000, and giving an option on part of defendant's stock, in consideration of which defendant agreed to manufacture and sell to the Wurlitzer Company any number of player pianos that company might order up to 175 from month to month during the term of the contract, at a certain price for the first thousand and a different price for the second. Other terms of the contract need not be stated in detail.

Complainant not having received pay for all that was due him held back the delivery to defendant of checks for over $12,000, that had come into his handsafter April 1. Ascertaining that fact about the 21st of April defendant sent out letters to its customers to learn if they had made remittances, and as a result a conference was had between complainantand Hay respecting the matter on April 29, when complainant refused to turn over the checks in his possession without a settlement,

which was then made upon a statement submitted by complainant showing $8,065.76 as due him for commissions on all shipments up to that time, and that amount was agreed to and paid on that date partly in cash and partly in notes that have since been paid. At the foot of the statement is the following: "Received settlement as statement subject to re-checking and change. 4-29-18." (Signed) "Lem Kline."

Defendant in error claims that was a settlement in full subject to a rechecking on the books as to the accuracy of the statement of account, and except as to orders not then on the books but afterwards filled, with respect to which there is no controversy. Included in the statement were commissions for the sale of 59 players delivered on complainant's contract with the Wurlitzer Company before it was cancelled, thus leaving 1941 players upon which he claims a commission, and which defendant in error delivered under its new contract with the Wurlitzer Company after the settlement.

The testimony of defendant's president, H. C. Bay, and two of its employes, present when the settlement was had, was that complainant said he was going to quit, and that the conversation between complainant and Bay was to the effect that the settlement was in full, and their testimony on that subject is not directly refuted by complainant, and does not contradict or vary the written statement or receipt.

Attendant circumstances, too, support defendant's version of the transaction and that there was an understanding and intention of the parties to terminate the existing contract. It was agreed that defendant was no longer to pay complainant's office rent or other expenses, and that complainant was privileged to represent other concerns. He immediately proceeded to negotiate with another company and instead of doing business thereafter under the name of Bollman Player Piano Company, by

which was then made upon a statement submitted by complainant showing $8,588.76 as due him for commissions on all shipments up to that time, and that amount was agreed to and paid on that date partly in cash and partly in notes that have since been paid. At the foot of the statement is the following: "Received settlement in statement subject to reconciling and change. 4-21-13." (Signed) "Leo Giles."

Defendant in error claims that was a settlement in full subject to a reckoning on the books as to the accuracy of the statement of account, and except as to orders not then on the books but afterwards filled, with respect to which there is no controversy. Included in the statement were commissions for the sale of 58 players delivered on complainant's contract with the Merlin Company before it was cancelled, thus leaving 2414 players upon which he claims a commission, and which defendant is never delivered under its new contract with the Merlin Company after the settlement.

The testimony of defendant's president, N. C. Kay, and two of its employees, present when the settlement was had, was that complainant said he was going to quit, and that the conversation between complainant and Kay was to the effect that the settlement was in full, and their testimony on that subject is not directly refuted by complainant, and does not contradict or vary the written statement or receipt.

Attendant circumstances, too, support defendant's version of the transaction and that there was an understanding and intention of the parties to terminate the existing contract. It was agreed that defendant was no longer to pay complainant's office rent or other expenses, and that complainant was privileged to represent other concerns. He immediately proceeded to negotiate with another company and instead of doing business thereafter under the name of Holland Player Piano Company, he

which he had previously done business under the contract, he did business under the name of Lem Kline Piano Company, paying his own rent and expenses, and within a short time closed a contract with the Kroeger Piano Company of Stamford, Conn., to sell its products. While Bay said complainant might sell a limited number of players monthly for defendant, if profitable to defendant, at a certain price, and complainant claims he undertook to obtain orders but that defendant "under cut" him on sales, no further sales were made through complainant; and it appears from a letter written in June to a customer that he was urging the purchase of Kroeger players instead of Bellman players. Not until after he filed his bill did he communicate with defendant as to a commission on deliveries to the Wurlitzer Company made after the settlement, when Bay told him he had nothing to do with them.

It is clear from these circumstances and other testimony of complainant himself that his contract was not in force at the time of filing his bill in November, 1918, as alleged therein, and that when he made the settlement of April 29, he regarded it as terminating his contract and as an accord and satisfaction.

While complainant was guilty of a breach of his contract in withholding checks contrary to an express provision of the contract, and there is little, if any, evidence to support the master's finding of a prior breach of the contract by defendant in not paying complainant all that was due him, yet there was no proof of a refusal of such payment, and no specific time for payment was agreed to. But regardless of which party first breached the contract we think the evidence shows that the contract of March 21 with the Wurlitzer Company was terminated on March 30, and that plaintiff did not sustain the burden of showing that it was kept alive after that date, and that whatever claim complainant may have had to commissions under the Wurlitzer deals, the settle-

which he had previously done business under the contract, he did business under the name of Lee Bilke Piano Company, paying his own rent and expenses, and within a short time closed a contract with the Krueger Piano Company of Kankakee, Ill., to sell its products. While the proof shows complainant sold a limited number of pianos mostly for defendant, or preferably to defendant, at a certain price, and complainant claims he undertook to obtain orders but that defendant "hunted out" the orders, no further sales were made through complainant, and it appears from a letter written in June to a customer that he was urging the purchase of Krueger pianos instead of Wurlitzer pianos. But still after he filed his bill did he recognize this contract or be a commission on deliveries to the Wurlitzer Company made after the settlement, when they told him he had nothing to do with them.

It is thus fair that although complainant and other testimony of complainant insists that his contract was not in force at the time of filing his bill in November, 1915, as alleged therein, and that when he made the settlement of April 30, he regarded it as terminating his contract and as an accord and satisfaction.

While complainant was guilty of a breach of his contract in selling Krueger pianos contrary to an express provision of the contract, and there is little, if any, evidence to support the master's finding of a prior breach of the contract by defendant in not paying complainant all that was due him, yet there was no proof of a refusal of such payment, and no specific time for payment was agreed to. But regardless of which party first breached the contract we think the evidence shows that the contract of March 21 with the Wurlitzer Company was terminated on March 30, and that plaintiff did not sustain the burden of showing that it was kept alive after that date, and that whatever claim complainant may have had to commissions under the Wurlitzer deals, the settle-

ment on April 29 was intended as an accord and satisfaction.

Nor do we think the testimony sufficient to support the allegation of the bill that the contract of April 10 was entered into for the purpose of cheating and defrauding complainant out of his commissions. But were it otherwise, it does not appear that he was ignorant of its existence at the time of the settlement. He admitted that when he submitted his statement on April 29 on which the settlement was had, he said nothing about its including commissions on orders not then shipped, and that he made no inquiries or demands respecting shipments under the contract of April 10 until after he filed his bill, knowing, as he must, that many shipments must have been made before that time. If, as the testimony tends to show, he intended on April 29 to quit defendant's employment and terminate his contract, and asked for a settlement in full with knowledge of the contract of April 10, he is apparently in no position to assert a claim of fraud with regard thereto, and if he did not regard the settlement as including all that he was entitled to under the Wurlitzer deal, it is strange that he was silent respecting a matter involving so much money.

Hence we think the entire testimony supports the theory of a mutual agreement to terminate the written contract between the parties and a settlement in full of all obligations under it on April 29, except as to a few subsequent shipments on previous orders that were not questioned and for which a decree was entered.

In this view of the case we deem it unnecessary to discuss other grounds upon which the chancellor may have sustained the exceptions and dismissed the bill.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

ment on April 19 was intended as an accord and satisfaction.

Nor do we think the testimony sufficient to sustain the allegation of the bill that the contract of April 18 was entered into for the purpose of cheating and defrauding complainant out of his commissions. But were it otherwise, it does not appear that he was ignorant of its execution at the time of the settlement. He admitted that when he submitted his statement on April 19 on which the settlement was had, he said nothing about his including commissions on orders not then shipped, and that he made no inquiries or requests respecting shipments under the contract of April 18 until after he filed his bill, knowing, as he must, that many shipments must have been made before that time. If, as the testimony tends to show, he intended on April 19 to quit defendant's employment and terminate his contract, and asked for a settlement in full with knowledge of the contract of April 18, he is apparently in no position to assert a claim of fraud with regard thereto, and if he did not regard the settlement as including all that he was entitled to under the written contract, it is strange that he was silent respecting a matter involving so much money.

Hence we think the entire testimony supports the theory of a mutual agreement to terminate the written contract between the parties and a settlement in full of all obligations under it on April 19, except as to a few outstanding shipments on previous orders that were not questioned and for which a decree was entered.

In this view of the case we deem it unnecessary to discuss other grounds upon which the chancellor may have sustained the demurrer and dismissed the bill.

AFFIRMED.

Crowley, P. J., and Fitch, J., concur.

116 - 28768

JOHN SCHWASS, Appellee, vs. HUNDING DAIRY COMPANY, a corporation, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 639

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered upon a verdict for $140.97 in favor of plaintiff in an action to recover damages to his automobile from a collision with defendant's motor truck at a street intersection in Chicago. Each party claimed negligence on the part of the other.

Plaintiff's car was going north on the east side of Michigan avenue, and defendant's truck east on the south street car track of 71st street. Plaintiff's car ran into defendant's truck, striking it about six or seven feet from its front. The collision took place east and apparently south of the center of the intersection when the front of the truck was within six to ten feet of the east curb of Michigan avenue.

Plaintiff admitted that he did not see defendant's truck until just before the impact and kept going straight ahead and made no effort to turn away from the truck, which its driver, apparently to avoid the collision, turned to the north just before the impact. One Tarbell, who was riding on the seat with plaintiff, said that when he first saw the truck it was about "ten feet at that time of being directly in front of us." Plaintiff and Tarbell said that the automobile slowed down to about eight miles an hour as it came to the intersection. Defendant's driver, and his son who was with him on the truck, and a peddler,

who had stopped his horse and wagon near the east line of Michigan avenue waiting for the two cars to pass, said that plaintiff did not slow down but continued to drive straight ahead, the peddler saying at the rate of 25 to 30 miles an hour. While defendant's driver said that when he reached the intersection plaintiff's car was about 100 feet south of it, going 18 miles an hour, which the plaintiff admitted, and the peddler that the truck was about 12 feet away from the intersection when plaintiff was about 50 feet from it, yet regardless of the precise distances, it is clear from all the testimony that defendant reached the intersection when plaintiff was some distance south of it, for though the speed of the truck was apparently less than that of the automobile, the collision was east of the center of the intersection, and plaintiff's car ran into defendant's.

It is evident, too, from their own testimony, that neither plaintiff nor his companion took any notice of the approaching truck until just about the time of the impact. Under such circumstances we do not think plaintiff exercised reasonable care to avoid an accident. With the existing conditions of atmosphere and light - both cars carrying lighted lamps, and there being an arc lamp at the northeast corner - and with no building at the southwest corner, as the evidence showed, plaintiff would have seen defendant's truck had he looked west as he approached the crossing, as he should have done. It is clear that he did not look until too late. But if he had seen the truck, and was going, as he claims, at eight miles an hour, he should have been able to stop his car and avoid a collision had he looked in time.

There is no claim that the truck was going at unusual speed. But if it was, plaintiff's want of care prevents his recovery.

From its refusal of instructions submitted by defendant the court apparently regarded the case as one where the plaintiff had the right of way simply because he was approaching from the right

who had stopped his horse and wagon near the east line of Sheldon avenue waiting for the bus to pass, [illegible] [illegible] of the rate of 18 to 20 miles an hour. [illegible] said when he reached the [illegible] plaintiff's [illegible] about 100 feet south of it, going 18 miles an hour, [illegible] plaintiff [illegible], and [illegible] that the truck [illegible] [illegible] from the intersection when plaintiff [illegible] about 50 feet [illegible] the [illegible] all the testimony [illegible] plaintiff was some distance south of it, [illegible] the truck was [illegible] than that of the [illegible], the collision was [illegible] of the center of the intersection, and plaintiff's car was [illegible].

It is evident, [illegible] that neither plaintiff nor his [illegible] the approaching truck until just [illegible] time of the impact. [illegible] long - a [illegible] the accident [illegible], as the evidence shows, plaintiff could have seen defendant's truck had he looked south as he approached the crossing, as he should have done. It is clear that he did not look until too late. And if he had seen the truck, and [illegible] going, as he claims, 18 miles an hour, he should have been able to stop his car and avoid a collision had he looked in time.

There is no claim that the truck was going at excessive speed. But if it was, plaintiff's want of care precludes his recovery.

From the [illegible] of [illegible] by defendant the court [illegible] that [illegible] plaintiff had the right of way [illegible]

and defendant from the left. While under certain circumstances a disregard of a party's right of way may control in fixing responsibility for a collision, yet it is usually only one factor in determining the question of negligence. The mere fact that plaintiff had the right of way under the statute did not release him from the duty of exercising due care not to injure others crossing the intersection. (Salmon v. Wilson, 227 Ill. App. 286; Baldwin v. Yellow Cab Co., Gen. No. 27961, Appellate Court, First District, decided March 13, 1923.) The duty of due care to avoid collisions at street crossings is reciprocal. (Day v. Brannan, 196 Ala. 113, 72 So. 16.) The one who has the right of way is not justified in asserting it when he observes, or in the exercise of ordinary care should observe, that there will be danger of a collision by so doing. (See cases above quoted and Berry on Automobiles, secs. 233, 245.)

We think not only that plaintiff's evidence failed to show the exercise of reasonable care on his part, but that the entire evidence shows the contrary, and therefore he cannot recover.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Fitch, J., concur.

110 - 25703

FINDING OF FACT.

We find that appellee did not exercise ordinary care to avoid the collision in question and was guilty of contributory negligence.

130 - 26701

FRED GRAFF,
Appellee,

vs.

JAMES B. DAVIS, the agent designated by the President of the United States under subdivision (A) of section (250) of the Transportation Act substituted for John Barton Payne, Director General for Railroads operating Pennsylvania Company (a corp.), and the PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY (a corp.),
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

238 Ill. App. 639

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit brought under the Federal Employers' Liability Act for injuries received while plaintiff was employed in interstate commerce on the Pennsylvania railroad then under control of the director general of railroads.

Plaintiff was injured while trying to light a lamp in or back of the cupola of a caboose of which he was the rear brakeman, one Bain the front brakeman, and one Murphy the conductor, all of whom were in the caboose at the time.

It was a part of Graff's duties as rear brakeman to take care of the rear lights of the caboose including one called the deck light in the back part of the cupola or a frame or box at the back of it.

His declaration alleges that in lighting the lamp it became necessary for him to stand on a certain support, which was negligently permitted to be covered with slippery, greasy and oily substances, and that he slipped from said support and was injured. The description of the interior construction of the

caboose and of the manner in which plaintiff received the injury is so vague and indefinite that we are unable to say from the record whether the point made by defendants that plaintiff assumed the risk is well taken or not. No dimensions of the car are given and the relative positions of various parts of the car referred to in the testimony become more or less a matter of conjecture. They are quite graphically explained in the briefs but not in the evidence.

Plaintiff said he approached the cupola and climbed up to a ledge that was about three feet long and ran lengthwise with the caboose, and that there was a similar shelf on the other side; that between the two shelves is a distance of three feet or more; that the deck light is in the center and back of the cupola and lit from inside the caboose. Describing the accident he said: "In starting to light the deck light I faced the rear of the caboose and stood on this platform or ledge," which he said was about four feet from the floor of the car and about six inches wide and twenty inches long; that when he got up there to light a match and reached for the light he took a "nose dive," striking the ledge on the other side and his chin on a drawer that was sticking out; that when he got on the ledge his foot gave out and he went "right over," - "slipped off the ledge."

On cross examination he said the cupola is above the floor of the car, about the middle of the car from the front end; that up there are two seats on each side, facing each other; that underneath them, or in front of one of them, is an oil box; that out <u>in front</u> of the oil box is the ridge or ledge; that an oil box is on one side and a refrigerator on the other; that <u>behind</u> the oil tank nearly on a level with it is the ledge. These descriptions of the interior of the car are so confusing and uncertain that it is difficult to get an adequate picture of the interior of the

car and the relative positions of the parts described. Another witness said: "The floor of the caboose is only a little place to stand." But the evidence does not enlighten us as to its dimensions, or its height from the car floor, or its distance from the top of the cupola, or whether it is higher or lower than the ledges, or whether the ledges are directly opposite the cupola, or what their distance from it. While plaintiff said the distance between the shelves or ledges is three feet or more, it must be considerably more if they are only six inches wide and against the sides of the car, judging from the usual width of a car. Definite evidence on these matters would have some bearing on plaintiff's position in lighting the lamp and show how he got on a narrow ledge four feet high and could while standing thereon reach a lamp back of the cupola.

The gist of plaintiff's case is that there was negligence in permitting grease to be on the ledge where plaintiff stood, and that his slipping thereon was the proximate cause of the injury. To prove the existence of such grease, he called Bain who testified that he saw black grease eight or ten inches long and half an inch thick on the ledge of the side where the ice box was, and that he told Murphy about it and Murphy said, "I know." While Murphy said that Bain did not so call his attention to oil or grease on one of the ledges, it does not definitely appear that plaintiff stood on the ledge where the grease was said to be. Neither Bain nor Murphy saw him standing on the ledge or fall therefrom, and plaintiff himself said that he did not know whether he was on the refrigerator side or the oil side. Plaintiff was familiar with the fact that brakemen filled their lamps from the oil tank and in so doing placed the lamp and cup on the ledge. If, therefore, he slipped on oil while standing on the ledge where the oil tank was there is much ground for urging that he assumed

part and the relative positions of the [illegible] [illegible]. [illegible] [illegible] said: "The [illegible] of the [illegible] is only a little [illegible] to stand." And the evidence does not enlighten us as to its [illegible], or its height above the [illegible], or its distance from the top of the temple, or whether it is higher or lower than the lodges, or whether the lodges are directly opposite the [illegible], or what their distance from it. [illegible] said that the distance between the [illegible] or lodges is three feet or more. [illegible] [illegible] [illegible] if they are only six inches wide and against the sides of the [illegible], [illegible] from the [illegible] of a [illegible]. [illegible] [illegible] on their [illegible] which [illegible] [illegible] [illegible] [illegible] position in [illegible] the lamp and that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of the temple.

The [illegible] of [illegible] [illegible] is that [illegible] [illegible] [illegible] in [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of the lodges. To prove the existence of such [illegible], he [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] lamp and [illegible] [illegible] [illegible] [illegible] the lodge of [illegible] [illegible] [illegible] [illegible] [illegible], and that he [illegible] [illegible] [illegible] [illegible] [illegible], "I [illegible]." [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of the lodges, it does not [illegible] whether he [illegible]

the risk. There is strong evidence tending to show that he stood on that side, for in falling he struck a drawer on the opposite side, and the evidence tends to show the drawers were on the refrigerator side of the car. If, therefore, the grease or oil which Bain saw was not on the ledge where plaintiff stood, - and there was no direct proof that it was - it is a serious question whether the injury was the result of defendant's negligence. If the grease or black oil testified to by Bain was on the refrigerator side of the car, where the drawers were, and plaintiff fell across the car and struck a drawer then it is apparent that plaintiff's theory of the cause of the accident is not supported by the evidence.

But being unable to say from such meager evidence whether defendant's negligence was or was not the proximate cause of the injury, or whether under the described conditions plaintiff did or did not assume the risk, and regarding the evidence not sufficiently clear and enlightening to enable us to render a final judgment here, either affirming or reversing on facts, we think the case should be sent back for a new trial and accordingly reverse the judgment and remand the cause.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

155 - 28003

UNION BANK OF CHICAGO, Appellee,

vs.

RICHARD A. KOCH, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The plaintiff in this case bought from defendant, a lawyer, four certificates of indebtedness of the United States in July, 1919, of the denomination of $1,000 each, which plaintiff placed with the Federal Reserve Bank of Chicago for collection. Another party having claimed title thereto on the theory they were stolen from him, the Federal bank filed an interpleader making him and plaintiff parties thereto, and deposited with the clerk of the court the amount due on the certificates.

It was alleged in plaintiff's statement of claim that defendant promised its president that if plaintiff would defend the cause in its own name and forbear suing him for the par value of the certificates with interest before the determination of the bill of interpleader that he (defendant) would reimburse the plaintiff for all costs by it expended, including attorney's fees, and the interest on the sum so deposited, amounting in all to $352.02.

Mr. Schlytern, president of the plaintiff bank, testified that he told defendant the Federal Reserve Bank had started a suit, that his bank had to defend it, and that there would be considerable outlay for which it would hold defendant responsible, and that defendant said "all right." Later he testified that there was no conversation between them after

filing the suit, and that when his bank received notice that the Federal Reserve Bank refused to pay the certificates or return them, he told defendant he "had to make them good," and defendant said, "return me the certificates and I will make them good." That was all he could remember said by either party.

Defendant denied there was any such conversation as the first one referred to, and said the only conversation with Schlytern relative to the matter was when the latter told him that the Federal Reserve Bank would reimburse plaintiff if it would guarantee the expense of a suit in case there was one, which Schlytern refused to do.

Plaintiff's cashier testified that he told defendant that plaintiff bank had to reimburse the Federal Reserve Bank and defendant said he would not pay unless the bank had the certificates; that at another time he told defendant it looked as if it would be necessary to start a suit to get possession of the certificates, and that defendant would have to stand the expense, to which defendant replied, "I suppose so;" that this was before any suit was brought. But defendant denied saying "I suppose so," or having any conversation about his bearing any expense, saying that when the cashier, on receiving word from the Federal bank that the certificates were stolen, told defendant he would have to pay, he said he would not, and that the bank would not have to pay for the certificates as it was a bona fide purchaser of them, and that the cashier wanted to know if he had "any case on it," and he showed him two Illinois cases to that effect.

We are of the opinion that the proof as to the promise relied upon is very indefinite and unsatisfactory and that the evidence thereon does not preponderate in plaintiff's favor. Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACTS.

Gridley, P. J., and Fitch, J., concur.

155 - 22606

FINDING OF FACTS.

We find that appellant did not promise appellee, as alleged in the statement of claim, that he would reimburse appellee for all costs and reasonable attorneys' fees by it expended in defending the suit of interpleader referred to in the statement of claim, and did not promise to pay interest on the deposit referred to.

164 - 28818

JOHN MAISCHAIDER, ANTHONY MAISCHAIDER,
ANNA HOFFMAN, LULU M. ALSIP and
EMILY M. THERRIEN,
Appellees,

vs.

AUGUST TORPE and LOUIS TORPE,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 630

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a bill for an accounting based on the theory that defendants were trusted agents for complainants in a real estate transaction in which they fraudulently made a secret profit. The decree was in complainants' favor. It is conceded that if the agency alleged existed and the cause is cognizable in equity the decree is right. The principal question is, whether the evidence sustains the chancellor's findings as to the fact of agency.

Defendants were real estate brokers for many years on West North avenue, Chicago, in the vicinity of the real estate involved where the father of complainants conducted a business. Their families were acquainted and on friendly terms for many years. On the death of their father complainants became seized as tenants in common of certain parcels of real estate, including the one in question. Negotiations were had from time to time with defendants through Louis Torpe with respect to the same from which complainants claim there arose a relation of trust and confidence in defendants. The material facts as found by the chancellor are as follows:

On March 29, 1921, Louis Torpe represented to two of complainants that he had a cash buyer for the North avenue property and wanted to know the least they would take for it. Starting with the price of $20,000 they finally agreed to take

$16,000. Two days later Louis Torpe showed them a contract for the sale of the property to one Paul Stassek, an employe of defendants, for $15,000 and said defendants could not get more. Complainants finally agreed to sell for that sum if the purchaser would pay defendants' commission. The contract submitted provided that complainants' should pay the commission. The change was made and on the next day it was signed by complainants, and pursuent thereto the premises were conveyed to Stassek ten days later for $15,000 less an encumbrance on the property. At the time Louis Torpe made such representations he, without the knowledge of complainants, was already negotiating for sale of the property to one William Moeller, who was anxious to buy it and had expressed to him his willingness to purchase it for $18,000, and finally agreed to pay $20,000 therefor. (It also appears that he was induced by Louis Torpe, not knowing his motives or seeing the necessity therefor, to have the title taken in the name of another.) These negotiations were kept open with Moeller until the contract with Stassek was signed, and three days later an agreement was drawn and signed for the sale of the property by Stassek to Moeller, pursuant to which a deed was executed on May 6th following and defendants received from Moeller $20,000 less said encumbrance. Complainants were ignorant until late in 1911 of the negotiations with Moeller, and of the amount he paid for the property, and of the fact that Stassek was an employe of defendants and a dummy in the transaction and not a bona fide purchaser.

On discovery of these facts the bill was filed demanding an accounting as aforesaid for the secret profits made by defendants out of the transaction, and upon them the chancellor found that defendants cheated and defrauded complainants of the difference between the two prices and that they held the same as trustees for complainants and were bound to account for the same. A stipulation

having been entered into between the parties as to the amount complainants would be entitled to recover, if anything, it became unnecessary to refer the cause to a master to state the account between the parties, and the decree was entered for the agreed sum of $4,762.54 with interest from the date of the decree.

While the evidence is conflicting on some points, we entertain no doubt of its sufficiency to support the chancellor's findings and decree. We think it is too obvious for discussion that Louis Forpe intended that complainants should regard his firm as their agent in the transaction else he would not have drawn the contract providing for their paying the commission, and that he was bound from the trust and confidence arising from the relation of principal and agent, to disclose the true state of facts. As said in Perry v. Engel, [illegible] Ill. [illegible], 554:

> "The relation of principal and agent is one of trust and confidence, and where such confidence is reposed and such relation exists it must be faithfully acted upon and preserved from any intermixture of imposition. The rule is the same no matter how large or small the commission paid may be or whether the agent is a mere volunteer at a nominal consideration."

We think there can be no question that by reason of such relationship and the fraud thus practiced a court of equity had jurisdiction to compel an accounting. (Mayr v. Shannon & Co., 196 Ill. App., 567; Rice v. Wallace, 190 id., 692; 21 [illegible] L. 821; Pomeroy's Equity Jurisprudence, 4th ed., sec. 1421.) In principle the case is not unlike the cases of Rice v. Wallace, supra; Kerfoot v. Hyman, 52 Ill. 512; Holberg v. Nichols, 149 Ill., 249; Salsbury v. Ware, 183 Ill. 505.)

There was sufficient evidence to warrant the court in finding that Stasack's name was made use of for the purpose of concealing from complainants the fact that defendants were making a profit, and as said in the last case cited, where there

having been adjusted [illegible] between the parties [illegible] the amount complainant would be entitled to recover, if anything, it became unnecessary to refer the cause to a master to state the account between the parties, and the decree was entered for the aggregate sum of $4,750.84 with interest from the date of the decree.

While the evidence is conflicting on some points, we entertain no doubt of the sufficiency [illegible] to support the chancellor's findings and decree. We think it is too evident [illegible] [illegible] large interest [illegible] [illegible] [illegible] [illegible] [illegible] and [illegible] the contract providing for their buying the [illegible], and that he had been from the first [illegible] arising from the relation as principal and agent, to disclose the true state of facts. As said in [illegible] v. [illegible], 177 Ill. 448, 454:

> "The relation of principal and agent in case of [illegible] [illegible] [illegible] [illegible] [illegible] agent and such relation [illegible] it must be [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]."

We think there can be no question that by reason of such relationship and the facts there presented a court of equity had jurisdiction in respect to accounting. (Clark v. [illegible], [illegible] Ill. App. [illegible]; Hahn v. [illegible], 173 Ill. 575; [illegible] 1 Story's Equity Jurisprudence, 14th ed., sec. [illegible].) In principle the case is not unlike the cases of [illegible] v. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible].)

There was sufficient evidence to warrant the court in finding that [illegible] [illegible] [illegible] [illegible] the purpose of [illegible], from complainant, the fact that defendants were making a profit, and as said in the [illegible] case [illegible], [illegible] [illegible]

was also a dummy purchaser, such concealment would not have been resorted to if there had not been a relation of trust and confidence between the parties.

The fact that the "decree is a money judgment only" does not oust the court of jurisdiction in view of the fact that the court acquired jurisdiction on the grounds above stated. No authorities need be cited on this proposition.

We find no reversible error and think it would subserve no useful purpose to compare and discuss the conflicting theories as to the evidence, for after a careful review of the same and the grounds of error relied upon we find no justification for disturbing the chancellor's findings and decree.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

185 - 28840

LOUISE OLSON, Appellee,		APPEAL FROM
vs.		MUNICIPAL COURT
CHICAGO MUTUAL LIFE COMPANY, Appellant.		OF CHICAGO.

233 I.A. 640

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order granting a nonsuit after a trial before the court without a jury. The trial was had in June, 1922, and the case was taken under advisement until November 21, when appellant claims that the court announced its decision and oral finding for defendant, and gave plaintiff leave to submit specific findings of fact.

The record shows no bill of exceptions preserving what then took place or any order of court between the one of June 30, 1922, continuing the hearing and one of March 14, 1923, overruling defendant's motion for judgment on finding, sustaining plaintiff's motion for nonsuit and entering judgment against plaintiff for costs.

The bill of exceptions preserving the proceedings had at the last date and afterwards filed recites that the parties appeared before the court on March 14, pursuant to notice by defendant of a motion to ask for judgment on findings of the court, and that plaintiff then moved for, and was granted, the nonsuit.

Aside from showing these facts, it shows nothing but a colloquy between counsel and the court respecting their recollections of what took place in the preceding November.

Of course, the fact whether the court then stated its findings or any other fact that then took place could not be preserved in that way and, therefore, it would be fruitless to discuss their respective contentions with regard to those facts. What then took place could only be preserved by a bill of exceptions duly allowed at that time or within thirty days thereafter, - that being the period which answers to a term of the Municipal Court. (People v. May, 276 Ill. 332; People v. Strauch, 247 id. 220; Finch & Co. v. Zenith Furnace Co., 245 id. 586; Village of Franklin Park v. Franklin, 228 id. 591.)

As, therefore, there is no record to support appellant's contention that the court actually stated its finding before the motion for nonsuit was made the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

Of course, the fact [illegible]
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[illegible]

[illegible]

[illegible]

57 - 28705

CHARLOTTE R. WEIGHTMAN,
Appellee,

vs.

MORRIS GOLDMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 640

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment against him for $250 for services of the plaintiff in procuring a tenant for defendant's property. Defendant contends that the alleged agreement to pay for such services is too vague and uncertain to constitute a contract, and that in any event the finding of the court is not supported by the evidence. The plaintiff testified in substance that she occupied four of the six flats in defendant's apartment building as a rooming house; that several months before her leases expired defendant told her that he wanted to lease the whole building to one tenant and asked her if she would "sell out," so that he could "carry it through," to which she replied, "If it is worth while;" that defendant then said that if she would help him he would "take care" of her and "see that she ma some money;" that she then advertised her flats for sale, and in that way found a tenant for the whole building who agreed to buy her furniture; that she introduced the purchaser to defendant, who accepted him as a tenant and leased the whole building to him for three years. If this was true, the language used was sufficien to constitute a contract for the payment of the reasonable value of her services in and about procuring such a tenant. The defendant did not deny that plaintiff introduced the tenant to him, nor that he accepted such tenant and made the new lease to him; but he denied making the alleged promise and claimed that plaintiff asked his permission to sell her flats, because she was in the millinery

business and could not take care of that business and her furnished rooms at the same time, and that defendant transferred the leases merely as a favor to her. We have read the transcript of the evidence and find no direct corroboration of either of these witnesses upon the question of the alleged promise. Both of them are interested parties. We do not find that plaintiff's story is any less reasonable or probable than the defendant's. The trial judge saw and heard the witnesses, and we find nothing in the record that would justify us in disturbing his conclusion. We certainly cannot say it was manifestly wrong.

Plaintiff's counsel has assigned cross-errors to the effect that the court failed to allow as much for plaintiff's services as the evidence requires. The only witness who testified to the value of plaintiff's services fixed such value at one-half the amount that a real estate broker would customarily charge for the same services, or one-half of eight per cent on the amount of rental for one year. On that basis the plaintiff's services were worth less than the amount allowed her by the trial court. Defendant offered no evidence as to the value of such services, and upon the evidence above mentioned, we think the court did not err in not allowing more than he did.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

66 - 28715

FRED THOMA, Defendant in Error,	ERROR TO
vs.	SUPERIOR COURT,
	COOK COUNTY.
FRED W. GEHREN, Plaintiff in Error.	238 I.A. 610

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment rendered against him in the Superior Court in an attachment suit. The attachment writ was levied upon real estate of the defendant and he was personally served with a copy of the writ, but filed no appearance or plea in the Superior Court. In due season, his default was taken and entered of record, and a month later the judgment in question was entered. It recites that the defendant having been theretofore defaulted, the court, after hearing the "proofs submitted by the plaintiff, * * * sustains the attachment issues," and assesses the plaintiff's damages at $7896. Then follows a judgment against the defendant in the usual form of a money judgment in assumpsit for the amount of such damages and costs, with an order for a general and special execution. There is no bill of exceptions in the record. The errors assigned question the sufficiency of the attachment affidavit and of the declaration.

The affidavit states that defendant and another (who was not served) are indebted to plaintiff in the sum of $7436 for money loaned, and gives five of the statutory grounds for attachment, not including non-residence. It does not state the place of residence of the defendants, nor state that

their residence is unknown, and that "upon diligent inquiry the affiant has not been able to ascertain the same," as required by section 2 of the Attachment Act. For this reason, the affidavit is undeniably defective. The provisions of the statute are clear, and its positive terms must be complied with. (Dietz v. The People, 77 Ill. 518.)

Defendant's counsel contend that because of thisdde-fect in the affidavit, the attachment writ and all subsequent proceedings are void, and that the court was without jurisdiction to enter the judgment. It is argued that the affidavit is the only basis for the attachment writ, and that since the affidavit omits one of the positive requirements of the statute, the writ issued thereon is void, and the court acquired no jurisdiction of the person of the defendant by the service of a void writ. There are two answers to this argument. The first is, that the writ is not void, but is voidable only; and the second is, that regardless of any defect in the attachment affidavit or writ, the court had jurisdiction, upon personal service of such writ, to enter a personal judgment against the defendant. Both the affidavit and the writ were amendable by section 28 of the Attachment Act; and any legal document that may lawfully be amended is not a nullity. In Hogue v. Corbit, 156 Ill. 540 the same defect existed in the affidavit for attachment as in this case, and it was there urged that the writ was void. The court held the contrary, saying (p. 544): "The validity of the writ depended upon the validity of the affidavit, and the affidavit being amendable, was voidable merely and not void. (Bassett v. Bratton, 86 Ill. 152.) The affidavit, the writ, and the levy of that writ gave the court jurisdiction over the subject matter of the attachment. A thing that is voidable has force and effect, but in consequence of some inherent quality or defect it is

their residence is unknown, and that "upon diligent inquiry the affiant has not been able to ascertain the same," as required by section 2 of the Attachment Act. For this reason, the affidavit is materially defective. The provisions of the statute are clear, and its positive terms must be complied with. (Clark v. The People, 77 Ill. 512.)

Defendant's counsel contend that because of this defect in the affidavit, the attachment writ and all subsequent proceedings are void, and that the court was without jurisdiction to enter the judgment. It is argued that the affidavit is the only basis for the attachment writ, and that since the affidavit omits one of the positive requirements of the statute, the writ issued thereon is void, and the court acquired no jurisdiction of the person of the defendant by the service of a void writ. There are two answers to this argument. The first is, that the writ is not void, but is voidable only; and the second is, that regardless of any defect in the attachment affidavit or writ, the court had jurisdiction, upon personal service of such writ, to enter a personal judgment against the defendant. Both the affidavit and the writ were amendable by section 28 of the Attachment act; and any legal document that may lawfully be amended is not a nullity. In [illegible] v. [illegible], 146 Ill. 549 the same defect existed in the affidavit for attachment as in this case, and it was there urged that the writ was void. The court held the contrary, saying (p. 549): "The validity of the writ depended upon the validity of the affidavit, and the affidavit being amendable, was voidable merely and not void. ([illegible] v. [illegible], 86 Ill. 152.) The affidavit, the writ, and the levy of that writ gave the court jurisdiction over the subject matter of the attachment. A thing that is voidable has force and effect, but in consequence of some inherent quality or defect it is

liable, upon proper steps being taken, to be legally annulled or avoided * * * by means of a direct attack upon it." In <u>Cline</u> v. <u>Patterson</u>, 191 Ill. 346, where an objection of a similar character was under consideration, the court said: "This writ had all the formal requisites required by the statute, was duly attested, but was insufficient, under the statute, because by the omission of part of its substance it was not substantially in the form prescribed; but it was clearly amendable under section 28 of the act. The attachment proceedings were therefore erroneous, but not void, and the court was not without jurisdiction."

To the extent, therefore, that the judgment in this case "sustains the attachment issue" it is not void, but it is erroneous; and if there had been no personal service upon the defendant, the only order or judgment the trial court could have entered, without error, would have been an order quashing the attachment writ and releasing the levy on the property attached. Here, however, there was personal service upon the defendant, and there was therefore nothing to prevent the court, upon his default, from rendering a personal judgment against him for the amount shown to be due, precisely as it could have done under section 27 of the Attachment Act if he had appeared and had the attachment quashed. (<u>Buchman</u> v. <u>Dodds</u>, 6 Ill. App. 25.)

It is next contended that the declaration is insufficient to support the judgment. It is said that "the declaration contains a fatal misjoinder of counts," and that the second count states no cause of action such as would support the judgment. There are two counts in the declaration. The argument as to misjoinder proceeds upon the assumption that the first count is a count in debt, and the second is an action on the case for deceit. The declaration begins by stating that the plaintiff, by his attorneys, complains of the defendants "of a plea of debt." This formal caption applies to both counts of

limits, upon proper steps being taken, to be legally annulled or avoided * * * by means of a direct attack upon it.' In Kline v. Kellerman, 182 Ill. 546, where an objection of a similar character was under consideration, the court said: 'This writ had all the formal requisites required by the statute, was duly attested, but was insufficient, under the statute, because by the omission of part of its substance it was not substantially in the form prescribed; but it was clearly amendable under section 25 of the act. The attachment proceedings were therefore erroneous, but not void, and the court was not without jurisdiction.'"

To the extent, therefore, that the judgment in this case "sustains the attachment issue" it is not void, but it is erroneous; and if there had been no personal service upon the defendant, the only order or judgment the trial court could have entered, without error, would have been an order quashing the attachment writ and releasing the levy on the property attached. Here, however, there was personal service upon the defendant, and there was therefore nothing to prevent the court, upon his default, from rendering a personal judgment against him for the amount shown to be due, precisely as it could have done under section 27 of the attachment act if he had appeared and had the attachment quashed. (Rothman v. Lewis, 8 Ill. App. 28.)

It is next contended that the declaration is insufficient to support the judgment. It is said that "the declaration contains a fatal misjoinder of counts," and that the second count states no cause of action such as would support the judgment. There are two counts in the declaration. The argument as to misjoinder proceeds upon the assumption that the first count is a count in debt, and the second is an action on the case for deceit. The declaration begins by stating that the plaintiff, by his attorney, complains of the defendants "of a plea of debt." This formal caption applies to both counts of

the declaration. Following this caption, the first count begins: "For that whereas," etc., and the second count begins: "And whereas also," etc. At the conclusion of both counts is a formal conclusion applying to both, as follows: "Yet the defendant, though often requested, * * * has not paid the plaintiff the several sums of money in said several counts above specified, together amounting to the sum of $7,000, or any part thereof * * * but wholly refuses to pay the same," etc. Except for the caption, the first count is in the usual form of a count in assumpsit upon a promissory note; and this, with the addition of the caption, is the recognized form of a count in debt on a promissory note. (Puterbaugh Pl. & Pr. 533.) The second count states that the defendants were indebted to the plaintiff in the sum of $5000 "for money loaned and delivered by the plaintiff to the defendants at their request." This language is substantially the form of a of a money count for money lent, common to both assumpsit and debt. Following this language is a statement of the alleged manner in which said $5,000 came to be loaned by the plaintiff to the defendants. Briefly, this statement is that the money was loaned to defendants on their representations that they were officers and directors of a mining company which was a duly organized and existing corporation, and which had sold enough of its stock to realize over $40,000 in cash, all of which had been used in buying valuable mining property in Colorado; that $5,000 more was required, and would be used to pay workmen for completing an unfinished tunnel "leading to valuable ore deposits," and that the loan would be repaid by the corporation within a reasonable time, or if, after investigation by the plaintiff, he was satisfied to invest said $5,000 in stock of the company, the corporation would issue stock for that amount "instead of having same repaid." It is then charged that all of these representations

the defendant. Following this section, the first count begins "That that whereas," etc., and the second count begins: "And whereas also," etc. At the conclusion of both counts is a formal conclusion applying to both, as follows: "Yet the defendant, though often requested, * * * has not paid the plaintiff the several sums of money in said several counts above specified, together amounting to the sum of $7,000, or any part thereof * * * but wholly refuses to pay the same," etc. Except for the caption, the first count is in the usual form of a count in assumpsit upon a promissory note; and this, with the addition of the caption, is the recognized form of a count in debt on a promissory note. (Chitty Pl. 6 Am. Ed. 250.) The second count states that the defendants were indebted to the plaintiff in the sum of $7000 "for money loaned and delivered by the plaintiff to the defendants at their request." This language is substantially the form of a of a money count for money lent, common to both assumpsit and debt. Following this language is a statement of the alleged manner in which said $7,000 were to be loaned by the plaintiff to the defendants. Briefly, this statement is that the money was loaned to defendants on their representations that they were officers and directors of a mining company which was a duly organized and existing corporation, and which had sold enough of its stock to realize over $60,000 in cash, all of which had been used in buying valuable mining property in Colorado; that $7,000 more was required, and would be used to pay workmen for completing an unfinished tunnel "leading to valuable ore deposits," and that the loan would be repaid by the corporation within a reasonable time, or if, after investigation by the plaintiff, he was satisfied to invest said $7,000 in stock of the company, the corporation would issue stock for that amount "instead of having same repaid." It is then charged that all of these representations

were false and known by defendants to be false when made, and made to deceive and defraud the plaintiff; that in fact the corporation had no assets whatever; that the amount loaned by plaintiff was not used to dig tunnels, but was used to pay officers' salaries - most of it to the defendant Gehrer - and that later on the corporation abandoned its work and its property was levied upon to pay wage claims to the amount of $2000. Assuming that these averments were inserted in the second count for the purpose of showing that the money alleged to have been loaned *to defendants* was obtained by false and fraudulent representations, it is a familiar principle that the person defrauded may waive the tort and sue in assumpsit to recover the money paid (*May* v. *Disconto Gesellschaft*, 211 Ill. 310; *Donovan* v. *Purtell*, 216 Ill., 629, 642); and where, as here, the amount so paid is a definite and specified sum, no reason is perceived why the person who so parted with his money may not sue in debt, as well as in assumpsit, to recover the money thus paid. It was squarely so held in *Alsbrook* v. *Hathaway*, 3 Sneed (Tenn.) 454; and, in effect, has been so held in this State. "Debt lies upon simple contracts wherever *indebitatus* assumpsit will lie, and is a concurrent remedy therewith. *United States* v. *Colt*, 1 Peters C. C. R. 145; *Smith* v. *Lovell*, 2 Pick. 178." (*Bedell* v. *Janney*, 4 Gilman, 193.) The same language is repeated in *Larmon* v. *Carpenter*, 70 Ill., 549. Debt lies to recover money lent, paid, had and received, on simple contracts and legal liabilities. (1 Chitty Pl., 9th Am. Ed. 109).

From what has been said it will appear that we are of the opinion that there is no misjoinder of counts, but that the whole declaration is a declaration in debt, containing two counts, the first upon a promissory note for $2000, and interest, and the second for $5000 money loaned, or money had and received by defendants for the use of the plaintiff, and interest.

were false and known by defendants to be false when made, and that he deceived and injured the plaintiff; that in fact the corporation had no assets whatever; that the amount loaned by plaintiff was not used in its business, but was used in the defendants' salaries - much of it by the defendant Scherer - and that later on the corporation abandoned its work and its property was levied upon to pay wage claims in the amount of $3000. Assuming that these statements were inserted in the second count for the purpose of showing that the money alleged to have been loaned to defendants was obtained by false and fraudulent representations, it is a familiar principle that the person defrauded may waive the tort and sue in assumpsit to recover the money paid ([illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill., [illegible]); and where, as here, the amount so paid is a definite and specified sum, no reason is perceived why the person who so parted with his money may not sue in debt, as well as in assumpsit, to recover the money thus paid. It was expressly so held in [illegible] v. [illegible], 3 [illegible] (Penn.) [illegible]; and, in effect, has been so held in this State. "Debt lies upon simple contracts whenever indebitatus assumpsit will lie, and is a concurrent remedy therewith. United States v. Colt, 1 Peters C. C. [illegible]; Smith v. [illegible], [illegible]." ([illegible] v. [illegible], 4 Scammon, [illegible].) The same language is repeated in [illegible] v. [illegible], [illegible] Ill., [illegible]. Debt lies to recover money lent, paid, had and received, on simple contracts and legal liabilities. (1 Chitty Pl., [illegible].)

From what has been said it will appear that we are of the opinion that there is no misjoinder of counts, but that the whole declaration is a declaration in debt, containing two counts, the first upon a promissory note for $[illegible], and interest, and the second for [illegible] money lent, or money had and received by defendants for the use of the plaintiff, and interest.

It is finally urged that the judgment is for an amount larger than is claimed, and that the form of the judgment is not the correct form of a judgment in debt. The first of these alleged errors is well assigned. By no possible method of computation can the amount of the alleged debt and damages be as much as the amount assessed as damages. The ad damnum fixes the amount of plaintiff's claim at $7436, and the default judgment should not have been for more than that amount. The second of these alleged errors is not, of itself, sufficient to reverse the judgment (R. R. I. & S. L. R. R. Co. v. Steele, 69 Ill. 253) although prior to 1872 it might have been reversible error. (March v. Wright, 14 Ill. 248.)

For the errors indicated, the judgment of the Superior court is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

79 - 38729

N. G. REUTER,
Appellant,

vs.

S. A. MARKS,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A. 640

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In 1920 each of the parties to this suit owned half of the capital stock of an Illinois corporation, and in December of that year the plaintiff sold and delivered his stock to the defendant for an amount then paid to the plaintiff equal to one-half of the difference between the liabilities shown on the books of the corporation and the book value of the assets, exclusive of outstanding accounts and bills receivable, with the understanding that defendant should collect the accounts and bills receivable and pay one-half of the same to the plaintiff, when collected. A year later the plaintiff brought this suit, claiming that defendant had collected certain specified accounts and notes and refused to pay the plaintiff his share thereof, as agreed, amounting to $789.08. The defendant filed an affidavit of merits, admitting the collection of some of the items specified in the plaintiff's statement of claim, and stating that he had retained the amounts so collected to pay sundry liabilities of the corporation, for unpaid taxes. With this affidavit of merits, the defendant also filed a statement of set-off, in which, after stating the terms of the agreement for the sale of plaintiff's stock, substantially as above indicated, he alleged that plaintiff kept the books of the corporation and represented to defendant that all the corporate

liabilities were shown on the books, and that defendant relied on that representation when he paid the plaintiff, for his stock, one-half of the excess in value of the corporate assets over the liabilities shown on the books; but that defendant thereafter discovered that the corporation owed about $2,000 for income and other taxes, and "corporation fees," not shown on the books; and further, that as the result of an alleged false and fraudulent income tax return made by the plaintiff, on behalf of the corporation, for the year 1918, the corporation "has become liable for" $600 attorney's fees. The set-off thus claimed, after deducting the items admitted by defendant's affidavit of merits to be due to plaintiff, amounts to $823.18.

The record shows that on the same day the affidavit of merits and the claim of set-off were filed an order was entered which states that "on motion of the plaintiff" the time to file an affidavit of merits to the set-off "is extended ten days." Fourteen days thereafter, an order was entered stating that plaintiff was "defaulted for want of affidavit of merits to defendant's set-off." The record of this order does not state upon whose motion this order was entered, nor who, if anyone, was present when such default was entered. No judgment was entered on this default, nor any other proceedings taken, for over a year thereafter.

The record next shows that on April 12, 1923, the case was reached in its regular course for trial, and that in the absence of defendant, the plaintiff submitted his evidence to a jury, who returned a verdict "against the defendant" for the amount of plaintiff's claim, and judgment was entered on the verdict. There is no reference, in the record of this judgment, to the prior default of the plaintiff, or to the claim of set-off on file.

liabilities were shown on the books, and that defendant relied on that representation when he paid the plaintiff, for his stock, one-half of the excess in value of the corporate assets over the liabilities shown on the books; but that defendant thereafter discovered that the corporation owed about $1,000 for income and other taxes, and "corporation fees," not shown on the books; and further, that as the result of an alleged false and fraudulent income tax return made by the plaintiff, on behalf of the corporation, for the year 1916, the corporation thus became liable for $500 attorney's fees. The set-off thus claimed, after deducting the items admitted by defendant's affidavit of merits to be due to plaintiff, amounts to $633.51.

The record shows that on the same day the affidavit of merits and the claim of set-off were filed an order was entered which states that "on motion of the plaintiff" the time to file an affidavit of merits to the set-off "is extended ten days." Fourteen days thereafter, an order was entered stating that plaintiff was "defaulted for want of affidavit of merits to defendant's set-off." The record of this order does not state upon whose motion this order was entered, nor who, if anyone, was present when such default was entered. No judgment was entered on this default, nor any other proceedings taken, for over a year thereafter.

The record next shows that on April 12, 1921, the case was reached in its regular course for trial, and that in the absence of defendant, the plaintiff submitted his evidence to a jury, who returned a verdict "against the defendant" for the amount of plaintiff's claim, and judgment was entered on the verdict. There is no reference, in the record of this judgment, to the prior default of the plaintiff, or to the claim of set-off on file.

On May 9, 1923, on motion of the defendant, the judgment so entered was vacated, and a week later the case came on again in regular course for trial before the court without a jury, a jury being waived. The record shows that at the close of that trial, a finding and judgment for $405.63 "against the plaintiff" were entered. From this judgment the plaintiff appeals.

The stenographic report of the proceedings had on the second trial shows that no evidence whatever was heard by the court, but that the trial consisted solely of a discussion between counsel as to the effect of the order defaulting the plaintiff for want of an affidavit of merits to the set-off. It appears that after some argument, the plaintiff's attorney asked the court to set aside the default order, and presented and asked leave to file affidavits tending to prove that the order "extending" the time to file an affidavit of merits to defendant's set-off was not entered "on motion of the plaintiff," but that in fact neither plaintiff nor anyone representing him was present in court when that order was entered, and that neither plaintiff, nor his counsel had any knowledge or notice that either that order, or the default order, had been entered, until the judgment in plaintiff's favor was vacated, at which time counsel for plaintiff understood that the default of the plaintiff should be also set aside. It further appears from a certified copy of the rules of the Municipal Court included in the transcript of the record, that there is no rule of the Municipal Court requiring an affidavit of merits to be filed to a statement of a defendant's claim of set-off, nor fixing a time when an answer of any kind must be filed to such claim of set-off. Rule 19 of that court provides that "in all cases except where a party is in default, new matter alleged in the pleading filed

On May 9, 1935, on motion of the defendant, the judgment so entered was vacated, and a week later the case came on again in regular course for trial before the court without a jury, a jury being waived. The record shows that at the close of that trial, a finding and judgment for $117.64 "against the plaintiff" were entered. From this judgment the plaintiff appeals.

The stenographic report of the proceedings had on the second trial shows that no evidence whatever was heard by the court, but that the trial consisted solely of a discussion between counsel as to the effect of the order defaulting the plaintiff for want of an affidavit of merits to the set-off. It appears that after such argument, the plaintiff's attorney asked the court to set aside the default order, and proceeded and asked leave to file affidavits showing he swore that the order "requiring" him to file an affidavit of merits to defendant's set-off was not entered "on motion of the plaintiff," but that in fact neither plaintiff nor anyone representing him was present in court when that order was entered, and that neither plaintiff, nor his counsel had any knowledge or notice that either that order, or the default order, had been entered, until the judgment in plaintiff's favor was vacated, at which time counsel for plaintiff understood that the default of the plaintiff would be also set aside. It further appears from a certified copy of the rules of the Municipal Court included in the transcript of the record, that there is no rule of the Municipal Court requiring an affidavit of merits to be filed to a statement of a defendant's claim of set-off, nor fixing a time when an answer of any kind must be filed to such claim of set-off. Rule 17 of that court provides that "in all cases except where a party is in default, any matter alleged in the pleading filed

last in order * * * shall be deemed denied by the opposite party."
Under this rule, in the absence of any general rule requiring a
written denial to be filed to a claim of set-off, the plaintiff
could not be defaulted for failure to file a written denial, or
an affidavit of merits, without notice and a special rule on him
to do so within a specified time. No such notice was given or
rule entered in this case, and therefore the default order was
erroneously entered, and should have been vacated on plaintiff's
motion. Instead of doing that, the trial court declined to hear
plaintiff's motion to vacate the default, upon the ground that
he could not set aside an order made by another judge of the same
court. In this, we think, there was manifest error. Clearly,
the action of one judge of the Municipal Court in entering a default for want of a pleading is not so binding upon another judge
before whom the case is regularly called for trial, over a year
later, as to prevent the latter from vacating such default upon a
proper showing. On the contrary it is the duty of the trial judge
to entertain and pass upon any motion of that character precisely
as if he had entered the default, and if he finds that the former
order was improperly made or entered, to correct the same. (Luther
v. Mathis, 211 Ill. App. 596.) To permit a judgment of this
kind to stand, where it appears that the party against whom the
judgment was rendered was in court at the time ready with his evidence to meet the claim of his opponent, and was prevented from
presenting his evidence only because an order defaulting him had
been erroneously entered without his knowledge more than a year
before by another judge of the same court, would be giving more
effect to form than to substance.

For the reasons stated, the judgment of the Municipal
Court is reversed and the cause remanded with directions to that

court to vacate the default and try the case on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

100 - 28751

JOSIE RICE,
Plaintiff in Error,

vs.

EUGENE L. McGARRY,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

233 I.A. 641

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff sued the defendant, her former attorney, in tort, claiming that he had collected $300 which was due her for temporary alimony and had appropriated the same to his own use; and also that he refused to return a transcript of evidence of the value of $50. From a judgment in favor of defendant, the plaintiff brings this writ of error.

It appears from the evidence that in November, 1919, the plaintiff had a suit for separate maintenance pending in the Circuit Court, and employed defendant to take the place of two other solicitors who had filed the bill in her behalf. She testified that she paid defendant a retainer of $100 and that he then told her that she "need not pay him any more because Mr. Rice would have to pay that." Defendant's version of what was said at that time is that plaintiff said her husband was a man of means, and, as she understood it, the court would allow solicitor's fees at the time of the disposition of the case; whereupon defendant told her he must have a retainer. When that was paid, her first solicitors withdrew from the case and defendant was substituted as her solicitor.

Prior to that time an order had been entered for the payment to her of $25 a week alimony. Defendant caused a petition to be filed in her behalf for an increase of alimony and for an allowance of solicitor's fees. The petition was

referred to a master and eventually an order was entered increasing the allowance for temporary alimony to $300 a month, and directing the husband to pay her $400 for her solicitor's fees. These amounts the husband paid through defendant's office.

The husband filed a cross-bill for divorce, charging adultery, and negotiations began between counsel with a view of effecting a settlement of the money questions involved in the suit. Defendant testified that plaintiff's husband offered to pay a lump sum of $15,000 in lieu of alimony, and $1,500 solicitor's fees, which offer he submitted to the plaintiff, but she refused to consider it, claiming that her husband was worth in excess of $50,000 and had an annual income of about $15,000.

On October 28, 1921, defendant sent plaintiff a bill for $1,000 for services, crediting her with the cash retainer paid in November, 1919, with the $400 allowed by the court, and with $100 paid by plaintiff in December, 1920, leaving a balance due, as he claimed, of $400. With this bill he sent a letter saying: "If agreeable to you I will keep the next check I receive from Mr. Rice and apply the same on account of your indebtedness to me." She replied at once saying she could not consent to this, because she needed all of it to pay her current expenses; and a few days later, she wrote again, saying that she had learned from her husband that he always mailed his check to defendant not later than the 17th of each month, and asking defendant to send her "my last check at once," and to send the November check "immediately following the 17th of the month." To this letter defendant replied that in view of the amount of work he had done, and her attitude regarding a settlement and the time spent in preparing her case for trial, "and with the prospect of a settlement being made between you and Mr. Rice without my aid," he thought he was justified in keeping the check for $300 and in asking her for the remainder of the bill. His letter closed as follows: "If you are not satis-

fied with this arrangement, I have no objection to your placing your case in some other hands, relieving me of the possibility of having to sue for my fee, in addition to the loss of time."

The day after receiving this letter, plaintiff caused another lawyer to serve notice on defendant that he would ask to be substituted as plaintiff's solicitor in the separate maintenance suit. When the motion was presented, the defendant objected on the ground that he had not yet been paid for his services. The judge stated that he would not enter the order of substitution unless defendant was paid. The next day, in the absence of the defendant, and without notice to him, the plaintiff and her new solicitor appeared before the same judge and told the judge that defendant had been paid in full by retaining $300 which he had collected from the plaintiff's husband for alimony; whereupon the order of substitution was entered. Her present solicitor admitted on the trial that this was true. Defendant had not at that time applied the sum collected to his claim for services, but did so when he learned that the substitution had been made in the manner stated. No further demand was made on defendant for the money so collected until after the separate maintenance suit and the cross bill for divorce had been tried. That trial resulted in a decree against the plaintiff and in favor of her husband, thereby ending all question of further alimony or solicitor's fees.

Plaintiff's counsel insist that the law is settled that under no circumstances has a solicitor the right to retain for fees any money collected by him as temporary alimony. Such seems to be the rule in New York, where the view is taken that alimony awarded upon a decree of divorce is not assignable by the wife and therefore cannot be subjected to the payment of her debts. (*Romaine* v. *Chauncey*, 60 Hun. 477; *Re [illegible]*, 75 N. Y. Supp. 580.) No Illinois case has been cited which decides this question. In this state the right of an attorney to retain possession, until his charges are paid, of property belonging to his client which

comes into his hands within the scope of his employment - called a possessory or retaining lien - has been recognized and enforced. (Sanders v. Seelye, 128 Ill. 631; McCracken v. City of Joliet, 271 Ill. 270.) This right of the attorney ordinarily extends to money collected by the attorney on behalf of his client. (Needham v. Voliva, 191 Ill. App. 256; 6 Corpus Juris, 766.) Whether a solicitor may assert this right, or lien, upon money ordered to be paid for temporary alimony against the wishes of his client, is a question which is not necessarily involved in this case, and which we do not decide, for the reason that it sufficiently appears from the evidence that the money collected by the defendant as temporary alimony was not applied to his account for services until the plaintiff had given her consent that it should be so applied. We think she cannot be heard at this time to say that she did not consent, in view of the evidence (or statement taken as evidence by the trial court) of her present solicitor that, on behalf of the plaintiff and in her presence, he procured an order from Judge Bush substituting himself as her solicitor, upon his representation, made in open court, that defendant had been paid in full by retaining the identical sum of money which is in controversy in this suit.

As to the item of $50 claimed by the plaintiff, it appears that plaintiff paid that amount to a court reporter for a transcript of evidence in another case, and that she left it with the defendant for safe keeping; that after defendant had been superseded as her counsel in the manner above indicated, the court reporter called at defendant's office and requested permission to take it for the purpose of making a copy, that defendant's clerk allowed him to take it for that purpose, that the reporter thereafter refused to return it to the plaintiff upon the demand of her present solicitor, who thereupon paid the reporter $14 to get it.

No reason is shown why the plaintiff could not have obtained such transcript from the court reporter by appropriate

[illegible] within the scope of his employment [illegible] a [illegible]
a percentage or retaining fees — has been recognized and enforced.
([illegible] v. [illegible], 170 Ill. 642; [illegible] v. [illegible], 301
Ill. 287.) This right of the attorney ordinarily extends to money
collected by the attorney on behalf of his client. ([illegible] v.
Smith, 184 Ill. App. 269; 4 Words and Phrases, 759.) [illegible]
[illegible] may assert this right, as lien, such money [illegible] is
be made for temporary alimony against the wishes of his client,
is a question which is not necessarily involved in this case, and
which we do not decide, for the reason that it sufficiently appears
from the evidence that the money collected by the defendant as
temporary alimony was not applied to his account for services until
the plaintiff had given her consent that it should be so applied.
It [illegible] he [illegible] at that time to say that she did not
consent, in view of the evidence [illegible] given at [illegible]
by the trial court of the present solicitor [illegible], on behalf of
the plaintiff and in her presence, he [illegible] from [illegible]
[illegible], [illegible] himself or her solicitor, upon this representation,
made in open court, that defendant had been paid in full by retain-
ing the [illegible] sum of money which is in controversy in this suit.

As to the item of [illegible] claimed by the plaintiff, it
appears that plaintiff sent this money to a court reporter for a
transcript of evidence in another case, and that she left it with
the defendant for this purpose; that after defendant had been substi-
tuted as her counsel in the divorce case [illegible], the court re-
porter [illegible] of defendant's [illegible] to take
it for the purpose of making a copy, that defendant's client [illegible]
him to [illegible] it for that purpose, [illegible] the reporter thereafter re-
fused to return it to the plaintiff upon the demand of her present
solicitor, who thereupon paid the reporter $15 to get it.

No reason is shown why the plaintiff [illegible] not have
obtained such transcript from the court reporter by [illegible]

legal proceedings, and the payment of the $14 to the reporter is a matter for which the defendant is not responsible.

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

178 - 28759

LYALL CRIPPS,
Appellee,

vs.

CHICAGO, WEST PULLMAN
& SOUTHERN RAILROAD COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

233 I.A. 641

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal brings up for review a judgment of the Circuit Court in favor of the plaintiff for $1460, representing the damages to the plaintiff's automobile resulting from a collision with one of defendant's trains at a crossing on 104th street, in the city of Chicago. The errors relied upon are that the verdict and judgment are manifestly against the weight of the evidence, that the court erred in the admission of evidence, in giving some of the instructions and refusing others. No brief has been filed in this court on behalf of the plaintiff. After reading the testimony, we agree with defendant's first contention, and for that reason it will not be necessary to consider the others.

The accident happened on December 26, 1920, between eleven and twelve o'clock at night. It was dark and had been snowing. There were several inches of snow on the ground. 104th street runs east and west, and at a point half a block east of Torrence avenue, it is crossed by a number of steam railroad tracks, running north and south. On the night in question, defendant was operating a train of cars on the eastern-most of these tracks. The train consisted of an engine and five or six cars, called by the witnesses "ladle" cars, loaded with hot slag from a furnace located some distance south of 104th street. North

of 104th street the grade of the tracks rises gradually until it reaches a place used for dumping. Just before the time of the accident, one of defendant's engines pulled this train of cars from the furnace north to a point about 200 feet south of 104th street, stopped there, switched the engine to the rear of the train, and started to push the "ladle" cars across 104th street and up the incline above mentioned to the dumping ground.

Several witnesses testified there was a glare from the molten slag in the darkness above the train, which could be seen at the 104th street crossing. The conductor of the train testified that before it started, he, with a lantern, went up to the crossing, gave the starting signal to the engineer by waving his lantern, to which the engineer replied by two blasts of his whistle, and that the train then moved north, with an automatic bell ringing on the engine. His testimony is corroborated by two apparently disinterested witnesses. Aside from the glare above mentioned, there were no lights on the train. The crossing was lighted only by an electric light on the north side of 104th street just east of the railroad track. There were gates at the crossing, but the gates were up, and, the evidence shows, were out of order at the time of the accident. So far as appears from the evidence, there was no watchman or gateman at the crossing at that time. Between 104th street and the furnace the land is open and vacant.

As the train started north, the plaintiff, driving his own taxicab, with four passengers, came south on Commercial avenue, which curves into 104th street some three blocks east of Torrence avenue. Plaintiff drove around this curve into 104th street and west on 104th street at a rate of speed estimated by defendant's witnesses at more than thirty miles an hour. Plaintiff testified that although he looked north and south "for trains" he did not see the train, then almost directly in front

of him and half way over the crossing, until he was ten or fifteen feet from the crossing. Then, he said, "When I saw what was going to happen, I swerved to the north and tried to beat the engine to it, or keep from having a worse accident than I had." On cross-examination, he testified that he tried to run into the gate post but missed it. The front of his cab was struck by the moving train and thrown to one side, badly damaged. Plaintiff also testified that he was going about twelve miles an hour, and did not see the glare from the "ladles," nor see anyone waving a lantern at the crossing, nor hear any bell or whistle. Three of his four passengers testified they saw or heard nothing of the train until the collision came, and that plaintiff was not driving faster than fifteen miles an hour.

The view of the passengers, seated as they were inside the closed cab, was more or less obstructed. The plaintiff's view, however, was not obstructed. His cab was a limousine, open where he sat, except for the glass wind shield in front. So far as the evidence shows there was nothing whatever to prevent him from seeing the approaching train, or the conductor standing on the crossing swinging his lantern, or the glare from the "ladles." Just before the train started north, a street car going east had come to the west side of the crossing on 104th street, and stood there at the time of the accident waiting for the train to pass. Both the motorman and the conductor of that street car testified that they saw the train and the glare from the "ladles," and the conductor of the train standing on the crossing swinging his lantern. If they could and did see these things, no reason appears from the evidence for the plaintiff's alleged failure to see and hear them, except his own carelessness. It seems clear from all the evidence that he heedlessly drove his cab into a place of danger and then, as he testified, tried to beat the train over the crossing.

[illegible]

[illegible]

For the reasons indicated, the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

108 - 28759

FINDING OF FACT.

The court finds as an ultimate fact that at and just before the time of the accident in question, the plaintiff did not exercise ordinary care in driving and managing his automobile, and that such lack of ordinary care on his part contributed to cause the accident in question.

119 - 28771

EDWARD GINTER,
Appellee,

vs.

HECO ENVELOPE COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 641

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff sued his former employer for damages for an alleged breach of his contract of employment, claiming that he was wrongfully discharged before his contract expired. On a trial before the court without a jury, he recovered a judgment for $3,738.30, from which this appeal was perfected.

The evidence shows that plaintiff worked for the defendant as its sales manager from March 1, 1919, until May 6, 1920. At the time he was first employed, the terms and conditions of his employment were put into the form of a letter addressed to him by the president of the defendant company, as follows:

> "The following agreement between you and the Heco Envelope Company will come into effect March 1, 1919, until February 28, 1920.
>
> "We agree to pay you a salary of $4,000 a year for your services in capacity of sales manager, and such other duties we have decided upon and agreeable to both you and the Heco Envelope Company.
>
> "Being understood that as well as managing the sales department it will be satisfactory to you to attend to the details of any contracts that may arise which will require your attention either in or out of Chicago."

On January 6, 1920, the annual meeting of the board of directors of the defendant corporation was held, and at that meeting the plaintiff was elected vice-president "for the ensuing year," and his salary fixed at the rate of $5,000

per year.

The by-laws of the defendant provide that the officers, including the vice-president, shall be elected by the directors, shall perform the duties pertaining to their respective offices, and shall hold office for one year, but may be removed at any time by the directors. The duties of the vice-president, as prescribed in the by-laws, are to perform all the duties of the president, when the president is absent.

It was stipulated on the trial that both before and after January 1, 1920, plaintiff performed all the services he was under any obligation to perform in any capacity up to May 6, 1920, and that the plaintiff was paid at the rate of $4,000 a year prior to January 1, 1920, and at the rate of $5,000 per year from that date until the Saturday preceding May 6, 1920. On the date last mentioned, the president of the company, without any formal action of the board of directors, ordered the plaintiff to quit, saying: "We do not want your services in this company any more and you will have to get out of here as soon as you can," tendering him a check at the same time for his last week's salary. Plaintiff refused the check, told the president he expected a settlement for the balance due him, and left.

It is contended by counsel for defendant that, by accepting the office of vice-president at an increased salary for the year following the annual meeting, plaintiff entered into a new contract of employment which operated as a cancellation of the first contract, and in so doing, he, as an officer of the corporation, was chargeable with knowledge of the by-law authorizing the directors to remove any officer at any time; that the act of the president, in assuming to discharge the plaintiff, was not the act of the board of directors, and therefore the plaintiff was never really discharged; therefore (it is argued) the plaintiff must be

per year.

The by-laws of the defendant provide that the officers, including the vice-president, shall be elected by the directors, shall perform the duties pertaining to their respective offices, and shall hold office one year, but may be removed at any time by the directors. The duties of the vice-president, as prescribed in the by-laws, are to perform the duties of the president, when the president is absent.

It was stipulated at the trial that both before and after January 4, 1922, [illegible] performed [illegible] the [illegible] he was [illegible] to [illegible] up to May 4, 1922, and that the plaintiff was paid at the rate of [illegible] a year prior to January 4, 1922, and at the rate of [illegible],000 per year from that date until the [illegible] preceding May 4, 1922. On the date last mentioned, the president of the company, without any formal action of the board of directors, informed the plaintiff in substance: "We do not want your services in this company any more and [illegible] will have to get out of here as soon as you can." [illegible] the plaintiff's salary. Plaintiff refused to leave, [illegible] expected a settlement for his salary [illegible], and left.

It is contended by counsel [illegible], by accepting the office of vice-president at an increased salary for the year following the annual meeting, plaintiff entered into a new contract of employment which operated as a cancellation of the first contract, and is so [illegible], but, as an officer of the corporation, [illegible] subject to the by-laws [illegible] the directors to remove any officer at any time; that the act of the president, in assuming to discharge the plaintiff, was not the act of the board of directors, and therefore the plaintiff was never legally discharged; therefore [illegible] the plaintiff [illegible]

held to have abandoned his contract when he quit defendant's service at the command of its president. A portion of this argument is sound, in our opinion; the remainder is unsound. We agree with defendant's counsel that the election of the plaintiff to the office of vice-president, with added duties and responsibilities, at an increased salary from and after January 1, 1920, and his acceptance of such election and of the increased salary paid after January 1, 1920, constituted a new contract between the parties, - or a modification of the old one. By the terms of this new contract - or modified old one - we think the defendant agreed to pay the plaintiff for his services at the rate of $6,000 a year for one year beginning January 1, 1920.

We cannot, however, agree with defendant's contention that plaintiff was never discharged merely because there was no formal action of the board of directors to that effect. There were three directors, of whom the president was one. Apparently he ran the business of defendant. He assumed the right to discharge the plaintiff, and to make the latter "get out," by force if necessary. His act in that respect was evidently known to the other directors and never repudiated or disaffirmed by them. It is a fair inference, at least, that they acquiesced in and approved his act. Thereby his act was ratified. Furthermore, the record shows that both parties understood, and acted upon the understanding, that plaintiff was discharged on May 6, 1920; and as it is conceded that his work up to that time was fully performed according to his contract, and as his contract did not expire until eight months thereafter, it follows that plaintiff did not voluntarily abandon his contract, but that the contract was wrongfully broken by defendant.

It is contended that this court cannot review the action of the trial court upon these questions in the absence of any propositions of law marked "Held" or "Refused" by the trial

court. The contrary was held in the recent case of <u>Pittsburgh C. C. & St. L. Ry. Co.</u> v. <u>City Ry. Co.</u>, 300 Ill. 162.

It is finally contended that the judgment is for too large an amount. We think this is true but not for the reason stated by defendant's counsel. It appears from the evidence that plaintiff was paid from January 1, 1920, to about May 1, 1920, at the rate fixed by the new contract of January 5, 1920, and was not paid the remainder of that year's salary. During that time he earned $300. Upon this basis, he was entitled to $3,033.33 - not $3,738.30 - as damages for defendant's breach of contract. This error can be cured by a <u>remittitur</u>, if plaintiff sees fit to so cure it. If, therefore, within ten days from the filing of this opinion, the plaintiff will file in the office of the clerk of this court a <u>remittitur</u> of $704.97, the judgment for the remainder, viz., $3,033.33, will be affirmed, otherwise the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED ON REMITTITUR.

Gridley, P. J., and Barnes, J., concur.

292 - 28350

FAUNTLEROY MATHEWS and BESSIE MATHEWS, Appellees,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
NORA DEVANNEY, Appellant.	

Opinion filed March 15, 1924.

233 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a forcible entry and detainer proceeding, brought by the plaintiffs, Mr. and Mrs. Mathews, to recover possession of a residence located in the City of Chicago. The defendant, Mrs. Devanney, had occupied the residence as a tenant, under succeeding leases, for some sixteen years. The last lease she had on the premises was one from the then owners, the Trustees of the Estate of Daniel Delaney. This was a lease for the period beginning May 1, 1922, and ending February 28, 1923. The plaintiffs became the owners of the premises, by warranty deed, executed by the aforesaid Trustees, under date of February 20, 1923. Mrs. Devanney had been paying $50.00 a month as rent under her last lease. Early in March the plaintiffs, through their agent, sent Mrs. Devanney copies of a new lease, for the period of one year at the same rental but with the provision that she pay the water taxes on the premises and also with a provision of the termination of the lease on 30 days' notice. Mrs. Devanney never executed these leases. She paid $50.00 to the plaintiffs' agent, as rent for the month of March. Later, the plaintiffs attempted to get possession of the premises but without success, whereupon the present pro-

ceedings were instituted. The issues in the trial court were presented to the court and a jury. At the close of all the evidence the court directed a verdict for the plaintiff. Judgment for possession followed. To reverse that judgment the defendant has perfected this appeal.

In support of the appeal the defendant contends that she was a tenant from year to year, and that she therefore could not be dispossessed except on sixty days' notice at the termination of any year, and she further contends that a sixty days' notice, which was served on her by the plaintiff's agent late in March, was not within the provisions of the statute as to notice, even considering her as a tenant from month to month.

Clearly the defendant was not a tenant from year to year but from month to month. The last formal lease under which she held possession, of the premises was for a term less than one year, namely, from May 1, 1922, to February 28, 1923. At about the time of the expiration of that lease, the ownership of the property changed hands and the defendant retained possession pending arrangements for a further lease of the premises, which arrangements were never made. Section 6 of our statutes on Landlord and Tenant (Ill. Sts. Ch. 80, sec. 6) provides that "in all cases of tenancy by the month or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by sixty days' notice in writing (until July 1, 1925, and thereafter by thirty days' notice in writing) and to maintain an action for forcible entry and detainer."

It is equally clear that the sixty days' notice served on the defendant under date of March 28, 1923, more than sixty days prior to the institution of these proceedings, which were commenced in the month of July, 1923, was a proper notice and one which complied with the requirements of the statute and that it was served as the statute requires. The notice was addressed to the defendant at the premises involved and by it she was notified that her tenancy "of the following premises, to wit: the brick dwelling known and located at No. 1380 Washington Boulevard, situate in the City of Chicago, in the County of Cook, and State of Illinois," would terminate on May 31, 1923, and by that notice the defendant was required to surrender possession of the premises at that time. On the reverse side of the notice was the affidavit of service, executed by one Filar, as agent of the plaintiffs. The affidavit was in due form and properly subscribed and sworn to before a notary public. It reads as follows:

> "John N. Filar, Agt. being duly sworn, deposes and says that on the 28th day of March, 1923, he served the within notice on the within named Nora Devanney, by delivering a copy thereof to one John Doe, residing on and in charge of said premises, and upwards of the age of twelve years."

The first criticism of the notice and affidavit of service as it was introduced in evidence is to the effect that the affidavit was defective in that it states that it was served on John Doe, in charge of "said premises," without stating what premises. No answer need be made to such a hyper-critical contention. The premises are twice referred to on the face of the notice and the contention is not made that they are not properly and accurately referred to in both places. The next criticism of the notice is to the effect that it is

defective in that the affidavit of service states that a copy was left with "John Doe". The argument is that at best the notice and affidavit of service, as introduced by the plaintiffs, was merely prima facie evidence of such notice and that the prima facie proof thus made was broken down because when Filar, the agent, of the plaintiffs, was on the stand he admitted, on cross-examination, that he did not know anybody by the name of John Doe, and the defendant testified that she knew no one by that name, and that there never was any person on or about the premises, by that name. This objection is quite as hypercritical as the first one. The witness Filar testified that when he went to the premises to serve his notice he was unable to find the defendant there; but that he did find on the premises a man appearing to be about forty years of age, who, the witness testified, he knew to be a boarder, and he further testified that at the time he served the notice he did not know this man's name, but that on a later occasion, when the defendant's son came over to a garage which was operated by the plaintiff, Mathews, apparently to make a tender of rent, this same man was with the defendant's son and he heard the latter introduce the man to the plaintiff, Mathews, under the name of Murphy, but the witness testified, as already stated, that at the time he served the notice he did not know the man's name was Murphy. It is argued by the defendant that the question of the good faith of the agent Filar, in making his affidavit of service to this notice should have been left to the jury, or, in other words, that the jury should have been permitted to decide "whether or not John Doe was in possession or residing on the premises in question" at the time the notice was served. It was nowhere

defective in that the affidavit of service avers that a copy was left with "John Doe". The argument is that at best the return and affidavit of service, as introduced by the plaintiffs, was merely _prima facie_ evidence of such notice and that the _prima facie_ proof thus made was broken down because when Filer, the agent, of the plaintiffs, was on the stand he admitted, on cross-examination, that he did not know anybody by the name of John Doe, and the defendant testified that she knew no one by that name, and that there never was any person in or about the premises, by that name. This objection is quite as hypercritical as the first one. The witness Filer testified that when he went to the premises to serve his notice he was unable to find the defendant there; but that he did find on the premises a man appearing to be about forty years of age, who, the witness testified, he knew to be a boarder, and he further testified that at the time he served the notice he did not know this man's name, but that on a later occasion, when the defendant's son came over to a garage which was operated by the plaintiff, Mathews, apparently to make a tender of rent, this same man was with the defendant's son and he heard the latter introduce the man to the plaintiff, Mathews, under the name of Murphy, but the witness testified, as already stated, that at the time he served the notice he did not know the man's name was Murphy. It is argued by the defendant that the question of the good faith of the agent Filer, in making his affidavit of service in this action should have been left to the jury, or, in other words, that the jury should have been permitted to decide "whether or not John Doe was in possession or residing on the premises in question" at the time the action was started. It was nowhere

denied in the evidence by the defendant, or any other witness, that a man answering the description of the witness Filar, named Murphy, was in fact a boarder in the defendant's home at the time Filar served the notice in question.

On this record the trial court was fully justified in refusing to direct a verdict for the defendant at the close of the plaintiff's evidence and in allowing the motion of the plaintiffs for a directed verdict in their behalf at the close of all the evidence.

The judgment of the Municipal Court appealed from is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. and O'CONNOR, J. CONCUR.

58 - 28706

JAMES D. [illegible],
Appellant,

vs.

THE LIQUID CARBONIC COMPANY,
a corporation,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 612

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree which dismissed his bill of complaint for want of equity. The cause was heard by the chancellor upon objections filed to the report of a Master, which by order stood as exceptions to the report.

The bill demanded an accounting and the order of reference required that the Master report whether the complainant was entitled thereto. The bill alleged and the report of the Master found that on the first day of October, 1917, complainant and defendant entered into a written contract whereby complainant agreed to act as a salesman for defendant to solicit orders and consummate sales in such territory as might be assigned to him by defendant, and to do such other work in that line as he might be instructed by defendant to do, for which services defendant agreed to pay complainant a salary of $150 a month, together with certain expenses and a commission of 1½% upon the net amount of sales as the same were in said contract defined. In the case of soda fountains and carbonators sold on time, the commission was not to be paid until one-third of the purchase price had been paid to defendant and in other cases not until the whole of the purchase price should be paid.

Other provisions as to "Cancellations," "Returns," "Deductions," "Bad Accounts," etc., were contained in the contract.

The bill alleged that the complainant performed all his duties under the contract until November 6, 1919, when the parties entered into another similar written contract with the exception that the latter contract was dated October 1, 1919, and provided for a salary of $250 a month and expenses, but no commissions.

The contract of October 1, 1917, terminated by its terms on September 30, 1918, and the answer of the defendant specifically denies that the complainant thereafter continued in its employment without any new or different arrangement as alleged in the bill, and denies that any renewal was made extending the prior contract beyond that date, and denies that the contract was in force thereafter, or that complainant was in active pursuance of his duties under that contract or any renewal thereof, continuously from September 30, 1918, to October 1, 1919, as alleged by the bill of complaint.

The issue raised by the averments of the bill on this point, and the denial thereof by the answer, is the controlling question in the case, to which the several exceptions to the Master's report are directed.

The defendant contends that the complainant failed to establish facts sufficient to call for the interposition of a court of equity, and that he may well be left to pursue his remedy at law.

The evidence fails to establish either a fiduciary relationship or an element of fraud. Indeed, it is not claimed that these elements are in the case nor in our opinion did the evidence tend to establish that (had it been true, would easily

have been shown upon the hearing) that there was any complexity of accounts between the parties such as a jury would find it impossible to intelligently comprehend.

It may, we think, well be doubted whether a bill in equity can be maintained within the rules stated in [illegible] v. Hoffman, 148 Ill. 85, and Miller v. Russell, 224 Ill. 68.

Disregarding this point, however, we prefer to place our decision upon the ground that on the ultimate question of fact evidence has not been pointed out to us sufficient to overcome the finding of the Master as approved by the Chancellor.

That question of fact is whether the written contract under which defendant was employed for a term beginning October 1, 1917, and ending September 30, 1918, must be held to have been renewed for the period beginning October 1, 1918, and ending September 30, 1919.

The determination of this question does not, in our opinion, depend upon the contradicted statements of the plaintiff, (who alone testified in his own behalf) and those of the defendant's superintendent and two other employees of the defendant, all of whom testified to alleged oral admissions by complainant, which were denied by him.

Such evidence is most unsatisfactory for obvious reasons. We base our opinion rather upon the uncontradicted evidence which appears in the case.

The defendant corporation is engaged in the manufacture and sale of soda fountains and soda fountain supplies, etc. It has a branch office in the City of Chicago and conducts its business there and in contiguous territory. It first employed the plaintiff as a salesman in February, 1915.

As it seems was its usual custom, defendant entered into a written contract covering the terms of complainant's

employment. Until about June, 1917, under defendant's direction, complainant worked in the territory adjacent to Indianapolis, Indiana, and was then transferred to the Chicago office and assigned to a territory known as the north side, which included certain suburbs of Chicago.

By the terms of his contract, complainant received $150 a month and with well defined exceptions, a commission of 1½% on sales made by him. Upon the expiration of his contract September 30, 1918, the written contract was not renewed. The one sufficient reason which appears in the record was that complainant's health had become impaired to such an extent as to make it doubtful if he would be able to continue in the service of the defendant. His sight was becoming impaired by cataracts which unfortunately formed on both his eyes. It appeared that an operation would be necessary, and he became, as the evidence shows of a very pessimistic state of mind.

He does not deny the testimony of a fellow employee, who says complainant told him that he did not know what the company would do with him after October 1.

The manager of defendant's Chicago branch office was Mr. Olwin, with whom complainant frequently talked about his physical condition, and who seems to have treated complainant with much consideration, even stating to him that he, Olwin, would see that complainant was taken care of until the operation was completed.

It is not disputed that, while the written contract was not re-executed, the same salary was paid to complainant, notwithstanding his disability which is further indicated by the fact that, during the entire fall of that year, commissions (which defendant also paid to him at the same rate as previously) amounted only to $36.66.

On December 18, 1918, complainant went to a

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

hospital and was operated on, returning to his home on January 10, 1919, and to the office of the defendant about January 27, 1919. He did not again take up the duties which had theretofore been in fact performed by him, although, as his counsel points out, the services thereafter performed were such as under the prior contract he might have been directed to perform by his employer at its discretion.

His own statement is to the effect that, up to some time in February, he was not able to do his usual work.

On February 2nd he made a trip to Iowa with one of defendant's salesmen, returning February 14th, and thereafter made another trip to Indianapolis. About March 15th he was put in charge of a new organization known as the Fruit and Syrup Squad, - a development of defendant's business which was experimental in character.

Up to the month of May he was paid the same salary as that of the previous year, namely, $150 a month. At his solicitation in May his salary was raised to $175 a month, and in August, without solicitation on his part, his salary was again increased to $200 a month. On November 19th he was given a written contract for the year beginning October 1, 1919, and ending September 30, 1920, and a salary of $200 a month without commission of any kind.

Complainant admitted on the hearing that all salary had been paid to him in full. He continued to work for defendant until September 13, 1920.

Complainant's case is based upon the theory that a new contract for the period in question must necessarily be inferred from the fact that, after the expiration of his written contract and up to April 1, defendant continued to pay the same salary as during the previous year, notwithstanding defendant's disability, and further generously paid the comparatively small amount of commission earned. The rule of law upon which complainant relies has

been definitely stated in the cases upon which (significantly) both defendant and complainant rely.

It is undoubtedly the law that one who is under a contract for a specified time in the employment of another and who continues after the expiration of the term named in the contract, will, in the absence of facts showing a contrary intention, be considered as holding over under the original contract. "It is the same, in principle, as a holding over by a tenant, who is under a specified contract. If he holds over he will be considered as holding over the first contract, if no change is shown."

Grover & B.S.M.Company v. Bulkley, 48 Ill., 189; Ingalls v. Allen, 132 Ill., 170; Crane Bros. Mfg. Company v. Adams, 142 Ill., 125; Moline Plow Company v. Booth, 17 Ill. App. 574.

As the defendant points out, the rule announced in these cases is based upon a presumption. In the last analysis the decision of the question must depend on what the evidence shows was the mutual intention of the parties. In the absence of some qualifying circumstances, an intention to continue the same contract upon the same terms will undoubtedly be inferred from the facts of a continuing similar service with the payment of a similar compensation. These appearing, the complainant argues that the burden of proof is shifted to defendant to establish the qualifying circumstances. This may be conceded. However, it is apparent from the evidence in this case that complainant was not willing to rest his case on these grounds, but assumed the affirmative, attempting to show oral conversations amounting to an express agreement. These were in substance denied (although not with the specific certainty satisfactory to complainant's counsel), and two other witnesses testified with more or less certainty to supposed admissions of complainant which were inconsistent with the testimony given by him. It is not necessary to weigh this contradictory evidence with nicety.

The undisputed facts of complainant's impaired physical condition, the change in the kind of service demanded by his employer, the successive increases in the amount of the salary paid per month, the fact that upon the whole record there is a failure to show such requests as would (in his then financial condition) in all human probability have been made by complainant for a payment of or advance upon commissions, had there been a contract for the payment of the same, with the further undisputed fact that he at the end of the year accepted (apparently without protest) a written contract for a slightly advanced salary without any reference whatever therein to commissions, make it impossible for us to say that the Chancellor erred in confirming the finding of the Master, which, while it does not have the weight of the verdict of a jury, is at least entitled to considerable consideration. Larson v. Gloss, 235 Ill., 584.

We are satisfied that complainant's cause upon the facts is without merit and that the bill was properly dismissed for want of equity.

The decree is therefore affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

104 - 28758

PEOPLE OF THE STATE OF ILLINOIS ex rel. ROBERT WILLIAM WELDER ROSS,
Plaintiff in Error,

vs.

ST. VINCENT'S INFANT ASYLUM and GERTRUDE E. HEALY, Its Agent and Employee,
Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

233 I.A. 612

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In the trial court Parmelia E. Ross of the city and County of San Francisco, in the State of California, filed her petition in which she alleged that the relator, Robert William Welder Ross, a child nine years of age and her adopted son, was restrained of his liberty by St. Vincent's Infant Asylum of Chicago, Illinois, Gertrude E. Healy, and others. She prayed that a writ of habeas corpus should be directed to these, and an order was entered directing that the writ issue.

It issued on August 1, 1922, and was returnable August 14, 1922. The respondent Gertrude E. Healy made return, denying that she had the custody, power over, or possession of the child. The Asylum made return that said child was detained by and under its protection in the city of Chicago, County of Cook and State of Illinois, for the purpose of being educated and maintained by it as lawful guardian. The Asylum further set up in its return that it was a legally organized corporation under the laws of the state of Illinois for the purpose, among others, of establishing and maintaining an asylum or home to receive therein foundlings and orphaned and abandoned infants and children, and to nurse, care for, rear, protect and provide homes for the same. It set up in its return the certificate of its incorporation, certified by the

Secretary of State, showing that this was the particular business or object for which the corporation was formed.

The return further set up chapter 58 of the Illinois Statutes, Smith-Hurd's Revised Statutes of Illinois, 1923, which in substance provides that, when any child in this state under the age of one year shall be wilfully abandoned by its parents and shall be taken and cared for by any charitable institution in this state, incorporated or otherwise, such parents shall thenceforth lose their right, control, and authority over the child, and that the same shall thereupon become vested in the institution. This respondent further made return that the child was and for more than ten months then last past had been placed in a private home and was properly maintained and cared for and would be produced by the respondent as the court might direct.

Further, that on June 2, 1912, the said child was, at th age of one day, found an abandoned baby at the door of the Guardian Angels' Home at Joliet, Illinois, by the Sisters of St. Francis, and was delivered to respondent, which assumed the care, custody and control of the child for the purpose of education and maintenance under and by virtue of the authority granted by the State of Illinois; that the name Robert William Walter was given to it, and that both the paternity and maternity of the said child is and was unknown.

The return further alleged that on June 3, 1912, the care of the said child was given to one James Hand and Ethel Hand, his wife, until such time as respondent was satisfied that they were able to provide a proper and suitable home for the child, when the respondent would give the necessary consent to the adoption of the child, it being then and there expressly understood by and between the respondent and the said John Hand and Ethel, his wife, that the legal custody and control of the said child should remain in the respondent until its adoption, if the

respondent would consent thereto.

Further, that on December 18, 1913, it was informed by the said John Hand that his wife, Ethel Hand, had abandoned their home, taking the said child with her, and was contemplating divorce proceedings; that the respondent, being unsatisfied with the then surroundings of the child, demanded that Ethel Hand return the child to the Home of respondent, whereby said Ethel surrendered said child to respondent on December 23, 1913, and that the said John Hand and Ethel Hand having become reconciled and promising they they would re-establish their home again, requested that the care of the child should be restored to them, and that thereupon the care of said child was again given to them; that on December 23, 1913, immediately after the care of the child was thus restored, Ethel Hand, without any permission or consent of respondent, kidnapped the child and left the city of Chicago for parts unknown; that respondent had no knowledge of the whereabouts of Ethel Hand and the said child until about July 15, 1921, when one Eugene Riley, who was then the husband of Ethel Hand, informed respondent that the child was in the state of California under the care of Parmelia E. Ross and William H. Ross, her husband, under an alleged adoption; that thereupon respondent, through its agent, Gertrude M. Healy, filed a petition for writ of habeas corpus in the Superior court in the state of California, in and for the City and County of San Francisco, on August 2, 1921, and that the writ of habeas corpus was issued accordingly; that, during the pendency of that suit Gertrude M. Healy informed Mr. and Mrs. Ross that respondent was the lawful guardian of the child, and that it did not at any time consent to its adoption nor did it have any notice thereof; and that said Ethel Hand was not the lawful guardian of the child, but had kidnapped it, whereupon Mr. and Mrs. Ross voluntarily brought the child to the railroad station and surrendered its custody to Gertrude M. Healy, as the agent of

respondent, and for the purpose of having it returned to the respondent. Respondent further made return that the said Ethel Hand was not at any time the lawful guardian of the child, could not give her consent to its adoption, and that the alleged adoption in California was obtained by fraud, as to the consent of the guardian necessary to an adoption, and that the said court was without jurisdiction to enter the alleged decree of adoption and said decree was and is without due process of the law and is null and void and in no force or effect whatever.

The return further alleged that the respondent was the legal guardian of the child and properly entitled to its care, custody, control, maintenance and education, and that the respondent did not at any time or place consent to the alleged adoption of the child as required by law, either by the said Ethel Hand or said Parmelia E. Ross or William M. Ross, nor did it have any notice of such alleged adoption.

The return was signed by St. Vincent's Asylum by Sister Raphael, president.

The court, after hearing the evidence of the respective parties, found the issues against the relator and for the respondents, overruled motions for a new trial and in arrest, entered judgment on the finding and dismissed the petition.

The evidence produced by the respective parties conflicts sharply on two issues of fact. First, as to whether, at the time the child in question was delivered to John Hand and Ethel Hand, it was delivered upon the condition that it should be thereafter adopted with the consent of St. Vincent's Asylum; and second, whether the surrender of the child in question to Gertrude Healy as the agent of the Asylum at San Francisco, California, was obtained by false representations.

An issue of law is also argued by the parties as to whether the proceedings in California, upon which the purported

respondent, and for the purpose of having it returned to the petitioner. Petitioner further alleges that the said Lydia Rose was not at any time the lawful guardian of the child, could not give her consent to its adoption, and that the alleged adoption in California was obtained by fraud, as in the absence of the guardian necessary to an adoption, and that the said court was without jurisdiction to make the alleged decree of adoption and said decree was not in without the purview of the law and is null and void and be of no force or effect whatever.

The return further alleged that the respondent was the legal guardian of the child and entirely entitled to its care, custody, control, maintenance and education, and that the respondent did not at any time or place consent to the alleged adoption of the child as required by law, either by the said Lydia Rose or said Franklin L. Rose or William H. Rose, nor did it give any sanction of such alleged adoption.

The return was signed by St. Vincent's Asylum by Sister [illegible], president.

The court, after hearing the evidence of the respective parties, found the issues against the relator and for the respondents, [illegible] the motion for a new trial was denied, entered judgment on the finding and dismissed the petition.

The evidence produced by the respective parties conflicts sharply on two issues of fact. First, as to whether, at the time the child in question was delivered to Lydia Rose and William Rose, it was delivered upon the condition that it should be thereafter adopted with the consent of St. Vincent's Asylum and second, whether the surrender of the child in question in California freely to the court of the asylum at San Francisco, California, was obtained by false representations.

An issue of law is also raised by the parties as to whether the proceedings in California, upon which the attempted

decree of adoption was entered, were legal and binding.

In view of the conclusion to which we have come, it will not be necessary to express an opinion upon these questions or any other than the alleged error of the court in excluding evidence.

The petitioner, Parmelia E. Ross, is the wife of William M. Ross, who is and for thirty years has been a sargeant of police at San Francisco, California. Their daughter, Ethel E., was married to one John Hand, and the marriage was childless. Mr. and Mrs. Hand resided at Chicago, Illinois, and he was employed in the County building. The child in question when a baby one day old was found lying at the door of the Guardian Angels' Home in Joliet, Illinois, and on the next day (June 3, 1912) was sent by this Home to St. Vincent's Infant Asylum. A day or two thereafter the infant was turned over by St. Vincent's Asylum to John Hand and Ethel Hand. The child was then in bad physical condition and weighed only four pounds. At the time of taking the child to their home the Hands employed a nurse and doctor and the public was given to understand that the child had been born into their home. There is no criticism of the care which was given on their part. About eighteen months thereafter domestic trouble came into the home of the Hands and Mrs. Hand was about to file a bill for divorce against her husband. Mr. Hand went to Sister Raphael, who is the head of the Infant Asylum, and she called up Mrs. Hand and requested her to come to the Asylum. Mrs. Hand went there, taking the child with her. She testifies (and her testimony is not denied by the Sisters) that while Sister Raphael was talking to her Sister Regina grabbed the baby away from her; that she then went to Mr. Hand, who went with her to Sister Raphael and begged that the child might be given back. The Hands then talked over their domestic troubles and Mrs. Hand agreed that she would try and reconsider her decision to leave her husband, whereupon the child

degree of mistake not material, were legal and binding.

In view of the conclusions to which we have come, it will not be necessary to express an opinion upon other questions or any other than the alleged error of the court in admitting evidence.

The petitioner, [illegible], is the wife of William [illegible], who is and for thirty years has been a [illegible] of police at [illegible], California. Their daughter, [illegible], was married to one John Hand, and the [illegible] was [illegible]. Mr. and Mrs. Hand resided at [illegible], Illinois, and he was employed in the County buildings. The child in question when a baby one day old was found lying on the door of the [illegible] home in Joliet, Illinois, and on the next day ([illegible]) was taken by this [illegible] to the [illegible] Infant asylum. A day or two thereafter the infant was turned over by St. Vincent's Asylum to John Hand and Ethel Hand. The child was then in bad physical condition and weighed only four pounds. At the time of taking the child to their home the Hands employed a nurse and doctor and the public was given to understand that the child had been born into their home. There is no [illegible] of the care which was given to [illegible]. About eighteen months thereafter [illegible] the [illegible] of the [illegible] and Mrs. Hand was [illegible] a [illegible] her [illegible] [illegible] her husband. Mr. Hand went to [illegible], who is the head of the Infant Asylum, and the [illegible] by Mrs. Hand and [illegible] him to [illegible] in the Asylum. Mrs. Hand [illegible], taking the child with her. The [illegible] [illegible] any [illegible] to [illegible] the child by the [illegible] that [illegible] [illegible] was [illegible] to her [illegible] the baby away from [illegible] [illegible] [illegible] to [illegible], who went with her to [illegible] [illegible] that the child might be given back. The [illegible] then [illegible] their [illegible] [illegible] and Mrs. [illegible] that she would try and [illegible] [illegible] to [illegible] [illegible], [illegible] the child

was again given to her by the Sister.

Mrs. Hand's attorney in the divorce proceedings was Mr. O'Donnell. Mrs. Hand testifies (but her testimony is flatly denied by O'Donnell) that he advised her to get the child back and leave the jurisdiction of the State until such time as she might decide whether she would go back to her husband. At any rate, on the evening of December 19, 1913, she left on a train for California, taking the child with her. The child remained in San Francisco in the care and custody of Mrs. Hand and of her mother, Mrs. Ross, until on or about August 6, 1921.

July 21, 1914, Ethel Hand filed a petition in the County Court of Cook County for the adoption of the child. St. Vincent's Asylum filed its appearance, replied to the petition and refused its consent. That proceeding was afterwards abandoned.

October 18, 1915, the petitioner, Mrs. Ross, and her husband, William M., brought proceedings to the end that the child might be adopted, and a decree to that effect was entered by the court of California, but St. Vincent's Asylum was not notified and the evidence tends to show that it did not have knowledge of those proceedings. Pending the hearing of the petition for *habeas corpus* in the California court, the child was delivered to Miss Healy by Mr. and Mrs. Ross, Mrs. Ross says with the understanding that it was to be brought to Chicago for medical treatment and to be afterwards returned, but this is denied by Miss Healy.

It is admitted that the Ross family have expended as much as $10,000 in giving the child needed medical care and attention; that they are well situated financially, and are able to and have given the child during the eight or nine years it was in their care and custody, a home such as they would provide for one of their own children. The evidence also tends to show that Mrs. Ross has a real affection for the child, which is reciprocated by him. Mrs. Ross is, as the record shows, a consistent member of

the Catholic church. Mr. and Mrs. Hand had the child christened in that church a few days after receiving it from the Asylum, and there does not seem to be any objection to the Ross family by reason of religious affiliation. Mrs. Ross upon the hearing offered (in case the court should be of the opinion that the child should be adopted under the laws of the State of Illinois) to bring the proper proceedings to that end. The record does not show definitely where the child was at the time of the hearing, and the court excluded all evidence tending to show what the real situation was in that respect. This is assigned as error.

Counsel for the petitioner insisted at the beginning of the trial that the child should be produced in court. Section 13 of the Habeas Corpus act, see Cahill's Illinois Revised Statutes, 1923, page 1403, provides: "The officer or person making the return shall at the same time bring the body of the party, if in his custody or power or under his restraint, according to the command of the writ unless prevented by sickness or infirmity of the party."

The request of counsel was, however, denied, the trial Judge stating: "There will be no special advantage in bringing a child of that age in court, whereas I wouldn't pay any attention to the wishes of the child, but if it developes on the hearing that it is necessary to produce the child, I will have the child produced."

Other requests during the hearing for the production of the boy in person were denied by the court, as was also a request that he be brought in as a witness.

While we are not disposed to say that the Statute requires in every case like this that the body of the child must be produced upon the hearing, where not prevented by sickness or infirmity, we do hold that this record fails to show any sufficient reason which would excuse respondent from producing the child. A

the Catholic church. So, one cannot hold that the child [illegible]
in that church a few days after [illegible] from the asylum, and
there does not seem to be any objection to the [illegible] family by
reason of religious affiliation. [illegible] the hearing [illegible]
[illegible] (in case the court should be of the opinion that the child
should be adopted under the laws of the State of Illinois) to
bring the proper proceedings to that end. The record [illegible]
[illegible] whether the child was at the time of the hearing,
and the court excluded all evidence tending to show what the real
situation was in that respect. This is assigned as error.

Counsel for the petitioner insisted at the beginning
of the trial that the child should be produced in court. Section
[illegible] of the Habeas Corpus act, see Smith's Illinois Revised Statutes,
[illegible], page [illegible], provides: "The officer or person making the re-
turn shall at the same time bring the body of the party, if in
his custody or power or under his restraint, according to the
command of the writ unless prevented by sickness or infirmity of
the party."

The counsel of respondent, however, [illegible], the trial
Judge [illegible]: "There will be no special advantage in bringing a
child of that age in court, whereas I wouldn't pay any attention
to the wishes of the child, but if it developed at the hearing
that it is necessary to produce the child, I will have the child
produced."

[illegible] respondent [illegible] any [illegible] for the production
of [illegible] was denied by the court, we may take [illegible] a pre-
sumed [illegible] being a witness.

While we are not disposed to say that the failure
[illegible] the body of the child must
be produced upon the hearing, where not prevented by sickness or
infirmity, we do hold that this record fails to show any sufficient
reason which would excuse respondent from producing the child. A

child of eleven years of age may give important testimony, and in this case his testimony would shed much light upon the whole transaction.

We think it was error for the court to deny the petitioner's motion in this respect. We think the court also erred in the exclusion of other competent and proper evidence offered.

Miss Healy testified and in reply to a question stated that a communication by her to Mrs. Ross under date of October 21, 1921, stating in substance that the child was happy with his own people and in splendid health, that there was no reason why he should not write except that he seemed to have forgotten in his happiness; that his parents said he never talked about California, was true. This was on cross-examination. She was then asked whether his parents were then living, whether the father and mother were unknown, whether the child wrote to Mrs. Ross, where he then was, when the witness had last seen him, whether the witness had any interest in the matter or adverse feeling or friendship for or against the parties. To each of these questions objections were interposed in behalf of the respondent and sustained by the court.

Even the rights of a natural parent, as the cases show, must at times yield to the interest of the child whose rights and interest the State as _parens patria_ will at all hazards protect. _People ex rel. Curley_, 23 Ill. App., 198; _Cormack_ v. _Marshall_, 211 Ill., 579.

The evidence from which this paramount question might be determined was excluded in this case, and for that error the judgment of the trial court is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely and Johnston, JJ., concur.

148 - 28809

WARREN-GODWIN LUMBER COMPANY,
a Corporation,
Appellant,

vs.

TRUE & TRUE COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 642

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment in the sum of $144.36, entered in favor of the defendant and against plaintiff, upon a claim of off-set and on the finding of the court.

The plaintiff sued for the unpaid purchase price of a car of lumber sold and delivered, and it is not disputed that the sum of $183.54 was due to plaintiff on that account. However, by way of off-set, the defendant claimed against plaintiff for its failure to deliver seven other cars of lumber as agreed. The court found damages in favor of defendant on this claim as alleged, and crediting thereon the amount conceded to be due to the plaintiff, found a net balance in defendant's favor as stated, and entered judgment therefor.

Plaintiff is a dealer in and manufacturer of lumber at Jackson, Mississippi. Defendant is a dealer in lumber at Chicago. July 11, 1921, at Chicago, Illinois, through J. L. Lane & Company, commission merchants, defendant gave an order, No. [illegible], for eight cars of lumber of certain described kinds and at prices therein named. The order stated that all the lumber should be "Usl Lgths." which it is agreed means "Usual Lengths."

The order stated, "Ship promptly." On July 20, 1921, plaintiff shipped one car of lumber on this order. On July 22, 1921, defendant telegraphed plaintiff, canceling the order, and on the same day wrote, "We have wired today cancellation order

[illegible]

[illegible] LUMBER COMPANY, a corporation, Appellant,

vs.

[illegible], Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

290 [illegible] 2

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment in the sum of $[illegible], entered in favor of the defendant [illegible] plaintiff, upon a trial of [illegible] and by the finding of the court.

The plaintiff sued for the unpaid purchase price of a car of lumber sold and delivered, and it is not disputed that the sum of $[illegible] was due to plaintiff on that account. However, by way of setoff, the defendant claimed against plaintiff for the failure to deliver seven other cars of lumber as agreed. The court found issues in favor of defendant on this claim as alleged, and [illegible] the amount [illegible] to be due to the plaintiff, found a net balance in defendant's favor as stated, and entered judgment [illegible].

Plaintiff is a dealer in [illegible] of lumber at [illegible]. Defendant is a dealer in lumber at [illegible]. [illegible], at [illegible], through [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

"[illegible]," which is [illegible] [illegible]."

The [illegible], "[illegible]." On July [illegible], [illegible], plaintiff [illegible] one car of lumber on this order. On July [illegible], [illegible], defendant [illegible] plaintiff, [illegible], and on the same day wrote, "[illegible] [illegible]

of which had been adjusted), defendant claiming that payment was not due until October 1.

September 27, 1921, defendant wrote plaintiff as follows: "We have no invoice of the seven cars still due us upon order No. 6030 of J. L. Lane & Co., accepted by you per arrangements with your attorney for shipment to be completed by September 27th. We are trusting, however, that these cars are all loaded in accordance with that arrangement and that BL's and invoices are in the mail to us. It is very important that we have these immediately without further delay." October 3rd, replying to a letter of plaintiff dated September 28, 1921, (in which payment was again requested for the car already delivered) defendant wrote: "We are without reply to our letter of September 27th re balance of seven cars due upon the order of J. L. Lane & Co., No. 6030 and accepted by you per arrangement with attorney for shipment to be completed by you by September 27th. Please let us hear immediately concerning and confer a favor." Again on November 11, defendant wrote plaintiff: "We kindly refer you to our letters of September 27th and October 3rd concerning the balance of the order which should have been shipped before September 27th in accordance with the arrangement with your attorney. Have you any suggestion to make? You, of course, realize that there is a loss to us for non shipment of the seven cars."

October 13, 1921, plaintiff wrote defendant, reciting some of the facts from plaintiff's standpoint, and requesting a check by return mail covering the shipment made. Plaintiff further stated: "Your methods, to say the least, are shameful, and you need not expect us to make further shipments on your order. At the time you wired us the collect telegram to cancel the order we had stock all ready for shipment, but we have not got the stock now and you could not expect us to hold the lumber sixty days until the market improves so you can reinstate the order. Please let us

of which had been adjusted, defendant claims that payment was not due until October 1.

September 20, 1921, defendant wrote plaintiff as follows: "We have no invoice of the seven cars which are to go upon contract No. [illegible] of [illegible] Co., accepted by you and arrangements with your attorney for shipment to be completed by September 27th. We are presuming, however, that these cars are all loaded in accordance with that arrangement and that B/L's and invoices are in the mail to us. It is very important that we have these immediately without further delay." October 3rd, replying to a letter of plaintiff dated September 30, 1921, (in which request was again made for the [illegible] already delivered [illegible]) "We are without reply to our letter of September 20th as to balance of seven cars due upon the order of [illegible] Co., No. [illegible] and accepted by you per arrangement with attorney for shipment to be completed by you by September 27th. Please let us know immediately concerning and oblige a favor." Again on November 11, defendant wrote plaintiff: "We simply refer you to our letters of September 20th and October 3rd concerning the balance of the order which should have been shipped before September 27th in accordance with the arrangement with your attorney. Have you any suggestion to make? We, of course, realize that there is a loss to us for the balance of the seven cars."

October 13, 1921, plaintiff wrote defendant, reciting some of the facts from plaintiff's standpoint, and requesting a check by return mail covering the balance due. Plaintiff further stated: "These accounts, to say the least, are overdue, and you need not expect us to make further shipments on your order. At the time you wired us [illegible] to extend the order we had cars almost all ready for shipment, but we have not got the stock here and you could not expect us to hold the lumber sixty days until the method employed by you has [illegible] the matter. Please let us

sixty eighty sent you by J. L. Lane & Company. Sorry to instruct." The evidence tends to show that the alleged reason for this cancellation was a claim of defendant that the lumber in the car shipped was not in fact of the usual lengths within the meaning of that term as used in the trade. While plaintiff did not concede this was the case, it adjusted the claim made on that account by an allowance of $1.00 per thousand on the purchase price. August 4, 1921, plaintiff wrote defendant: "There are seven cars more due you on this order and this is to advise that the stock is ready to be loaded and we insist that you advise us by return mail whether or not you expect to accept the balance of the order." August 10, 1921, plaintiff again wrote defendant: "Please see our letter of the 4th inst., and let us have reply. There are seven cars more due you on this order and we expect you to take this lumber. Please let us know at once whether or not you expect to accept this balance. Please let us hear from you at once." Again on August 13, 1921, plaintiff wrote the defendant: "We again ask you that you please let us have a reply to our letters, and let us know whether or not you expect to accept the balance of seven cars due on your order. Please let us hear from you promptly."

August 17, 1921, defendant replied to these letters as follows: "Your letter concerning order No. 6080 sent you by J. L. Lane & Co., and which you insist upon making shipment and demurring to our cancellation, received. All right, we will withdraw our cancellation as requested by you, and you can complete shipment of same by September first, so get busy and hustle it out and see that cars are fairly well loaded and in lengths heavy to 12- 14- 16 feet, and if it is any advantage to you to load cars with 20 thousand feet or less, we will grant you that privilege. This to complete the order." Shortly thereafter a controversy arose between plaintiff and defendant as to the time at which payment should be made for the car of lumber already shipped (the price

sixty eighty sent you by J. L. Lane & Company. Sorry to instruct."
The evidence tends to show that the alleged reason for this cancellation was a claim of defendant that the lumber in the car shipped was not in fact of the usual lengths which the wording of that type is used in the trade. While plaintiff did not concede this was the case, it adjusted the claim with an that car by an allowance of $1.00 per thousand on the purchase price. August 4, 1923, plaintiff wrote defendant: "There are three cars more due you on this order and this is to advise that the stock is ready to be loaded and we insist that you advise us by return mail whether or not you expect to accept the balance of the order."
August 11, 1923, plaintiff again wrote defendant: "Please see our letter of the 4th inst., and let us have reply. There are three cars more due you on this order and we expect you to take this lumber. Please let us know at once whether or not you expect to accept this balance. Please let us hear from you at once." Again on August 15, 1923, plaintiff wrote the defendant: "We again ask you that you please let us have a reply to our letters, and let us know whether or not you expect to accept the balance of three cars due on your order. Please let us hear from you promptly."

August 17, 1923, defendant replied to these letters as follows: "Your letter concerning order No. 6980 sent you by J. L. Lane & Co., and which you insist upon making shipment and demurring to our cancellation, received. All right, we will withdraw our cancellation as requested by you, and you can complete shipment of same by September first; we got busy and bundle it out and saw that cars are fairly well loaded and in lengths twenty to 12- 14- 16 feet, and if it is any advantage to you to load cars with 30 thousand feet or less, we will grant you that privilege. This is complete the order." Shortly thereafter a controversy arose between plaintiff and defendant as to the time at which shipment should be made for the car of lumber already shipped [illegible]

have the check by return mail covering the cars shipped, so that we can close your account on our books."

An extended correspondence followed, the recital of which would unduly extend this opinion. It is not argued on behalf of the plaintiff that the failure to pay for the first car at the time demanded justified the refusal to make further shipments. Its contention seems to be that the letter of August 17, 1921, was not an unconditional withdrawal of the notice of cancellation theretofore given, but that it was an entirely new offer which would require an acceptance and a new meeting of the minds of the parties in order to revive the original contract. Plaintiff says that there is no evidence in the record anywhere that it agreed to the withdrawal of the cancellation as expressed in defendant's letter of August 17, 1921. We do not agree with this construction of the correspondence between the parties. It is apparent from plaintiff's letters of August 4th, 10th and 13th, as heretofore recited, that plaintiff was insisting that defendant had no right to cancel its order and that the same should be carried out as made. Having repeatedly taken this position, the defendant, as it had a right to do, assented, and stated that it would withdraw its cancellation as requested. The further statement that plaintiff could complete the shipment by September 1 is in no way inconsistent. The request to "get busy and hustle" and see that the cars were fairly well loaded must be regarded simply as requests which are in no way made a condition of the reinstatement. We think the further request as to the lengths of the lumber must be regarded in the same way. A preponderance of the evidence, however, indicates that this request as to lengths was not inconsistent with but equivalent to the provisions of the original order in that respect.

The plaintiff contends that certain evidence taken by depositions on this point which was ruled out by the court

have the clerk by return mail returning the note indorsed, so that we can close your account on our books."

The extended correspondence followed, the content of which would hardly warrant this opinion. It is not argued on behalf of the plaintiff that the failure to pay for the first car of the pine demanded justified the refusal to make further shipments. His contention seems to be that the letter of August 17, 1916, was not an unconditional withdrawal of the notice of cancellation theretofore given, but that it was an entirely new offer which would require an acceptance and a new meeting of the minds of the parties in order to revive the original contract. Plaintiff says that there is no evidence in the record anywhere that it agreed to the withdrawal of the cancellation as contained in defendant's letter of August 17, 1916. We do not agree with this construction of the correspondence between the parties. It is apparent from plaintiff's letters of August 4th, 10th and 12th, heretofore quoted, that plaintiff was insisting that defendant had no right to cancel its order and that the same should be carried out as made. Having repeatedly taken this position, the defendant, as it had a right to do, receded, and stated that it would withdraw its cancellation as requested. The further statement that plaintiff would complete the shipment by September 1 is in no way inconsistent. The request to "get busy and hurry" and see that the cars were fairly well loaded were no more than requests which was in no way made a condition of the withdrawment. We think the further request as to the lengths of the lumber must be regarded in the same way. A preponderance of the evidence, however, indicates that this request as to lengths was not inconsistent with the provisions of the original order in that respect.

The plaintiff complains that certain evidence taken by depositions on this point which was ruled out by the court

should have been received, but we think there was no reversible error in this respect. The answers are in the record and even if admitted would not, in our opinion, have established the point for which the plaintiff contends. In the numerous letters which followed immediately after the final refusal of plaintiff to deliver the remainder of the lumber, the thought does not seem to have occurred to plaintiff that defendant's letter of August 17 imposed any new terms as a condition precedent to a withdrawal of its cancellation. This thought was first expressed on November 12, 1921, when plaintiff wrote: "Upon examination you will observe that you did not ask us to reinstate the original order but wanted us to ship out the seven cars with specified lengths, making an entirely new order." This construction seems to have been adopted when litigation seemed near.

The plaintiff further contends that the court erred in entering judgment in favor of defendant on its set-off, for the reason that no damages were proven as of the date of the alleged breach which plaintiff says, if it occurred at all, must have occurred on September 1, 1921, by reason of the suggestion of defendant in its letter of August 17, 1921, that the shipment should be completed at that time. There is no merit in this contention. Proof of the market price of the lumber in question was made as of "about" October 1, 1921. The defendant made repeated requests for the shipment of the lumber and did not receive a final refusal until October 13, 1921. The defendant had a right to waive the provision in regard to the time of shipment, if it saw fit so to do. The evidence indicates that the market price of the lumber was advancing, and it is probable that, if the movement had been in the other direction, there would have been no refusal to deliver the lumber.

The judgment is affirmed. AFFIRMED.

McSurely and Johnston, JJ., concur.

should have been received, but we think there was no prejudicial error in this respect. The evidence now in the record and [illegible], if admitted would not, in our opinion, have established the point for which the plaintiff contends. On the contrary [illegible] [illegible] followed immediately after the first refusal of plaintiff to the [illegible] the [illegible] [illegible] the letter, the [illegible] [illegible] [illegible] [illegible] been accorded to plaintiff that [illegible] [illegible] [illegible] [illegible] [illegible] any own ideas as a condition [illegible] to a [illegible] of the cancellation. This [illegible] [illegible] expressed on September 13, 1940, when plaintiff wrote: "Your [illegible] [illegible] [illegible] agree that you did not ask us to [illegible] the original order but wanted us to ship and [illegible] [illegible] [illegible] [illegible], making an entirely new order." This [illegible] [illegible] to have been [illegible] when litigation [illegible] arose.

The plaintiff further contends that the court erred in refusing to [illegible] [illegible] in favor of defendant on the counterclaim, for the reason that no [illegible] were present as at the time of the alleged breach [illegible] [illegible] [illegible] [illegible], if it occurred at all, must have occurred on September [illegible], 1940, by reason of the [illegible] of the [illegible] in the letter of March 18, 1940, that the [illegible] should be completed at that time. There is no merit in this contention. Proof of the market value of the lumber in question was made as of "about" October 4, 1940. The defendant made [illegible] requests for the shipment of the lumber and did not receive a final refusal until October 18, 1940. The defendant had a right to treat the contract in regard to the time of shipment, as it saw fit so to do. The evidence indicates that the market value of the lumber was advancing, and it is probable that, if the contract had been in the [illegible] [illegible], the [illegible] would have been [illegible] to [illegible] the [illegible].

The judgment is affirmed.

AFFIRMED.

[illegible] and [illegible], JJ., concur.

131 - 28407

FRANK SINDELAR, Administrator
of the Estate of Henry Sindelar,
Deceased,
Appellee,

vs.

THE BALTIMORE & OHIO CHICAGO
TERMINAL RAILROAD COMPANY,
Appellant.

APPEAL FROM [illegible] COURT
OF COOK COUNTY.

233 I.A. 642

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, Frank Sindelar, administrator of the estate of Henry Sindelar, deceased, against the defendant, The Baltimore & Ohio Chicago Terminal Railroad Company, to recover damages for the death of Henry Sindelar, alleged to have been caused by the negligence of the defendant. The case was tried before a jury and the jury returned a verdict in favor of the plaintiff in the sum of $5,[illegible]. From the judgment on the verdict the defendant prosecuted this appeal.

The death of the deceased, Henry Sindelar, was the result of a collision between a train of the Pere Marquette Railroad Company running over the tracks of the defendant under a lease from the defendant which owned and operated the tracks, and an automobile in which the deceased was riding as a guest. The accident occurred near the intersection of 51st street and Leavitt street in the City of Chicago on October 31, 19[illegible], at about midnight. Fifty-first street is an east and west street. The tracks of the defendant intersect 51st street at a grade crossing in the vicinity of Leavitt street. At the intersection there are three parallel tracks, two main tracks and one switch track. At the time of the accident the deceased and four companions were returning from a party at 63rd street and Western avenue in an automobile.

[illegible], administrator of the Estate of Henry [illegible], Appellee,

vs.

The [illegible] Railroad Company, Appellant.

APPEAL FROM [illegible] COURT OF COOK COUNTY.

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, [illegible], administrator of the estate of Henry [illegible], deceased, against the defendant, The [illegible] Railroad Company, to recover damages for the death of Henry [illegible], alleged to have been caused by the negligence of the defendant. The case was tried before a jury and the jury returned a verdict in favor of the plaintiff in the sum of [illegible]. From the judgment on the verdict the defendant prosecutes this appeal.

The death of the deceased, Henry [illegible], was the result of a collision between a train of [illegible] and [illegible] [illegible] [illegible] [illegible] [illegible] of the defendant [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] street and [illegible] street in the City of Chicago on [illegible], at about [illegible]. [illegible] street is [illegible] [illegible] [illegible]. The tracks of the defendant [illegible].

This automobile was followed by another one. The deceased was not the driver of the automobile. He was seated in the rear seat of the automobile. Several of the men in the automobile were musicians and had been playing in an orchestra at the party. They had their musical instruments in the automobile with them. The instruments consisted of a bass drum, two and a half or three feet high, a snare drum, a xylophone, a violin and a concertina.

When the deceased, with his companions, left the place of the party in the automobile, the automobile was driven north on Western avenue to 51st street. It turned east on 51st street and went as far as the crossing at the tracks of the defendant, where it was struck. The deceased, Henry Hindeler, was killed. His body was found about 100 feet south of the crossing. After the automobile was struck it was found about 250 or 300 feet south of 51st street. The train, according to the testimony of the locomotive engineer, ran about 525 feet before it could be brought to a stop. Many of the facts bearing on material issues are in dispute. The facts will be more particularly stated under the objections of counsel for the defendant relating to the evidence.

The declaration of the plaintiff contains several counts. It alleges, in substance, that the defendant carelessly and negligently operated the train; that the defendant wilfully and wantonly operated the train; that the defendant failed to comply with ordinances providing for the erection and maintenance of gates, signal bells, and other safety appliances at street crossings; that the defendant failed to comply with an ordinance providing that flagmen should be stationed at street crossings to signal all persons of the approach of trains; that the defendant violated an ordinance in respect of the rate of speed of trains.

One of the principal objections of counsel for the defendant is that the ordinances in respect of the erection and maintenance of gates, signal bells, and other safety appliances at

This automobile was followed by another one. The [illegible] was not the driver of the automobile. He was seated in the rear seat of the automobile. Several of the men in the automobile were musicians who had been playing in an orchestra at the party. They had their musical instruments in the automobile with them. The instruments consisted of a bass drum, etc. and a [illegible] [illegible], a snare drum, a xylophone, a violin and a [illegible].

When the [illegible], [illegible] [illegible] [illegible], left the scene of the party in the automobile, the automobile was driven south on [illegible] avenue to 51st street. It turned east on 51st street and went as far as the crossing of the tracks of the [illegible], [illegible] in the street. The [illegible], [illegible] [illegible], was killed. His body was found about 100 feet south of the crossing. After the automobile was struck it was found about 400 or 500 feet south of 51st street. The train, according to the testimony of the locomotive engineer, was about 500 feet before it could be brought to a stop. [illegible] of the [illegible] [illegible] on material [illegible] [illegible] [illegible] [illegible]. The facts will be more particularly stated under the [illegible] of [illegible] for the [illegible] relating to the evidence.

The declaration of the plaintiff contains several counts. It alleges, in substance, that the defendant carelessly and negligently operated the train; that the defendant wilfully and wantonly operated the train; that the defendant failed to comply with ordinances providing for the erection and maintenance of gates, signal bells, and other safety appliances at street crossings; that the defendant failed to comply with an ordinance providing that flagmen should be stationed at street crossings to signal all persons of the approach of trains; that the defendant violated an ordinance in respect of the rate of speed of trains.

One of the principal contentions in behalf of the defendant is that the ordinances in respect of the erection and maintenance of gates, signal bells, and other safety appliances at

street crossings were improperly admitted in evidence; and that if the ordinances had been excluded, as they should have been, there would be no evidence to support the plaintiff's declaration that the failure of the defendant to comply with the ordinances was the proximate cause of the death of the deceased. According to the evidence the first ordinance was passed in the year 1897 and is designated as section 1750. The ordinance provides, in substance, for the erection of gates, signal bells, and other safety appliances operated from towers or by other reliable means, satisfactory to the Mayor and Commissioner of Public Works, at all such streets and public crossings within the city "as may be designated by the mayor and commissioner of public works. In 1905 in an ordinance designated as section 1994, the above ordinance was substantially re-enacted with the exception that, instead of the provision "may be designated by the mayor and commissioner of public works," the following provision was inserted: "may be designated by the City Council." In 1911 in an ordinance designated as section 2105, the ordinance designated as section 1994 was substantially re-enacted. In 1917 an ordinance designated as section 2195 provided, in substance, that flagmen, whose duty it shall be to signal all persons of the approach of trains, shall be kept and maintained at such crossings and "at such hours as the City Council may from time to time prescribe."

On the authority of the case of Curran v. C. & W. I. R. R. Co., 289 Ill., 111, counsel for the defendant contend that none of the above ordinances became operative as to the defendant until the defendant was "notified by the proper authorities named in the various ordinances, and before the date of the accident in question when and where to station flagmen and when and where to construct gates." We are of the opinion that the contention of counsel for the defendant is correct. Counsel for the plaintiff maintain that proof of notice to the defendant is shown by the following evidence:

street crossings were improperly [illegible] in [illegible]; and that if the ordinances had been violated, as they should have been, there would be no evidence to support the plaintiff's contention that the failure of the defendant to comply with the ordinance was the proximate cause of the death of the intestate. According to the [illegible] these the first ordinance was passed in the year 1887 and is designated as section 1751. The ordinance provides, in substance, for the erection of gates, flagmen, bells, and other safety appliances against [illegible] or by other [illegible] means, satisfactory to the Mayor and Commissioner of Public Works, at all such streets and public crossings within the City "as may be designated by the Mayor and Commissioner of Public Works. In 1893 in an ordinance designated as section 1871, the above ordinance was substantially re-enacted with the exception that, instead of the provision "as may be designated by the Mayor and Commissioner of Public Works," the following provision was inserted: "may be designated by the City Council." In 1911 in an ordinance designated as section [illegible], the ordinance designated as section 1871 was substantially re-enacted. In 1911 an ordinance designated as section 1881 provided, in substance, that flagmen, whose duty it shall be to signal all persons of the approach of trains, shall be kept and maintained at such crossings and "at such hours as the City Council may from time to time prescribe."

On the authority of the case of [illegible] v. [illegible] [illegible] Ill. App. 111, counsel for the defendant contend that none of the above ordinances became operative as to the defendant until the defendant was "notified by the proper authorities named in the various ordinances, and before the duty of the [illegible] to require gates and where to station flagmen and where to construct gates." We are of the opinion that this contention of counsel for the defendant is correct. Counsel for the plaintiff maintain that proof of notice to the defendant is shown by the following evidence:

October 22, 1906, the City Council of the City of Chicago passed an order as follows: "That the Commissioner of Public Works be and he is hereby directed to order the Calumet Terminal Railway Company and the P. C. & St. Louis to place watchmen and construct gates at the intersection of 51st street, in the 30th ward." The evidence shows that at the time of the passage of the order "the intersection" of the defendant "at 51st street and Leavitt *** was in the 30th ward." On October 30, 1906, the following letter was written by the Commissioner of Public Works:

"October 30th, 1906.

Calumet Terminal Railroad Company,
Chicago, Illinois.

Gentlemen:

In accordance with the attached order passed by the City Council of October 22, 1906, you are hereby notified to place a watchman and construct gates at the intersection of 51st street where your tracks are located in the 30th ward of the City of Chicago.

Yours respectfully,
J. E. McGann,
Commissioner of Public Works.

% Ill. Steel Co.,
John Faithorn, Esq.,
Gen. Mgr.,
305 Grand Central Passenger Station,
Chicago."

Counsel for the defendant contend that it was "incumbent on plaintiff to show which ordinance was effective at the time of the accident, and to prove a notice under that ordinance, or at least a notice under an ordinance in effect at the time said notice was given." We agree with the contention of counsel. In our opinion the notice given by the plaintiff applies only to the ordinance passed in the year 1897 and designated as section 1750. The other ordinances in regard to the erection of gates, so far as the case at bar is concerned, were not operative and effective as to the defendant. The re-enactment, however, of the different ordinances providing for the erection of gates, did not "affect the obligation of defendant to erect and maintain gates but that obligation was continued throughout." Carlin v. C. & W. I. R. R. Co., 297 Ill.,

194, 192.

It is further objected by counsel for the defendant that the notice is insufficient. It is argued that the letter shows that the Commissioner of Public Works was "acting in accordance with the order of the city council" and did not make an independent designation as required by the ordinance. We think that the objection is extremely hypercritical. On a reasonable construction of the letter it would be presumed that the Commissioner of Public Works either made an independent designation, or else adopted as his own designation the one made by the City Council. Furthermore, the ordinance does not provide that the railroads affected by the ordinance shall be explicitly notified that the Commissioner of Public Works made an independent designation or that he made any designation at all. The letter indicates where the gates were to be constructed, namely, "at the intersection of 31st street where your tracks are located in the 30th ward," and that is sufficient.

Counsel for the defendant further object that "there is absolutely no proof that the mayor had anything to do with the alleged designation." The ordinance does not require that any such proof shall be made. Neither does the case of Curran v. C. & E. I. R. R. Co., supra, say that any such proof shall be made. All that was held in that case was, that in respect to ordinances providing for fences along the railroad tracks, the railroad companies were entitled to notice (p. 116) "when and where the fences were to be constructed along their tracks." Counsel for the defendant have not referred us to any authority which holds that the plaintiff was under any obligation to notify the defendant who made the designation, or how it was made.

Counsel for the defendant deny that the defendant was charged with notice of the order of the city counsel referred to in the letter of the Commissioner of Public Works, but admit that the defendant is "charged with notice of the laws and ordinances of the

[illegible]

It is further claimed by counsel for the defendant that the action is insufficient. It is urged that the [illegible] shows that the [illegible] of Public Works was "acting in accordance with the order of the city council" [illegible]. [illegible]

Counsel for the defendant further object that [illegible]

[illegible] or how it was done.

Counsel for the defendant [illegible]

City of Chicago." The defendant then was charged with notice of the existence of the ordinance in question, namely, the ordinance passed in 1897 and designated as section 1750, although the ordinance may not have been operative and effective until the defendant was notified to erect the gates. If the defendant was not under a legal obligation to take notice of the order of the City Council, the defendant had express notice of the order through the letter the defendant received from the Commissioner of Public Works. We think that the objections of counsel for the defendant so far urged to the sufficiency of the notice are without merit.

Further objecting to the sufficiency of the notice, counsel for the defendant contend that the plaintiff has not proved that the letter of the Commissioner of Public Works was ever mailed or received. In view of the case of *Carlin* v. *C. & W. I. R.R.Co., supra*, which was adhered to in the case of *Livak* v. *Chicago & Erie R. R. Co.*, 299 Ill., 218, 223, we do not consider this question an open one. The plaintiff in the case at bar proved by similar proof to that made in the case of *Carlin* v. *C. & W. I. R. R. Co., supra*, that the letter was a public record in the department of Public Works of the city of Chicago; and on our interpretation of the case of *Carlin* v. *C. & W. I. R. R. Co., supra*, that proof was sufficient to render the letter admissible to establish the fact presumptively that the defendant received the letter either by mail or otherwise, and was notified in accordance with the intent of the ordinance. Counsel for the defendant contend that the case of *Carlin* v. *C. & W. I. R. R. Co., supra*, is not conclusive of the question. Counsel maintain that that case simply holds that such letters as the one in question "are not private correspondence but relate to public acts and conduct of the Commissioner of Public Works, and therefore can not be deemed private papers or self-serving; in other words such letters form an exception to the hearsay rule." The case of *Carlin* v. *C. & W. I. R. R. Co., supra*, not only held as counsel for the de-

City of Chicago." The defendant then was charged with notice of the existence of the ordinance in question, namely, the ordinance passed in 1907 and designated as section 2795, [illegible] the ordinance may not have been operative and effective until the defendant was notified by arrest [illegible]. If the defendant was not under a legal obligation to take notice of the names of the City Council, the defendant had [illegible] notice of the names through the [illegible] the defendant received from the Commissioner of Public Works. It is [illegible] that the objections of counsel for the defendant as [illegible] to the sufficiency of the notice are without merit.

Further objection to the sufficiency of the notice, counsel for the defendant contend that the plaintiff has not proved that the letter of the Commissioner of Public Works [illegible] notice of [illegible]. In view of the view of [illegible] v. [illegible], which was adhered to in the case of [illegible] v. [illegible], [illegible] Ill., [illegible], we do not consider this [illegible] an open one. The plaintiff in the case at bar proved by similar proof to that made in the case of [illegible] v. [illegible] that the letter was a public record in the Department of Public Works of the City of Chicago; and as was [illegible] in the case of [illegible] v. [illegible], that proof was sufficient to render the letter admissible to establish the fact presumptively that the defendant received the letter either by mail or otherwise, and was notified in accordance with the terms of the ordinance. Counsel for the defendant contend that the case of [illegible] v. [illegible], is not applicable to the question. Counsel maintain that that case simply holds that when letters as the one in question "are not private correspondence but relate to public acts and duties of the Commissioner of Public Works, and therefore are not to be treated as private papers [illegible], and [illegible] such letters [illegible] in the [illegible]." The case of [illegible] v. [illegible], and [illegible] held in support for the de-

fendant contend, but also hold that such letters are evidence that they were mailed or forwarded to the party to whom they are addressed. The court thus stated the question involved in the case of Carlin v. C. & W. I. R. R. Co., supra, (p. 187): "Defendant contends that it was not obligated to comply with the requirements of the ordinance until it had been notified to do so, and that there was no proof of notice having been given. To prove notice plaintiff offered letter-press copies of letters and documents, which were received in evidence over objection by defendant." In passing on the question the court said (pp. 189, 190):

"Defendant contends that all the foregoing evidence was incompetent and should not have been admitted. It is argued that no proper foundation was laid for the introduction of the letter-press copies and communications; that it was not shown that the letters were actually directed to defendant or that they were mailed or forwarded to it. The letter-press copies and documents were produced by a witness who testified he had been employed in the department of public works of the city of Chicago for more than twenty-one years and during that period had charge and custody of the records and official correspondence of the department of public works. The letter-press copies and documents were preserved in bound volumes designated by numbers. They were in no sense private correspondence but related wholly to the public acts and conduct of the commissioner of public works and were the records of such acts and conduct of the office as were necessary to be kept. They could in no sense be deemed private papers or self-serving. They were properly admitted in evidence." Counsel for the defendant say that "there is nothing in the Carlin case ** to the effect that such letters are evidence of more than they contain." We do not understand that counsel for the plaintiff are contending that the letter in the case at bar is evidence of anything that it does not contain. Clearly the letter is only evidence of what its contents import.

[illegible]

But what does the letter "contain" and what do its contents import? It contains the name of an addressee, and a statement as follows: "In accordance with the attached order passed by the City Council October 22, 1900, you are hereby notified to place a watchman and construct gates at the intersection of 91st street where your tracks are located in the 30th ward of Chicago." According to the case of Carlin v. C. & W. I. R. R. Co., supra, the statement, "you are hereby notified" must be held presumptively to import that the addressee was, in fact, notified. Whether the letter was received through the mail or in some other manner is immaterial. In the case of State ex inf. v. Heffernan, 243 Mo., 442, which was cited with approval in the case of Carlin v. C. & W. I. R. R. Co., supra, the court said (p.453): "Where records are kept of municipal acts and proceedings, the law is clearly defined that the same are receivable in evidence of the truth of the facts recited; and it would seem to be a rule that when so produced they establish themselves."

Counsel for the defendant urge still another objection to the sufficiency of the notice. The objection is based on the following facts: That the Chicago Terminal Transfer Railroad Company and not the "Calumet Terminal Railroad Company," the company named in the letter of the Commissioner of Public Works, was the owner of the tracks and right of way at the street crossing at 91st street at the time that the letter was sent; and that John Faithorn was not the general manager of the "Calumet Terminal Railroad Company," but was the general manager of the Chicago Terminal Transfer Railroad Company. Counsel for the defendant argue that even though it should be conceded that the letter was received by "John Faithorn, Esq., Gen. Mgr.," in whose care the letter was sent, yet since Faithorn was incorrectly designated as the general manager of the "Calumet Terminal Railroad Company," instead of being designated as the Chicago Terminal Transfer Railroad Company, the letter of the Commissioner of

but what does the letter "notified" [illegible] [illegible] the [illegible] [illegible]? It contains the name of no addressee, and a [illegible] as follows: "In accordance with the attached order passed by the city council October 23, 1905, you are hereby notified to [illegible] [illegible] and construct gates at the intersection of [illegible] street [illegible] [illegible] tracks are located in the [illegible] part of Chicago." According to the case of Carlin v. [illegible], [illegible] the statement, "you are hereby notified" must be held presumptively to import that the addressee was, in fact, notified. Whether the letter was received through the mail or in some other manner is immaterial. In the case of [illegible] [illegible] v. [illegible], 144 Ill., 596, which was cited with approval in the case of Carlin v. [illegible], the court said (p. [illegible]): "Where records are kept of [illegible] with due [illegible], the law is already [illegible] that the same are [illegible] to evidence of the truth of the facts recited; and it would seem to be a safe rule [illegible] to [illegible] [illegible] [illegible]."

Counsel for the defendant urge still another objection to the sufficiency of the notice. The objection is based on the following facts: That the Chicago Terminal Transfer Railroad Company and not the "Chicago Terminal Railroad Company," the company named in the letter of the Commissioner of Public Works, was the owner of the tracks and right of way at the street crossing at 69th street at the time that the letter was sent; and that John [illegible] was not the general manager of the "Chicago Terminal Railroad Company," but was the general manager of the Chicago Terminal Transfer Railroad Company. Counsel for the defendant argue that even though it should be presumed that the letter was received by "John [illegible], Gen'l Man., [illegible]," to whom said the letter was sent, yet since [illegible] was incorrectly designated as the general manager of the "Chicago Terminal Railroad Company," instead of being designated as the Chicago Terminal Transfer Railroad Company, the letter of the Commissioner of

Public Works was not notice to "John N. Faithorn, an officer of the Chicago Terminal Transfer Railroad Company." It is admitted by counsel for the defendant that the Calumet Terminal Railroad Company was a predecessor in title of the defendant. The evidence shows, however, that the Calumet Terminal Railroad Company never was the owner of the tracks and right of way at the crossing at 51st street. The defendant acquired title to the tracks and right of way at the crossing at 51st street from the Chicago Terminal Transfer Railroad Company on April 1, 1910, after foreclosure proceedings had been begun against the latter company. The Calumet Terminal Railroad Company conveyed all of its property to the Chicago & Northern Pacific Railroad Company prior to 1891. The Chicago Terminal Transfer Company acquired title to the property of the Chicago & Northern Pacific Railroad Company in foreclosure proceedings begun against the latter company in 1891. On July 1, 1897, the Chicago Terminal Transfer Railroad Company commenced operation and continued to operate until sometime in 1906, when the foreclosure proceedings were begun against it. John N. Faithorn was appointed receiver in the foreclosure proceedings and operated the road until April 1, 1910, when, as we have stated, it was acquired by the defendant. Before the foreclosure proceedings John N. Faithorn was at one time vice-president and later president of the Chicago Terminal Transfer Railroad Company. He was connected with that company during its entire existence. He did not, however, have any official connection with the Calumet Terminal Railroad Company.

When the letter of the Commissioner of Public Works was written on October 30, 1900, Faithorn was president or vice-president of the Chicago Terminal Transfer Company, and at that time that company was the owner of the tracks and right of way at the crossing at 51st street. It is obvious, therefore, that when Faithorn received the letter he knew that it was intended as a

[illegible]

[illegible]

notice to the Chicago Terminal Transfer Company, and not to the Calumet Terminal Railroad Company. It is true that the Calumet Terminal Railroad Company, as we have stated, never owned the property in question and had, years before the letter of the Commissioner of Public Works was written, conveyed all of the property that it did own to the Chicago & Northern Pacific Railroad Company. But the letter in any event was sufficient to impose the duty on Faithorn of making inquiry as to who the letter was intended for, if Faithorn had any doubts in this respect. In view of the fact that the Chicago Terminal Transfer Company, of which company Faithorn was president and at one time vice-president, owned the tracks and right of way at the crossing designated by the letter, Faithorn was not justified in wholly disregarding the letter merely because it made a mistake in the name of the company. But counsel for the defendant argue that there is no evidence that "John Faithorn, Gen. Mgr. of the Calumet Terminal Railroad Company," is "one and the same person" as "John N. Faithorn, an officer of the Chicago Terminal Transfer Railroad Company;" that "the inference that they were the same person is purely speculative, and the court may not thus bridge the gap between evidence and conjecture." It is a well established rule that the identity of the name is *prima facie* evidence of the identity of the person, and that it devolves upon those who deny the identity to overcome the presumption by proof. *Bayha* v. *Mumford*, 58 Kansas, 445, 466. The cases supporting the rule are too numerous to cite. Many of them may be found collected in the following annotations and text books: 17 L.R.A., p. 224; Abbott's Proof of Facts (3rd ed.) p. 556; The "Blue Book" of Evidence, (Jones' Commentaries on Evidence), vol. 1, sec. 10[illegible], pp. 481-484; Reynolds' Trial Evidence, p. 172. The authorities hold that in addition to the identity of the name, all facts and circumstances which bear on the question of identity are admissible either

[illegible] in the Chicago Terminal [illegible] Company, and not of the Chicago Terminal [illegible] Company. It is true that the Chicago Terminal Railroad Company, [illegible] the [illegible] property in [illegible] [illegible] the same [illegible] [illegible] Company, [illegible] [illegible] [illegible] view of the fact that the Chicago Terminal Transfer Company, [illegible] [illegible] [illegible] Chicago Terminal Transfer Railroad Company, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

to prove the identity or to rebut the presumption arising from the identity. In the case at bar the fact that the Calumet Terminal Railroad Company was a predecessor in title of the Chicago Terminal Transfer Railroad Company and of the defendant, even though the Calumet Terminal Railroad Company did not own the tracks and right of way at the crossing at 51st street, is a circumstance to be considered in identifying the Faithorn named in the letter of the Commissioner of Public Works as the same Faithorn who was an official connected with the Chicago Terminal Transfer Railroad Company. Other facts which are relevant are that the Chicago Terminal Transfer Railroad Company owned the tracks and right of way at the crossing at 51st street at the time that the letter of the Commissioner of Public Works was sent, and that Faithorn was the president or vice-president of that company at that time; also that the name Faithorn is rather an unusual name, [illegible]. The "Blue Book of Evidence," (Jones' Commentaries on Evidence), section 100, p. 482. The fact that the initial "N" in the name of Faithorn is omitted in the letter of the Commissioner of Public Works may to some extent weaken the presumption of identity, but it does not conclusively rebut the presumption.

It is our opinion that the Faithorn, who was president or vice-president of the Chicago Terminal Transfer Railroad Company at the time the letter of the Commissioner of Public Works was written, knew, or should have known, that the notice contained in the letter was intended to apply to the Chicago Terminal Transfer Railroad Company. This inference is specially justified in view of the fact that the Chicago Terminal Transfer Railroad Company was charged with notice of the existence of the ordinance of the year 1897, designated as section 1750, to which we have held that the notice was applicable. In other words, at the time that the letter of the Commissioner of Public Works was written, namely, October 30, 1900, the Chicago Terminal Transfer Railroad Company, the predecessor

to prove the identity or to rebut the presumption arising from the identity. In the case at bar the fact that the Calumet Terminal Railroad Company was a predecessor in title of the Chicago Terminal Transfer Railroad Company and of the defendant, even though the Calumet Terminal Railroad Company did not own the tracks and right of way at the crossing at 116th street, is a circumstance to be considered in identifying the Pullmann named in the letter of the Commissioner of Public Works as the same Pullmann who was an official connected with the Chicago Terminal Transfer Railroad Company. Other facts which are presented are that the Chicago Terminal Transfer Railroad Company owned the tracks and right of way at the crossing at 116th street at the time that the letter of the Commissioner of Public Works was sent, and that Pullmann was the president or vice-president of that company at that time; also that the name Pullmann is rather an unusual name, The "Rule Book of Evidence," (Jones' Commentaries on Evidence), section 197, p. 175. The fact that the initial "E" in the name of Pullmann is omitted in the letter of the Commissioner of Public Works may to some extent weaken the presumption of identity, but it does not conclusively rebut the presumption.

It is our opinion that the Pullmann, who was president or vice-president of the Chicago Terminal Transfer Railroad Company at the time the letter of the Commissioner of Public Works was written, knew, or should have known, that the notice contained in the letter was intended to apply to the Chicago Terminal Transfer Railroad Company. This inference is especially justified in view of the fact that the Chicago Terminal Transfer Railroad Company was charged with notice of the ordinance of the city council of the year 1897, designated as section 1830, in which we have held that the notice was sufficient. In other words, at the time that the letter of the Commissioner of Public Works was written, namely, October 30, 1900, the Chicago Terminal Transfer Railroad Company, the predecessor

in title of the defendant, was charged with knowing that this ordinance directed that railroad companies in the City of Chicago should erect and maintain gates at such street crossings as should be designated by the Mayor and Commissioner of Public Works. And the Chicago Terminal Transfer Railroad Company was charged with this knowledge even though the ordinance was not operative and effective. Being charged with the knowledge of the existence of the ordinance, the Chicago Terminal Transfer Railroad Company reasonably should have expected that a notice necessary to put the ordinance in operation would be given. When, therefore, Faithorn received the letter of the Commissioner of Public Works, even though the name of the railroad was incorrectly stated, he was at least put on inquiry to ascertain why the letter was addressed to him, in view of the fact that he necessarily must have anticipated that a notice of such a character would be sent to the Chicago Terminal Transfer Railroad Company.

We are of the opinion that the evidence introduced by the plaintiff was sufficient to make at least a prima facie case that notice was given to the defendant in substantial compliance with the provisions of the ordinance which was passed in 1887 and designated as section 1750; and that the ordinance, therefore, was operative and effective as to the defendant.

Counsel for the defendant maintain that the argument of counsel for the plaintiff based on the ordinances admitted in evidence was improper and prejudicial to the defendant. The argument objected to is stated by counsel for the defendant as follows: "Twenty years without complying with the law or orders of the city council. Think of it, gentlemen! Exposing the public all these years to this danger, this great danger. Now, I say to you, in this case we have an open defiance of the law; an open defiance of the law passed for the safety of the public who has granted this railroad this franchise to run over their streets. For twenty years

in title of the defendant, was charged with knowing that this ordinance directed that railroad companies in the City of Chicago should erect and maintain gates at such street crossings as should be designated by the Mayor and Commissioner of Public Works; and the Chicago Terminal Transfer Railroad Company was charged with this knowledge even though its ordinance was not operative and effective. Being charged with the knowledge of the existence of that ordinance, the Chicago Terminal Transfer Railroad Company reasonably should have expected that a notice necessary to put the ordinance in operation would be given. When, therefore, Callahan received the letter of the Commissioner of Public Works, even though the name of the railroad was incorrectly stated, he was at least put on inquiry to ascertain why the letter was addressed to him, in view of the fact that he necessarily must have anticipated that a notice of such a character would be sent to the Chicago Terminal Transfer Railroad Company.

We are of the opinion that the evidence introduced by the plaintiff was sufficient to make at least a prima facie case that notice was given to the defendant in substantial compliance with the provisions of the ordinance which was passed in 1897 and designated as section 1760; and that the ordinance, therefore, was operative and effective as to the defendant.

Counsel for the defendant maintain that the argument of counsel for the plaintiff based on the ordinance admitted in evidence was improper and prejudicial to the defendant. The argument objected to is stated by counsel for the defendant as follows: "Twenty years without complying with the law as notice of the city council. Think of it, gentlemen! Consider the public and twenty years on this corner, this great county. Yes, I say to you, in this case we have an open defiance of the law; an open defiance of the law passed for the safety of the public and the people that walk these streets this crossing is the most dangerous. For twenty years

they have been exposed to a great and serious danger. ** If it were not for the failure to erect these gates we would not be here today; this accident never would have occurred. If this law is of no value, if we cannot enforce it, if the defendant can violate with impunity, then we might as well wipe these laws off the books." Since we have held that sufficient notice was given to the defendant to render the ordinance of the year 1897, designated as section 1750, operative and effective, it follows that counsel for the plaintiff had the right to discuss that ordinance and to draw all inferences from it that would be justified on the evidence. He had the right to argue in respect of the ordinance on any reasonable theory of the case. We do not think that his argument was unreasonable. The other ordinances in regard to the erection and maintenance of gates were substantially re-enactments of the ordinance of the year 1897, designated as section 1750. We do not think that there is anything in the argument of counsel for the plaintiff which would constitute reversible error.

Counsel for the defendant contend that the deceased was guilty of contributory negligence and that his negligence was the sole proximate cause of the accident. They maintain that on the evidence the deceased was guilty of negligence, both as a matter of law and on the weight of the evidence. On some of the material issues of fact the evidence is conflicting. Whether there was a flagman at the crossing with a lantern in his hand as the automobile was approaching the crossing; whether there were box cars on the switch track which to some extent obscured the view of the train from the automobile; whether the locomotive engineer rang his bell or blew his whistle; whether the automobile was going fast or slow - are some of the facts in dispute. One fact, which is undisputed and which is important when considered in connection with the rate of speed at which the automobile was going, is that 51st street was in bad condition. There is a street car line on

[illegible]

[illegible]

[illegible]

51st street. According to the testimony of Arthur Benke, a witness on behalf of the plaintiff, on each side of the tracks there is a brick pavement, but in the middle of the tracks there is no pavement at all; that in the middle of the tracks there are "rails and bumps." The street car line ends about 100 feet from the railroad crossing. From the point where the street car line terminates, to the railroad crossing the street is unpaved. The flagman at the crossing, an employee of the defendant, who testified on behalf of the defendant, stated that outside of the street car tracks there was no pavement; that the street between the end of the street car tracks and the railroad crossing "is nothing but dirt with big holes in it;" that the street was "all holes in the pavement, mud holes;" that there "were lots of holes there;" that the holes were "about four or six inches deep;" that the condition of the street "is the same along those two blocks."

The towerman, an employee of the Pennsylvania Company, a witness for the defendant, testified that there were "big holes" in the street; that beyond the end of the street car line there are a "lot of big holes;" and that "before the street car tracks end, for about a half a block, there is no pavement between the street car tracks;" that "there is nothing but dirt and that is full of holes."

In regard to the speed at which the automobile was going as it approached the crossing, the testimony for the plaintiff varies from seven to twelve miles an hour. August Hindelar, a brother of the deceased, who was in the automobile which was following the automobile that was struck, testified on behalf of the plaintiff that the automobile that was struck "appeared to be going slowly across the tracks." The testimony for the defendant was to the effect that the automobile was going "very fast;" at a "great rate of speed;" "awful fast;" "as fast as they could go." As far as we can discover the rate of speed was not estimated in

that street. According to the testimony of Arthur Beuhm, a witness on behalf of the plaintiff, on each side of the street there is a brick pavement, but in the middle of the street there is no pavement of any; that in the middle of the street there are "holes and bumps." The street for some little ways north from the railroad crossing. From the point where the street car line terminates, to the railroad crossing the street is unpaved. The flagman at the crossing, an employee of the defendant, who testified on behalf of the defendant, stated that outside of the street car tracks there was no pavement; that the street between the end of the street car tracks and the railroad crossing "is nothing but dirt with big holes in it;" that the street was "all holes in the crossing, and holes;" that there "were lots of holes there;" that the holes were "about four or six inches deep;" that the condition of the street "is the same right there the crossing."

Tom Cameron, an employee of the Philadelphia Company, a witness for the defendant, testified that there were "big holes" in the street; that beyond the end of the street car line there was a "lot of big bumps;" and that "before the street was [illegible], for about a half a block, there is no pavement between the street and tracks;" that "there is nothing but dirt and there is lots of holes."

In regard to the speed at which the automobile was going as it approached the crossing, the testimony for the plaintiff places them speed at twelve miles an hour. August Hieronimus, a brother of the decedent, who was in the automobile which was following the automobile that was struck, testified on behalf of the plaintiff that the automobile "that was struck [illegible] to be going slowly across the tracks." The testimony for the defendant was to the effect that the automobile was going "very fast;" at a "great rate of speed;" "awful fast;" "as fast as they could go;" as far as [illegible] the rate of speed was not estimated in

hours per mile by any of the witnesses for the defendant. A circumstance to be considered in determining whether the automobile was going "very fast" or at a "great rate of speed" is that some of the occupants of the automobile had their musical instruments in the automobile with them, and a fast rate of speed over the street in its bad condition would be likely to injure the instruments.

Among the witnesses for the plaintiff who testified that there were box cars on the switch track near the crossing and on the north side of the crossing, were two policemen who went to the scene of the accident after the collision. Emil Witkowsky, a relative of one of the men in the automobile, testified that when he went to the scene of the accident the day after the accident to look for a violin, he saw box cars "standing on the north side of 51st street." Two witnesses for the plaintiff who were present at the accident, testified that they saw box cars just north of the crossing.

The yardmaster of the defendant testified on behalf of the defendant that there were no box cars on the switch track between 51st street and 50th place; that he had charge of placing cars on the switch; that he was not at the scene of the accident but heard of it the next morning. The flagman and the towerman testified on behalf of the defendant that there were no box cars on the switch track. The locomotive engineer, an employee of the defendant, and the fireman, also an employee of the defendant, were not questioned about the box cars.

On the issue whether the flagman was at the crossing with a lantern in his hand as the automobile approached the crossing, two witnesses testified for the plaintiff. One was Arthur Beuke, who was in the automobile with the deceased; the other was deceased's brother, August Biedelar, who was in an automobile

hours per mile by any of the witnesses for the defendant. A circumstance to be considered in determining whether the automobile was going "very fast" or at a "great rate of speed" is that none of the occupants of the automobile had [illegible] in the automobile with them, and a fast rate of speed over the [illegible] in its bad condition would be likely to injure the machine [illegible].

Among the witnesses for the plaintiff who testified that there were two cars on the switch track near the crossing and on the north side of the crossing, [illegible] positions [illegible] the scene of the accident after the collision. [illegible], [illegible] of one of the men in the automobile, testified that when he went to the scene of the accident the day after the accident to [illegible] for a [illegible], he saw two cars "standing on the north side of [illegible] street." Two witnesses for the plaintiff who were present at the accident, testified that they saw two cars just north of the crossing.

The [illegible] of the defendant testifying on behalf of the defendant that there were no two cars on the switch track between [illegible] street and [illegible] street; that he had charge of [illegible] cars on the switch; that he was out at the scene of the accident and [illegible] of it the next morning. The flagman and the [illegible] testified on behalf of the defendant that there were no two cars on the switch track. The [illegible] [illegible], an employee of the defendant, and the flagman, [illegible] an employee of the defendant, were not [illegible] about the cars.

At the [illegible] the flagman was at the crossing with a lantern in his hand as the automobile approached the crossing, two witnesses testified for the plaintiff. One was [illegible], who was in the automobile with the [illegible]; the other was [illegible]'s [illegible], [illegible], who was at [illegible]

behind the automobile in which the deceased was riding. Both of these witnesses testified that they did not see any flagman or watchman at the crossing with a light. Bauke testified that he looked on both sides and did not see anybody on the crossing. He also stated that the automobile stopped at the crossing and that the driver looked in both directions. Later he stated that he did not know whether the automobile stopped or not; that he did not remember. Sindelar testified that he did not see anyone on the crossing.

The flagman testified on behalf of the defendant that he was standing on the crossing holding a lantern at arm's length as the automobile came "dashing" along 81st street; that the automobile turned towards him and he thought it was going to run over him; that when the train hit the automobile he "skipped." The towerman testified on behalf of the defendant that at the time of the collision the flagman was "right on the crossing between the B. & O. and the Panhandle on the east side of the crossing, the east side of the B. & O. crossing;" that he was in the center of the street, and had a white lantern in his hand. The locomotive engineer testified on behalf of the defendant that he saw a white light, that appeared to be stationary, at the crossing, and what he supposed was the flagman. The fireman testified for the defendant that he saw the flagman and the lantern; that the engine had a very bright electric headlight that lighted up the entire crossing; that "we could discern a man on the tracks with those headlights ahead of the engine, approximately two blocks." The fireman also testified that the lantern appeared to be stationary. Later he testified the flagman was "flagging for us " - not for them to stop but to "protect" them at the crossing. On cross-examination the fireman was asked if he did not testify at the coroner's inquest in answer to the question "Did you notice a watchman on the crossing?" that he"saw a lantern there; that he didn't know." By agreement between counsel for the

behind the automobile in which the deceased was riding. Both of these witnesses testified that they did not see any flagman or watchman at the crossing with a light. Banks testified that he looked on both sides and did not see anybody at the crossing. He also stated that the automobile stopped at the crossing and that the driver looked in both directions. Later he said -- that he did not know whether the automobile stopped or not; that he did not remember. Gamble testified that he did not see anyone at the crossing.

The flagman testified on behalf of the defendant that he was standing at the crossing holding a lantern at arm's length as the automobile came "bumping" along the street; that the automobile turned towards him and he thought it was going to run over him; that when the train hit the automobile it "exploded." The [illegible] testified on behalf of the defendant that at the time of the collision the flagman was "right at the crossing between the [illegible] and the automobile on the east side of the crossing, the west side of the [illegible] crossing" that he was in the center of the street, and had a white lantern in his hand. The locomotive engineer testified on behalf of the defendant that he saw a white light, that appeared to be stationary, at the crossing, and that he assumed was the flagman. The fireman testified for the defendant that he saw the flagman at the crossing; that the engine had a very bright electric headlight that lighted up the entire crossing; that "we could discern a man or the tracks with these headlights ahead of the engine, approximately two blocks." The fireman also testified that the lantern appeared to be stationary. Later he testified the flagman was "flagging [illegible]" - for the [illegible] to stop [illegible] "[illegible]" than at the crossing. On cross-examination the fireman was asked if he did not testify at the coroner's inquest in answer to the question "Did you notice a watchman at the crossing?" that he "saw a lantern there; that he didn't know." The statements between counsel for the

defendant and counsel for the plaintiff the testimony of the fireman in "the other trial," in regard to the flagman was read into the record and is as follows:

"Q. Did you notice a watchman on the crossing? A. I saw a latern there, I don't know.

Q. You saw a lantern there? A. Yes.

Q. You testified so, did you not?

A. Yes. At the inquest I just said I saw a lantern, I don't remember the watchman, but since the inquest I have found different."

We think it unnecessary to set out in detail the testimony relating to the ringing of the bell and the blowing of the whistle. It is sufficient to state that the witnesses on behalf of the plaintiff testified that they heard no bell or whistle, and that the witnesses for the defendant testified that the whistle was blown and that the bell was ringing. The evidence shows that the automobile had "big,bright lights on;" and that the engine had a brilliant electric headlight which the engineer stated would enable one to "discern a man on the track" about a thousand feet ahead; and that the rays of the headlight would "spread over more than the track" - that they would extend west of the "B. & O. main line track at 51st street;" but that he "was unable to say how many feet." The evidence shows that the train was going at the rate of about 25 or 30 miles an hour at the time of the collision. Before concluding the statement of the evidence there is one item to which attention should be directed, and that is an alleged conversation between the flagman and the towerman as the automobile was approaching the crossing. The flagman testified that when he first saw the automobile in which the deceased was riding, and the automobile behind it, the automobiles were at Western avenue turning into 51st street - a little more than two blocks away - about 2¼ or 2 1/3 of a block; that he called to the towerman and said: "There they come again and it looks

to me they both will meet; the train and the automobiles will meet;" that the towerman did not answer; did not say a word. At that time the train was three small blocks away; the automobile about two blocks away; that the automobiles were "going as fast as they could go," but that he had no idea how fast that might be; that he had no idea how fast automobiles could go; that when they reached Oakley avenue, a block away, he put up his lantern; that while they were going from Western avenue to Oakley avenue he did not do anything; that he stood still all the time.

It seems highly improbable, almost incredible, that such a conversation took place in the circumstances. What the flagman meant when he said "There they come again" is an enigma. Who "they" were does not appear. Was the expression intended to refer to the particular occupants of the automobile or to persons generally who drove over the crossing? Why the flagman said "they" are coming "again" is not explained. The implication is that the same automobiles, or the same occupants of the automobiles, or both the same automobiles and the same occupants had been there before either the same evening or at some other time. There is nothing in the record, however, to clear up the situation. Furthermore, the conduct of the flagman according to his own testimony is incomprehensible. If he saw the automobiles over two blocks away, and believed that a collision was so imminent that he called the towerman's attention to the almost certain danger, why did he not make some effort to prevent the catastrophe other than standing still and holding the lantern at arm's length? The towerman testified in respect of the alleged conversation, but his testimony is unsatisfactory and self-contradictory, and in some particulars it is contrary to the testimony of the flagman. In one part of his testimony he stated that when he first saw the "automobiles" they were about two blocks away. In the part of his testimony relating to the alleged conversation he stated im-

to me they both will meet; the train and the automobiles will meet;" that the towerman did not answer; did not say a word. At that time the train was three small blocks away; the automobile about two blocks away; that the automobiles were "going as fast as they could go," but that he had no idea how fast that might be; that he had no idea how fast automobiles could go; that when they reached Oakley avenue, a block away, he put up his lantern; that while they were going from Western avenue to Oakley avenue he did not do anything; that he stood still all the time.

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as we [illegible] both will [illegible] that the automobile will surely' that the [illegible] did not [illegible] did not say a word. At that time the train was three small blocks away; the automobile about two blocks away; that the automobile was 'going as fast as they could go,' but that he and [illegible] had no [illegible] then he had no time nor [illegible] automobiles would go; that when they reached railway crossing, a block away, he put up his [illegible]; that while they were going [illegible] enough to finally [illegible], he did not [illegible] anything; that he could still see the train.

It seems highly improbable, almost incredible, that such a conversation took place in the circumstances. What the [illegible] meant when he said "There they come again" is so unique. The "they" were [illegible] yet around. Was the expression intended to refer to the particular occupants of the automobile or to drivers generally who drove near the crossing? Why the [illegible] said "they" and [illegible] 'again' is not explained. The application to just the [illegible] tiles, or the near occupants of the automobiles, or only the same automobile and the same occupants had been there before either the same evening or at some other time. There is nothing in the record, however, to clear up the situation. Furthermore, the conduct of the [illegible] according to his own testimony is incomprehensible. If he saw the automobile over two blocks away, and believed that it would [illegible] and so [illegible] that he called the [illegible]'s attention to its almost certain danger, why did he not make some effort to prevent the catastrophe other than standing still and [illegible] the [illegible] at [illegible]'s [illegible]? The [illegible] in respect of the alleged conversation, but his testimony is contradictory and self-contradictory, and in some particulars it is [illegible] to the testimony of the [illegible]. In one part of his testimony he stated that when he first saw the "automobiles" they were about two blocks away. In one part of his testimony relating to the alleged conversation he stated the-

pliedly that at the time of the conversation the "automobile" was about a block away. He testified that he was then in his tower, which was "quite high," but he could not say whether it was 12 or 15 feet high. He testified that his attention was drawn to the automobiles by the flagman who called up to him to let him know they were coming; that the flagman said, "They are coming pretty fast and they are going to get catched;" that he did not know whether "they" had been there before; that he has a bell in the tower; that when he saw the automobiles coming he did not ring the bell. He also testified that the automobile that was struck did not turn toward the flagman; that the flagman did not run away; that he saw the flagman all of the time. The towerman admitted that he testified at the coroner's inquest in regard to the alleged conversation with the flagman.

On cross-examination the towerman's attention was directed to parts of his testimony at the coroner's inquest in regard to the alleged conversation between him and the flagman and also to other remarks between them, and the towerman was then asked whether he had said "that" at the inquest. He replied that he had but that he "couldn't say" whether it was true; that he guessed it was true. The towerman's attention was then called to the following specific questions and answers referred to as part of his examination at the coroner's inquest in reference to the alleged conversation with the flagman: "Did he speak to you? Answer: He didn't speak to me; there was no time. Q. That was true then was it?" The towerman replied, "Yes, sir." The following question was then put to him: "So what you said about his saying 'They are coming fast, and they are going to get catched,' all of that is not true, is it?" The towerman answered, "Yes, that is true too." The further question was asked: "That is your idea of what is true - both of those statements, is it?" To this question the towerman did not reply. The towerman testified that about two days after his testimony at the

allegedly that at the time of the conversation the "automobile" was about a block away. He testified that he was then in his tower, which was "quite high," but he could not say whether it was 12 or 15 feet high. He testified that his attention was drawn to the automobile by the flagman who called up to him to let him know they were coming; that the flagman said, "they are coming pretty fast and they are going to get smashed;" that he did not know whether "they" had been there before; that he had a bell in the tower; that when he saw the automobile coming he did not ring the bell. He also testified that the automobile that was wrecked did not turn toward the flagman; that the flagman did not run away; that he saw the flagman all of the time. The towerman admitted that he testified at the coroner's inquest in regard to the alleged conversation with the flagman.

On cross-examination the towerman's attention was directed to parts of his testimony at the coroner's inquest in regard to the alleged conversation between him and the flagman and also in which results between them, and the towerman was then asked whether he had said "that" at the inquest. He replied that he was sure that he "might'nt say" whether it was true; that he guessed it was true. The towerman's attention was then called to the following specific questions and answers referred to as part of his examination at the coroner's inquest in reference to the alleged conversation with the flagman: "Did he shout to you? Answer: He didn't shout to me; there was no time. Q. Well was there time and did?" The towerman replied, "Yes, sir." The following question was then put to him: "Is what you said about him saying 'they are coming fast, and they are going to get smashed,' all of that is not true, is it?" The towerman answered, "Yes, that is true too." The further question was asked: "That is your idea of what is true — both of those statements, is it?" To this question the towerman did not reply. The towerman testified that about two days after his testimony at the

inquest he had a conversation with a representative of the defendant in which the representative asked him "about all the conversation that the flagman had after he saw the automobiles."

Waiving the question whether the towerman was impeached, and assuming for the sake of argument that his testimony corroborates the flagman, we doubt whether the conversation between the two men took place. If it did, the question naturally arises why the flagman did not make such efforts to avert the collision as were proportionate to the danger indicated by the conversation. The towerman, on his own testimony, did nothing. The flagman, according to his testimony, merely stood on the crossing and held his lantern at arm's length. The towerman could have rung his bell. The fact that the towerman was in the employ of another Railroad company and under no legal duty to act in behalf of the defendant is immaterial. We are not attempting to charge the defendant with negligence by reason of the act of the towerman. We are merely comparing the conduct of the towerman with customary conduct to determine the weight and credibility of his testimony. The flagman could have gone beyond the tracks toward the approaching automobile and flagged the automobile with his lantern. The flagman could have done this notwithstanding the fact that the evidence for the defendant showed that the flagman had only one foot. The jury would have been justified in believing that the conversation did not take place and they may have believed so. Such a conclusion would not be inconsistent necessarily with the jury's finding, in answer to the special interrogatory submitted by the defendant as to whether the jury believed the flagman was guilty of negligence, that the flagman was not negligent. The jury might have believed the flagman's testimony, which was corroborated by other witnesses for the defendant, that he warned the approaching automobile by holding his lantern at arm's length, and the jury might have considered such warning

[illegible] he had a conversation with a representative of the defendant in which the representative asked him "about all the conversation that the flagman had after he saw the automobiles."

Taking the question whether the [illegible] was [illegible], and assuming for the sake of argument that his testimony [illegible] the flagman, or [illegible] the conversation between the two men took place. If it did, the question naturally arises why the flagman did not make such efforts to avert the collision as were proportionate to the danger indicated by the conversation. The lineman, on his own testimony, did nothing. The flagman, according to his testimony, merely stood at the crossing and held his lantern at arm's length. The lineman could have rung his bell. The fact that the lineman was in the employ of another railroad company and under no legal duty to act in behalf of the defendant is immaterial. We are not attempting to charge the defendant with negligence by reason of the act of the lineman. We are simply weighing the conduct of the lineman with ordinary caution to determine the weight and credibility of his testimony. The flagman could have gone beyond the crossing toward the approaching automobile and flagged the automobile with his lantern. The flagman might have done this notwithstanding the fact that the evidence for the defendant showed that the flagman had only one flag. The jury would have been justified in believing that the conversation did not take place and they may have believed so. Such a conclusion would not be inconsistent necessarily with the jury's finding, in answer to the special interrogatory submitted by the defendant as to whether the jury believed the flagman was guilty of negligence, that the flagman was not negligent. The jury might have believed the flagman's testimony, which was corroborated by other witnesses for the defendant, that he warned the approaching motorists by holding his lantern at arm's length, and the jury might have considered such warning

sufficient to excuse the flagman from negligence. In considering the alleged conversation between the flagman and the leverman, we are not examining the conversation with the idea that negligence could be predicated against the defendant because the flagman failed to make such efforts to avert the collision, as the exigencies of the situation would have required on the theory that the conversation was true. We are only endeavoring to determine the truth or falsity of the conversation as bearing on the question of the alleged contributory negligence of the deceased - namely, whether the driver of the automobile and the deceased were guilty of such reckless conduct as would be implied if the conversation was true. We have reached the conclusion that the jury reasonably could have disbelieved the testimony in regard to the conversation, because of the inherent improbability of the testimony. Podarski v. Stone, 186 Ill., 540, 548.

From a consideration of all of the evidence we are clearly of the opinion that the deceased was not guilty of contributory negligence as a matter of law. "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co., 259 Ill., 476), but cases occasionally arise which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant." Kelly v. Chicago City Ry. Co., 283 Ill., 641, 645.

We think that it is obvious that the case at bar does not come within the class of cases defined in Kelly v. Chicago City Ry. Co., supra.

Counsel for the defendant maintain that the evidence does not show that the deceased looked and listened as the automobile approached the tracks, so that he could warn the driver. A failure to

sufficient to excuse the flagman from negligence. In considering the alleged conversation between the flagman and the conductor, we are not considering the conversation with the idea that negligence could be predicated against the defendant because the flagman failed to make such efforts to stop the collision, as the nature of the situation would have required on the theory that the conversation was true. We are only endeavoring to determine the truth or falsity of the conversation as bearing on the question of the alleged contributory negligence of the deceased - namely, whether the driver of the automobile and the deceased were guilty of such reckless conduct as would be implied if the conversation was true. We have reached the conclusion that the jury reasonably could have disbelieved the testimony in regard to the conversation, because of the inherent improbability of the testimony. [illegible] v. [illegible], [illegible] Ill., [illegible], [illegible].

After a consideration of all of the evidence we are clearly of the opinion that the deceased was not guilty of contributory negligence as a matter of law. "As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, ([illegible] v. Illinois Central Railroad Co., [illegible] Ill., [illegible]), but where undisputedly [illegible] a person is so careless of his conduct as violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no ordinarily prudent person would have acted as he did and render judgment for the defendant." [illegible] v. Chicago City Ry. Co., [illegible] Ill., [illegible], [illegible].

We think that it is obvious that the case at bar does not come within the class of cases defined in [illegible] v. Chicago City Ry. Co., supra.

Counsel for the defendant maintain that the evidence does not show that the deceased looked and listened as the automobile approached the tracks, so that he could warn the driver. A failure to

look and listen is not of itself negligence as a matter of law. Henry v. C.C.C. & St. L. Ry. Co., 236 Ill., 219, 221.

The question whether the deceased was guilty of negligence in failing to look and listen for the purpose of cautioning the driver is a question of fact to be determined by the jury on a consideration of all of the evidence. Henry v. C.C.C. & St. L. Ry. Co., supra; Kelly v. Chicago City Ry. Co., supra.

Has the plaintiff shown by a preponderance of the evidence that the deceased exercised due care and was not guilty of contributory negligence? We are of the opinion that the verdict of the jury on this question is not manifestly against the weight of the evidence. It is conceded by counsel for the defendant, as it must be, that the negligence, if any, of the driver of the automobile cannot be imputed to the deceased. The precise question then is whether the deceased exercised the care that an ordinarily prudent person would have exercised in the circumstances. Facts in numerous cases have been cited by both counsel for the defendant and counsel for the plaintiff illustrative of the general rule. However, as there is nearly always a material variation of the facts in the different cases, each case must be determined largely on its own facts. In the case at bar all that the deceased could have done in the exercise of due care would have been to look and listen and warn the driver of the automobile of any danger that was reasonably apparent. But was there any reasonably apparent danger which could have been observed if the deceased had looked and listened? On the testimony of the defendant, undoubtedly there was. On the testimony of the plaintiff there was not. On the testimony for the defendant, if considered alone, the driver, the deceased and all the occupants of the automobile were guilty of the grossest negligence. On the testimony of the plaintiff, if considered alone, neither the driver, the deceased, nor any of the occupants of the automobile was guilty of negligence. We make these observations merely to emphasize the fact that the testimony of the

witnesses on many material issues is directly conflicting and reasonably cannot be harmonized. The only way in which the deceased could be charged with contributory negligence would be to reject the testimony of the plaintiff on many material issues and to accept the testimony of the defendant on those issues. On a consideration of all the evidence, we do not think that we would be warranted in doing that.

We do not deem it necessary to discuss in detail all of the arguments urged by counsel for the plaintiff and counsel for the defendant on the evidence. We think that we have stated sufficient testimony to shew the conflict of the evidence. We will notice, however, the contention of counsel for the defendant to the effect that if it should be conceded that there were box cars on the switch track which tended to obscure the vision in the direction from which the train was approaching, "such obstructing cars, instead of excusing the deceased from looking and listening and exercising care, were palpable notice to him of danger and a standing admonition to use care and precaution." Such an inference undoubtedly could be drawn, but the question of the contributory negligence of the deceased should not be determined on that inference alone. That inference, together with all the other inferences that could be legitimately deduced from the evidence, would have to be considered in deciding whether the deceased was guilty of negligence. Even if the deceased had seen the box cars, would that fact alone have been sufficient to compel him to caution the driver or to attempt to get the driver to stop? A consideration of all the evidence would be necessary to determine the question. It is fair to assume that the inference suggested by counsel for the defendant was argued to the jury and was considered by them. The facts and circumstances in every case, however, do not always require, as a matter of due caution and care, that a guest in an automobile should attempt to stop the driver or to give him directions. To do so in some situa-

witnesses on many material issues is directly conflicting and reasonably cannot be harmonized. The only way in which the judgment could be [illegible] would be to reject the testimony of the plaintiff on many material issues and to accept the testimony of the defendant on those issues. On a consideration of all the evidence, we do not think that we would be warranted in doing that.

We do not deem it necessary to discuss in detail all of the arguments urged by counsel for the plaintiff and against the [illegible] on the evidence. We think that we have stated sufficient [illegible] to show the [illegible] of the evidence. We will notice, however, the contention of counsel for the defendant to the effect that [illegible] that there was not [illegible] the [illegible] in the direction from which the train was approaching, [illegible] the [illegible] and [illegible] plaintiff's notice to him of danger and [illegible] [illegible] [illegible] [illegible] should not be [illegible] on that inference alone. That [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] sufficient to [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] to the [illegible] of all the evidence [illegible]

tions might be harmful rather than helpful. Cases may be conceived where interference with the driver would confuse him and increase the danger. In some cases the duty to warn the driver might be imperative. In others, the duty might be to remain inactive and not to interfere with the driver. In the case at bar we think that the question of contributory negligence was one of fact for the jury, and we do not think that the verdict of the jury in deciding the question adversely to the defendant is manifestly against the weight of the evidence. We are also of the opinion that the verdict of the jury in finding the defendant guilty of negligence is not manifestly against the weight of the evidence. The rule is a familiar one, and has been announced in many cases, "that where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside." Carney v. Sheedy, 295 Ill., 78, 83. It is also the rule that a verdict will not be disturbed merely because the evidence is doubtful. Illinois Central Railroad Co. v. Cowles, 32 Ill., 116, 121; DeForest v. Oder, 42 Ill., 500, 501.

Counsel for the defendant contend that counsel for the plaintiff made improper remarks to the jury in his argument. The remarks complained of are stated by counsel for the defendant as follows: "The towerman stands there. He sees this automobile. He is warned by the flagman there is going to be a collision; right at his very hand is a bell, there for that purpose, to warn the public. Do you think those are the actions of a reasonable, red-blooded man? If you were in his place and you saw that danger, and saw the collision was impending, and you out of natural, human instinct wanted to stop it, wouldn't you ring your bell?"

Counsel for the defendant argue that the remarks were improper because the Railroad company, of which the towerman was an employee, is "not a party defendant in this case and no negligence

tiory might be imputed against them both. Cases may be conceived where interference with the driver would confuse him and increase the danger. In some cases the duty to warn the driver might be imperative. In others, the duty might be to remain inactive and not to interfere with the driver. In the case at bar we think that the question of contributory negligence was one of fact for the jury, and we do not think that the verdict of the jury in deciding the question adversely to the defendant is manifestly against the weight of the evidence. We are also of the opinion that the verdict of the jury in finding the defendant guilty of negligence is not manifestly against the weight of the evidence. The rule is a familiar one, and has been announced in many cases, "that where there is a contrariety of evidence and the testimony by fair and reasonable intendment will sustain the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside." [illegible] v. [illegible], [illegible] Ill., [illegible]. It is also the rule that a verdict will not be disturbed merely because the evidence is conflicting. Illinois Central Railroad Co. v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill., [illegible].

Counsel for the defendant contend that remarks [illegible] the plaintiff made improper remarks to the jury in his argument. The remarks complained of are stated by counsel for the defendant as follows: "The [illegible] [illegible], in case like [illegible], he is exposed to the dangers there is going to be a collision, right at his very hand is a bell, there for that purpose, to warn the public. Do you think there was the action of a reasonable, prudent man? If you were in this place and you saw that danger, and saw the collision was impending, and you out of control, human instinct would be to ring it, wouldn't you ring your bell?"

Counsel for the defendant argue that the verdict [illegible] employees because the [illegible] Company, of which the [illegible] was an employee, is not a party defendant in this case and no negligence

was charged against said company or its towerman." The towerman was a witness in the case at bar, and counsel for the plaintiff, of course, had the right to discuss his testimony. The context of the argument of counsel for the plaintiff from which the excerpt is taken, is not set out in the brief or abstract of counsel for the defendant, but we are referred by counsel for the defendant to the record. On an inspection of the record we find that before counsel for the plaintiff made the remarks objected to, he had been discussing at some length the question of the credibility of the testimony of the flagman and the towerman. He was not arguing that the towerman was guilty of negligence. Just immediately preceding the above excerpt from the argument of counsel for the plaintiff, counsel for the plaintiff had been arguing as follows: "The flagman says that he turned around and ran away before the actual collision, and didn't see the collision, but heard a shot, and turned around and that was the collision. The towerman says the flagman stood his ground, right there, and never moved. Again, is it true the towerman stands there? Assume their story is true." Then follow the remarks objected to by counsel for the defendant. We think that the part of the argument of counsel for the plaintiff, which counsel for the defendant complain of, when considered in connection with the context of the argument, was entirely proper.

Counsel for the defendant maintain that the trial court erred in instructing the jury. The instructions complained of are the instructions given at the request of the plaintiff, numbered 5, 6, 12, 8, 9, 11, 13 and 14. The objection of counsel for the defendant to the instructions numbered 5, 9, and 13, is that they submit the question whether the plaintiff was guilty of contributory negligence to the jury, and that there is no evidence on which to base such an issue. We do not think the court erred in giving the instruction. In our view the question of contributory negligence was not a matter of law, but was one of fact for the jury.

was charged against said company or its insurance." The witness was a witness in the case at bar, and counsel for the plaintiff, of course, had the right to discuss his testimony. The portion of the argument of counsel for the plaintiff from which the excerpt is taken, is not set out in the brief or abstract of counsel for the defendant, but we are referred by counsel for the defendant to the record. On an inspection of the record we find that before counsel for the plaintiff made the remarks objected to, he had been discussing at some length the question of the credibility of the testimony of Mr. Flagman and the insurance. He was not arguing that the insurance was guilty of negligence. That immediately preceding the above excerpt from the argument of counsel for the plaintiff, counsel for the plaintiff had been arguing as follows: "Mr. Flagman says that he turned around and was away before the actual collision, and didn't see the collision, but heard a crash, and turned around and that was the collision. The insurance says the Flagman waved his ground, [illegible], and never moved. Again, he is true the insurance [illegible] because [illegible] is true." Then follow the remarks objected to by counsel for the defendant. We think that the part of the argument of counsel for the plaintiff, which counsel for the defendant complains of, when considered in connection with the context of the argument, was entirely proper.

Counsel for the defendant maintain that the trial court erred in instructing the jury. The instructions complained of are the instructions given at the request of the plaintiff, numbered 2, 4, 12, 6, 8, 11, 13 and 15. The objection of counsel for the defendant to the instructions numbered 2, 4, and 13, is that they submit the question whether the plaintiff was guilty of contributory negligence to the jury, and that there is no evidence on which to base such an issue. We do not think the court erred in giving the instructions. In our view the question of contributory negligence was not a matter of law, but was one of fact for the jury.

Furthermore, counsel for the defendant cannot assign error on the instructions in question, as the issue of contributory negligence was submitted to the jury in the instructions given at the request of the defendant, numbered 5, 9, 10, 11, 12 and 13. Brimie v. Belden Manfg. Co., 287 Ill., 11, 18.

The instructions given at the request of the plaintiff, numbered 11 and 14, are objected to by counsel for the defendant on the ground that they instruct the jury on the theory that the ordinances relative to the erection and maintenance of gates and safety appliances at crossings are admissible in evidence. As we have held that the ordinances were properly admitted in evidence, the objection is overruled.

Plaintiff's instructions numbered 6 and 13, complained of by counsel for the defendant, are duplicates. The particular part of the instructions objected to is as follows: "In order to charge plaintiff's intestate with the duty of warning the driver of the automobile in question, the evidence must show that the circumstances were such that plaintiff's intestate had time and opportunity to become conscious by the exercise of ordinary care of the facts giving rise to such duty and the reasonable opportunity to perform it." The ground of the objection of counsel for the defendant is that "the burden was on the plaintiff to prove by preponderance of the evidence that the deceased was in the exercise of ordinary care and precaution at all times prior to the accident." In our opinion the instructions do not purport to relieve the plaintiff of the burden of proof. The jury are merely told what "the evidence must show." In the first part of the instructions the jury were told that their finding must be based on "a preponderance of the evidence, under the instructions of the court;" and the jury were explicitly told in other instructions that the burden of proof was on the plaintiff.

The instruction numbered 8, given for the plaintiff, is objected to by counsel for the defendant for the reason that it sub-

Furthermore, counsel for the defendant cannot assign error on the in-structions in question, as the issue of contributory negligence was submitted to the jury in the instructions given at the request of the defendant, numbered 8, 9, 10, 11, 13 and 14. Wright v. Union Depot Co., 207 Ill., 15, 18.

The instructions given at the request of the plaintiff, numbered 11 and 12, are objected to by counsel for the defendant on the ground that they instruct the jury on the theory that the ordi-nances relative to the erection and maintenance of gates and safety appliances at crossings are admissible in evidence. As we have held that the ordinances were properly admitted in evidence, the objec-tion is overruled.

Plaintiff's instructions numbered 4 and 13, complained of by counsel for the defendant, are applicable. The particular part of the instructions objected to is as follows: "In order to charge plaintiff's intestate with the duty of warning the driver of the au-tomobile in question, the evidence must show that the circumstances were such that plaintiff's intestate had time and opportunity to become conscious by the exercise of ordinary care of the facts giving rise to such duty and the reasonable opportunity to perform it." The ground of the objection of counsel for the defendant is that "the burden was on the plaintiff to prove by a preponderance of the evi-dence that the deceased was in the exercise of ordinary care and precaution at all times prior to the accident." In our opinion the instructions we see nothing to relieve the plaintiff of the burden of proof. The jury are merely told that "the evidence must show," In the first part of the instruction the jury were told that their finding must be based on "a preponderance of the evidence, under the instructions of the court;" and the jury were explicitly told in other instructions that the burden of proof was on the plaintiff.

The instruction numbered 5, given for the plaintiff, is objected to by counsel for the defendant for the reason that it sub-

mitted the question of contributory negligence to the jury, and for the further reason that it instructed the jury in regard to the care that should be exercised by the driver of the automobile in the operation of the automobile. We have previously held that the question of contributory negligence was properly submitted to the jury. The objection to the other part of the instruction is not argued by counsel for the defendant, but the objection is only stated as follows: "It will be readily seen that the first paragraph of this instruction has no application to the facts or law involved in this case." Beyond this statement there is no further discussion of the objection. No authorities are cited. In our opinion the court did not commit error in giving the part of the instruction complained of. It is merely advisory. It does not submit the question of the driver's negligence to the jury as an issue in the case. The jury reasonably could not have/been misled into believing that the deceased was excused from the obligation of exercising care if the jury believed that the driver operated the automobile with due care, for the reason that in the same instruction the jury are told that the deceased was under the duty of exercising ordinary care for his own safety.

In objecting to the instruction given for the plaintiff, numbered 9, counsel for the defendant merely stated their objection without argument, as follows: "Evidence tending to show ordinary care on the part of the deceased both before approaching the crossing and after reaching the switch track, where under any view taken of the evidence the approaching train could have been seen, is entirely lacking." We think that the objection is without merit.

In our opinion the trial court did not commit reversible error in giving any of the instructions complained of by counsel for the defendant.

For the reasons stated the judgment of the trial court

mitted the question of contributory negligence to the jury, and for the further reason that it instructed the jury in regard to the care that should be exercised by the driver of the automobile in the operation of the automobile. We have previously held that the question of contributory negligence was properly submitted to the jury. The objection to the other part of the instruction is not argued by counsel for the defendant, but the objection is only stated as follows: "It will be readily seen that the first paragraph of this instruction has no application to the facts as developed in this case." Beyond this statement there is no further discussion of the objection. No authorities are cited. In our opinion the court did not commit error in giving the part of the instruction complained of. It is merely advisory. It does not submit the question of the driver's negligence to the jury as an issue in the case. The jury reasonably could not have misapplied this believing that the deceased was excused from the obligation of exercising care if the jury believed that the driver operated the automobile with due care, for the reason that in the same instruction the jury are told that the deceased was under the duty of exercising ordinary care for his own safety.

In objecting to the instruction given for the plaintiff, numbered 9, counsel for the defendant merely state their objection without argument, as follows: "Whatever [illegible] is that ordinary care on the part of the deceased only required ascertaining the approaching car after reaching the switch track, where since any [illegible] of the deceased [illegible] would have been none, is entirely harmless." We think that the objection is without merit.

In our opinion the trial court did not commit reversible error in giving any of the instructions complained of by counsel for the defendant.

For the reasons stated the judgment of the trial court

is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

133 - 28409

IGNAS SATAVA, administrator of the estate of JOHN SATAVA, deceased,
Appellee,

vs.

BALTIMORE & OHIO CHICAGO TERMINAL RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 643

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, Ignas Satava, administrator of the estate of John Satava, deceased, against the defendant, The Baltimore & Ohio Chicago Terminal Railroad Company, to recover damages for the death of John Satava, alleged to have been caused by the negligence of the defendant. The case was tried before a jury, and the jury returned a verdict in favor of the plaintiff in the sum of $5,000. From the judgment on the verdict the defendant prosecuted this appeal. The death of the deceased, John Satava, was the result of a collision between a train of the Pere Marquette Railroad Company, running over the tracks owned and operated by the defendant, under a lease from the defendant, and an automobile in which the deceased was riding as a guest. Another guest in the automobile with the deceased was Henry Kindeler, who was also killed as a result of the collision.

The facts, the questions relied on for reversal, and the briefs of both the plaintiff and the defendant in the case at bar are all substantially the same as in the case of Frank Kindeler, administrator of the estate of Henry Kindeler, deceased, v. Baltimore and Ohio Chicago Terminal Railroad Company, decided on appeal to this court, Case No. [illegible], opinion filed March 17, 1924, not yet reported. In the case at bar counsel for the

defendant state that the facts in the two cases "are to a great extent the same" but that "there is, however, some difference in the cases." The difference, in so far as we are able to discover, has not been specifically pointed out by counsel for the defendant. We find that there is a difference in the cases, but we do not think the difference is a material one. In our opinion the case at bar is controlled by the decision in the case of Frank Sindelar, administrator of the estate of Henry Sindelar, deceased, v. Baltimore and Ohio Chicago Terminal Railroad Company, _supra_. There are variations in the testimony of some of the witnesses in the two cases, but we do not think that these variations are matters of substance. There seems to be an objection to an instruction which is made in the case at bar by counsel for the defendant and which was not urged in the other case. The objection relates to the refusal of an instruction in regard to the burden of proof requested to be given by the defendant, numbered 1. We think, however, that the instruction is covered by the instruction given for the defendant, numbered 8.

Although the question whether the flagman was negligent was not the controlling question in respect to the defendant's negligence, special interrogatories were submitted to the jury in both cases on the question of the flagman's negligence.

The special interrogatory which was submitted to the jury at the request of the defendant in the case at bar, is different in form from the special interrogatory, which was submitted to the jury at the request of the defendant in the other case. The answers by the jury to the special interrogatories are also different. The special interrogatory and the answer thereto in the case at bar are as follows: "Do you find from a preponderance of evidence that the flagman negligently failed to warn the driver of the automobile of the approach of the train and that the negligence, if any, on his part was a proximate cause of the collision in question? Answer:

Yes."

The special interrogatory and the answer thereto in the other case were as follows: "Do you find from a preponderance of the evidence that the flagman was guilty of negligence as charged in the declaration, as explained in these instructions, and that such negligence, if any, was the proximate cause of the collision in question? No."

The affirmative answer of the jury to the special interrogatory in the case at bar is, in our opinion, more in consonance with the evidence, than was the negative answer of the jury to the similar special interrogatory in the other case. In the other case we held that the negative answer of the jury to the special interrogatory reasonably could be justified on the theory that the jury may have believed the flagman's testimony, which was corroborated by other witnesses for the defendant, that he warned the approaching automobile by holding his lantern at arm's length, and that the jury might have considered such warning sufficient to excuse the flagman from negligence. On the other hand, the conclusion is permissible that the holding of the lantern at arm's length by the flagman was not sufficient warning by the flagman. In other words, the evidence may warrant two reasonable inferences in regard to the flagman's conduct, - one that he was negligent and the other that he was not. The more probable inference, in our opinion, is that the flagman was negligent. In our view both the affirmative answer to the special interrogatory in the case at bar, and the negative answer to the special interrogatory in the other case, reasonably could be given, and still the alleged conversation between the flagman and the towerman could have been disbelieved. And the verdicts in the two cases finding the defendant guilty of negligence are not inconsistent with either of the answers to the special interrogatories,

for the reason that independently of the question of the flagman's negligence, there is evidence sufficient to support a verdict finding the defendant guilty of negligence.

For the reasons stated the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

53 - 28662

S. ARIANI,
Defendant in Error,

vs.

MRS. IDA MASILOTTI,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

233 I.A. 643

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by the defendant, Mrs. Ida Masilotti, from a judgment in the Municipal Court of the City of Chicago, in favor of the plaintiff, S. Arianà, in an action of forcible detainer. On October 27, 1923, on the motion for the plaintiff, we struck the bill of exceptions or stenographic report of the testimony, filed on behalf of the defendant, from the files. The only assignments of error argued by the defendant are the following ones: "(1) The court erred in instructing the jury to return a verdict for the plaintiff; (2) The verdict returned by the jury under the instructions of the court was contrary to the evidence." As these assignments of error are based upon errors in the bill of exceptions, and not on anything contained in the common law record, and the bill of exceptions having been stricken from the files, the judgment of the Municipal Court must be affirmed. People v. [illegible], 266 Ill. 548, 556.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

59 - [illegible]

R. F. SCHAFFER,
Appellee,

vs.

K. V. KEMPF,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A. 613

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, K. V. Kempf, from a judgment of the Municipal Court of the City of Chicago in favor of the plaintiff, R. F. Schaffer, in the sum of $360.80. The facts are not in dispute. The only question to be determined is involved in the construction of a contract between the parties.

The defendant is engaged in the "steamship ticket and foreign exchange business." The plaintiff requested the defendant to transmit the equivalent of $110.80 in Polish marks to Arthur Richter, at Nowrot Strasse 92 Lodz, Poland. The plaintiff paid the $110.80 to the defendant and received a receipt which was worded as follows: "Bank Post Remittance. No. 56669 Chicago, Illinois 7/14 1919. Received of R. F. Schaffer at 10727 Mich. Ave. the equivalent of 1360 Polish Marks to be forwarded to Arthur Richter, address Nowrot Strasse 92 Lodz Poland $110.80. Signed K. V. Kempf, By [illegible]. Cashier. Payment of the above amount is herewith guaranteed. If for some reason payment cannot be effected same will be refunded to sender less expenses." A similar receipt was given for $250 which the plaintiff requested the defendant to transmit to the same party at the same address. The equivalent of the $250 in Polish Marks at the time the $250 was paid to the defendant to be transmitted was 3165. The money in each instance

was transmitted by the defendant according to the usual course of such transactions. Neither of the amounts which the plaintiff requested the defendant to transmit to Richter was received by Richter for the reason that Richter had left Lodz without leaving any address. In the meantime the Polish Marks had depreciated in value. The defendant received as a refund for the $110.80, 1300 Polish Marks which were the equivalent of $1.36, and as a refund for the $250, 1160 Polish marks which were the equivalent of $18. These sums were tendered to the plaintiff by the defendant, but the plaintiff refused to accept them and demanded the return of $110.80 and the $250.

It is not contended by the plaintiff that the defendant was guilty of any negligence in the method by which the defendant transmitted the money, or that the defendant failed to exercise reasonable diligence to deliver the money. The only question to be decided is what is meant by the following clause in the receipts: "Payment of the above is herewith guaranteed. If for some reason payment cannot be effected same will be refunded to sender less expenses." The contention of counsel for the defendant is that the loss caused by the depreciation of the Polish Marks should be borne by the plaintiff. In support of their contention counsel for the defendant rely on the case of Weiss v. Liberty Trust & Savings Bank, 227 Ill. App. 405, which they maintain is conclusive of the question involved in the case at bar. In the case of Weiss v. Liberty Trust & Savings Bank, supra, the court held that the loss in that case caused by the depreciation of foreign exchange should be borne by the sender of the money. But the agreement in that case, which was also embodied in a receipt, was materially different from the agreement in the case at bar. In the case of Weiss v. Liberty Trust & Savings Bank, supra, the receipt recited that the money to be

was transmitted by the defendant according to the usual course of such transactions. Neither of the [illegible] which the plaintiff requested the defendant to transmit, [illegible] was received by plaintiff for the reason that [illegible] had been [illegible] leaving any address. It was admitted that [illegible] had depreciated in value. The defendant received [illegible] a refund for the [illegible], less [illegible] which were the equivalent of [illegible], and as a refund for the [illegible], [illegible] which were the equivalent of [illegible]. These sums were tendered to the plaintiff by the defendant, but the plaintiff refused to accept them and demanded the return of [illegible] and [illegible].

It is not contended by the plaintiff that the defendant was guilty of any negligence in the method by which the defendant transmitted the money, or that the defendant failed to exercise reasonable diligence in [illegible] the money. The only question to be decided is what is meant by the following clause in the contract: "Delivery of the money is [illegible] guaranteed. If the same [illegible] [illegible] will be [illegible] [illegible]." The contention of counsel for the defendant is that the loss caused by the depreciation of the [illegible] should be borne by the plaintiff. In support of this contention counsel for the defendant rely on the case of [illegible] v. [illegible], [illegible], which they maintain is conclusive of the question involved in the case at bar. In the case of [illegible] v. [illegible], the court held that the loss in that case caused by the depreciation of foreign exchange should be borne by the sender of the money. But the agreement in that case, [illegible], [illegible] different from the agreement in the case at bar. In the case of [illegible] v. [illegible] [illegible], the court [illegible] that the money [illegible]

transmitted was received "subject to rules and regulations of European post offices." The receipt further recited that "it is agreed that we [the agency transmitting the money] are not liable for any delay caused by European post offices or any other cause beyond our control." The evidence showed that the failure to deliver the money was due to war conditions and lack of communications with the country to which the money was sent. It is obvious that the facts in the case of [illegible] v. Liberty Trust & Savings Bank, supra, are materially different from the facts in the case at bar.

On our construction of the clause in question in the case at bar, the plaintiff does not have to bear the loss due to the depreciation of the Polish Marks. In the clause the payment of the money was "guaranteed" and further it was expressly agreed that if the payment could not be effected the "same" would be refunded to the sender. The meaning intended to be conveyed is unmistakable. There is no ambiguity in the language. The intent is so plainly and clearly expressed that a description of its meaning or an attempt to construe the language would be merely a repetition of the words.

In our opinion the judgment of the trial court should be affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

65 - 28714

DENNIS J. EGAN, Bailiff of the Municipal Court of Chicago, for use of FRANK SCAAR & CO.,
Plaintiff in Error,

vs.

S. E. NEWBERGER,
Defendant in Error.

ERROR TO COUNTY COURT, COOK COUNTY.

233 I.A. 643

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The action in this proceeding was brought by the plaintiff, the Bailiff of the Municipal Court of the City of Chicago, against the defendant, S. E. Newberger, to recover from Newberger the unpaid balance of $390 of a bid made by Newberger for the purchase of property sold by the Bailiff under an execution. Frank Scaar & Company had obtained a judgment in the Municipal Court of the City of Chicago against Jacobson & Company, a corporation, for the sum of $365.46. An execution was issued on the judgment, and the Bailiff levied and sold "all the right, title and interest" of Jacobson & Company in certain real estate. At the sale Newberger bid $400. He paid the Bailiff $10 in cash, and promised to pay the balance. He refused, however, to pay the balance on the ground that he had been fraudulently induced to buy the property by the attorneys for Frank Scaar & Company, the judgment creditors, although Jacobson & Company had no right, title or interest in the property. Jacobson & Company had made an assignment for the benefit of their creditors conveying to a trustee all of their property of every kind and character. The case was tried before a jury and the jury returned a verdict in favor of the defendant, Newberger. The plaintiff, the Bailiff, has prosecuted this appeal.

Only two witnesses testified directly in regard to the alleged fraudulent representations - Newberger and the attorney for Frank Gosar & Company, the judgment creditors.

Newberger testified that he was the brother-in-law of Sol Jacobson, the president of Jacobson & Company; that Jacobson & Company owed him $4,000 or $5,000; that about ten days before the sale he received a notice of the sale; that after he received the notice he telephoned one of the attorneys for Frank Gosar & Company, the judgment creditors, and "asked him about it," and that the attorney told him to come over to his, the attorney's office; that he went to the office and that one of the several of the attorneys who were present said, "Now you have a good chance in buying in this property to recover your money, because these people have no title," meaning that the trustee to whom Jacobson & Company had conveyed the property in question had no title; that the attorney said further, "and you can buy this property and you can recover your money;" that the attorney told him Jacobson did not sign any deed; that he, Newberger, said to the attorney, "Why don't you buy it?;" and that the other attorney who was present said: "It will look better - we represent the plaintiff in the case, the one that got the judgment and it would look much better if you should buy it;" that one of the attorneys said, "If you buy it in we will give you a clear title and the deed after fifteen months. The Bailiff will give you a certificate and after fifteen months you will get a clear title;" that he, Newberger, said "If this is the case I will buy it;" that "after this there was nothing done;" that the sale was had and that he bought the property; that after the sale he consulted an attorney who told him that the Bailiff had no right to sell the property; that he couldn't deliver anything. Harry H. Krinsky, one of the attorneys for

Frank Soanr & Company, the judgment creditors, testified on behalf of the plaintiff that when Newberger came to his office, Sol Jacobson was with Newberger; that Newberger did most of the talking; that Newberger wanted to know if he could not work with him, Krinsky, "in the line of getting the money upon the claim" that he, Krinsky, represented, and also "some money" that he, Newberger, "claimed was due him from Jacobson & Company;" that he, Krinsky, thinks that Newberger mentioned that "it was in the thousands;" that he, Krinsky, told Newberger that he, Krinsky, "could not possibly mix the claim of Soanr & Company" with Newberger's claim; that he, Krinsky, was only interested in the claim of Soanr & Company; that Newberger said: "What do you think of the sale that is coming up?;" that he, Krinsky, said that if he did not "think well of it" he "shouldn't go on with it;" that he, Krinsky, couldn't tell exactly when, but that he was told that there was "something wrong with the deed of the property or the conveyance of the property to the trustee;" and that he thought that if he, Newberger, "would bid in this property under the sale we would collect our money at least;" that he, Krinsky, never told Newberger that if he, Newberger, bought the property "that he would get a good title to it;" that all that Newberger asked him was what he, Krinsky, thought of the sale; that after the sale Newberger told him that he, Newberger, had bought the property and was glad of it.

While the Bailiff was making the sale, and before Newberger had bid for the property, a man who stated he was a representative of the "Title & Trust Company," said that he wanted to "announce" that "this defendant has no interest in the property." The Bailiff then said: "That don't make any difference to me. All we expect to sell is the right, title and interest of the defendant to this property; and whether he has any interest in it, that is a matter for the purchaser to

[illegible]

[illegible]

figure out." Newberger heard the statement of the man representing the "Title & Trust Company" and also the reply of the bailiff. Newberger's testimony in this respect is that a man who was present and who said he was from the Chicago Title & Trust Company "cautioned" the Bailiff that he had "no right to sell this property at all;" that "this property is not in the title of Jacobson; it is all sold and bought by several parties before this sale took place;" that the Bailiff said, "It's none of your business what it is." Newberger testified further that after the announcement of the representative of the Chicago Title & Trust Company he, Newberger, bid on the property and paid 10% on the bid.

The burden of proving fraud is upon the defendant; and in our opinion he has failed to make the proof. The rule is a familiar one that the burden of proving fraud rests upon the party alleging fraud. Mortimer v. McMullen, 202 Ill. 413, 415. An equally familiar rule is that the proof of fraud must be strong and cogent, clear and convincing. Mortimer v. McMullen, supra (p. 414); McKennan v. Mickelberry, 242 Ill. 117, 134. It is also the rule that "if the motives and designs of the parties charged with fraud or collusion may be traced to an honest and legitimate source equally as to a corrupt one, the former explanation ought to be preferred." McKennan v. Mickelberry, supra. (p. 134.) Applying these elementary rules to the evidence, we are clearly of the opinion that the proof of fraud is not strong and convincing; and that the motives of the attorneys who are charged with fraud were honest and legitimate. It is doubtful whether Newberger's own testimony clearly proves fraud. Newberger, on his own testimony, had notice of the sale at least 10 days before the sale. He thus had an opportunity of making inquiries as to the property. Furthermore, on his own testimony, he had a claim of $4,000 or $5,000 against Jacobson & Company,

and that fact would raise the inference that he was interested in ascertaining the nature and title of the property. The further fact, testified to by Newberger, that Sol Jacobson, the president of Jacobson & Company, was Newberger's brother-in-law, is a circumstance to be considered as affording Newberger a source from which he could get direct information in regard to the conveyance of the property to the trustee by Jacobson & Company. We can see no reasonable explanation why Newberger imagined that he had a right to rely exclusively on the attorneys for Frank [illegible] & Company, the judgment creditors of Jacobson & Company, for information and guidance. Newberger, according to his testimony, went to the offices of those attorneys, not at their request or solicitation, but on his own motion. The conversation which Newberger stated that he had with the attorneys does not clearly and convincingly show that the attorneys were attempting to use fraudulent efforts to induce Newberger to bid at the sale. Newberger sought their advice, and, as he testified, they told him that he would get a clear title and a deed after fifteen months. There is no satisfactory proof that the attorneys knew, or had reason to believe, that the statement was false. The statement may have been a mere expression of opinion; and this inference is supported by the fact that Newberger testified that the attorneys told him that the trustee to whom Jacobson & Company had conveyed the property had no title; that is to say that in the opinion of the attorneys the conveyance was invalid. Furthermore, Newberger knew that there was a difference of opinion about the validity of the conveyance of Jacobson & Company to the trustee. On Newberger's own testimony, Newberger heard "a gentleman who said he was from the Chicago Title & Trust Company" warn the bidders that Jacobson & Company had no title to the property; that the property had been sold before the sale. This man apparently was speaking from knowledge. In fact the very

purpose in giving the warning was to put reasonably careful bidders on notice that in the opinion of the man who gave the warning Jacobson & Company did not have title to the property. Newberger was thus confronted, before he had bid, with two statements in regard to the property. It is true that Newberger testified that he was also told at the sale by one of the attorneys for Frank [illegible] & Company, with whom he had previously had the conversation about the property, to buy the property; that the attorneys "would take care of him." This statement of the attorney only emphasized the conflicting opinions about the title to the property. In the circumstances it is fair to assume that an ordinarily prudent man would have refrained from bidding. The fact that Newberger nevertheless bid for the property leads to the inference that he knew that he was taking a chance. On his own testimony Newberger did not act as a reasonably careful and prudent man would act; and even on Newberger's testimony the statements of the attorneys may be explained on the theory of an honest motive. When Newberger's testimony is further considered with the testimony of Krinsky and all of the evidence in the case, it is clear that Newberger was not induced to make the bid by fraudulent representations of the attorneys for Frank [illegible] & Company, the judgment creditors.

In our opinion the verdict of the jury is manifestly against the weight of the evidence. The judgment of the trial court is reversed and the case remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

[illegible]

[illegible]

[illegible]

[illegible]

70 - 28720

HERBERT G. WICKERSHEIN, Plaintiff in Error,

vs.

EDWARD H. FORKE, Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

233 I.A. 644

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Herbert G. Wickershein, from a judgment in the Municipal Court of the City of Chicago, in favor of the defendant, Edward H. Forke. There is no dispute as to the facts. The only question to be determined is one of law involving the rights of Forke under a lease of which the plaintiff was the lessor. The original lessees under the lease from the plaintiff were the defendant Edward H. Forke, J. Arthur Levy and Robert G. Fritsch. The premises were occupied by the North-West Auto Sales Company, a corporation, in which Forke, Levy and Fritsch were interested. On May 31, 1918, Levy assigned all of his interest in the lease to the defendant. The defendant also bought Levy's interest in the North-West Auto Sales Company at the time Levy assigned his interest in the lease to the defendant. In 1919 Fritsch died and the defendant bought the estate of Fritsch, and also became the sole owner of the company. From the time that the lease was made until the controversy over the lease arose, the North-West Auto Sales Company occupied the premises, and the rent was paid to the plaintiff by the checks of the company. The lease covered a period of 5 years beginning May 7, 1918. The lease contained the following provision for renewal: "That parties of the second part shall have an option to re-rent said property for another period of 5 years at the

rate of $200 per month, provided they exercise their right to rent the said premises prior to 60 days before the expiration thereof." The clause just quoted is the precise part of the lease in controversy. On January 8, 1923, the defendant individually and as president of the North-West Auto Sales Company, notified the plaintiff, in writing, that "we have elected" to exercise the right under the option and to re-rent the premises for a period of 5 years from May 7, 1923.

It is contended by counsel for the plaintiff that as the plaintiff "contracted for the responsibility of all three lessees, for the new term he is entitled to the protection of the financial responsibility of all three lessees - that less than three whether one or two may not be forced on him." The answer to the contention of counsel for the plaintiff is that the lease did not contain any restrictions in regard to the assignment of the lease by the lessees, and that "in the absence of statutory or contractual restrictions to the contrary, a lessee for years may, without the lessor's consent, or any provision in the lease, either assign, sublet, or mortgage or otherwise encumber the term granted." 24 Cyc. pp. 962, 963.

In the case of Howland v. White, 48 Ill. App. 236, the court said (p. 243): "All leases except leases at will may be assigned if there is no restriction in the lease itself (12 Amer. & Eng. Ency. of Law, 1029) and the assignee of a lease is granted by the said Sec. 14 of Chap. 80, R. S., the same remedies, by action or otherwise, for the non-performance of any agreement in the lease for the recovery of rent or other cause of forfeiture, as the lessor might have had, while the owner of the lease or attornment must, we think, be hereafter deemed unnecessary to vest the assignee of a lease with the full rights of his assignor - the original lessor."

The case of Tabor v. Collins, 130 Ill. App. 333,

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

cited by counsel for the plaintiff, is not in point for the reason that in that case the lease contained an express covenant against the assignment of the lease.

It is further contended by counsel for the plaintiff that the defendant had no assignment from the administrator of the estate of Fritsch, and that the defendant could not have acquired Fritsch's interest in the lease after Fritsch's death on the theory of a joint tenancy and a survivorship of Fritsch's interest in the defendant. Counsel for the defendant expressly states that he does not contend that the defendant acquired Fritsch's interest in the lease by virtue of survivorship; but that his contention is that the defendant acquired Fritsch's interest in the lease by the purchase of Fritsch's estate. The testimony of the defendant, which is uncontradicted, is that the defendant was the administrator of the estate of Fritsch, and that he bought the estate of Fritsch. The defendant's testimony that after he acquired the interest of Levy and Fritsch in the North-West Auto Sales Company, he was the sole owner of the company is also uncontradicted.

In our opinion an actual assignment of Fritsch's interest in the lease by the defendant, as administrator of the estate of Fritsch, to the defendant, individually, was not necessary. The defendant acquired all of Fritsch's interest in the lease by the purchase of Fritsch's estate just as effectively as if the assignment had been made. Having acquired all of the rights in the lease, the defendant was entitled to the benefit of the option clause of the lease allowing the lessee the privilege of renewing the lease. By an assignment of a lease the option clause, as well as other clauses of the lease, pass by virtue of the assignment. [illegible] v. Goodnow et al., 108 Ill. 528, 534.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

car, and said, "You white headed son-of-a-bitch, I am going to get you, you" - [the epithet used is unprintable]; that he, the conductor "gave the motorman a bell," and the defendant got off the car and looked for something to throw at him, the conductor; that the defendant started to run north on Halsted street; that the following night the conductor went north on the same route and saw the defendant standing at Roosevelt road waiting for "our car;" that the defendant looked at the conductor for several minutes; that there were about twelve people there waiting for the car; that he, the conductor, gave the motorman the signal to go ahead, but that the motorman didn't go for some reason; that the defendant got on the car, gave him, the conductor, a transfer, and he, the conductor, gave the defendant a transfer in return; that the defendant stood just outside the railing; that he, the conductor, was watching him; that he, the conductor, saw the defendant "go in his pocket and pull out something that looked like a knife;" that he, the conductor, gave the motorman three bells and the motorman stopped the car and "came back;" that he, the conductor, asked the defendant if he wasn't on the car the night before, and that the defendant said "Yes;" that he, the conductor, told the motorman that the defendant had a knife in his hand, and that the motorman grabbed the defendant's hand and "the knife was right there;" that the knife was about 3½ inches long; that a police officer was in the car and that he, the conductor, explained to him what the defendant did and asked the officer to arrest the defendant; that after the officer arrested the defendant, the defendant threatened the conductor; that he, the conductor, shoved the defendant off of the car when the defendant threatened him and called him a vile name; that he pushed the defendant so that he lost his hold.

The motorman testified that the first thing he

[illegible]

noticed was when he "got the emergency bell;" that he stopped, went back to the rear of the car and saw the conductor standing there looking pale; that the conductor said the defendant had been on the car the day before; that he, the motorman, asked the defendant if that was so, and the defendant said "Yes;" that he, the motorman, said to the defendant "You got something in your hand," and he, the motorman, grabbed the arm of the defendant and found the defendant's knife. Three witnesses, who were passengers on the car, testified that they saw the knife in the hand of the defendant. The policeman, who arrested the defendant, testified that the defendant had a knife in his hand, and that he, the policeman, took the knife from him.

The only testimony on behalf of the defendant was that of the defendant himself. According to his testimony, when he got on the car he put his hand in his pocket, got his transfer, gave it to the conductor and asked him for another one; that the conductor did not give him another transfer; that the conductor said, "What is that you have in your hand;" that he, the defendant, told the conductor that it was "none of his business;" that the conductor called for the motorman and told the motorman to get an officer; that when the officer came the conductor said to him, "I want this fellow arrested;" that he, the defendant, had done nothing the previous day to cause the conductor to want him, the defendant, locked up; that when he, the defendant, put his hand in his pocket, he pulled out everything at the time, the knife, the transfer and about 11 cents.

In our opinion the verdict of the jury is not manifestly against the weight of the evidence. The testimony of the defendant himself is inherently improbable. According to his testimony he did nothing whatever at the time of his arrest to cause his arrest, and had done nothing the day before

to cause his arrest. According to his version of the affair, there was no altercation of any kind between him and the conductor. If the defendant's testimony is to be believed, the conductor had the defendant arrested for no reason whatever. Such an act on the part of the conductor would be opposed to customary conduct. It is only fair to assume from the defendant's own testimony that something further took place between him and the conductor than has been testified to by the defendant. It is wholly improbable that the conductor had the defendant arrested for merely doing what the defendant says he was doing.

In our opinion the judgment of the trial court should be affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

175 - [illegible] -

SARAH KESSELL,
Appellee,

vs.

BARNETT KESSELL,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 644

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Barnett Kessell, from an order of the Superior Court of Cook County in respect of a decree of divorce, theretofore granted in favor of the complainant, Sarah Kessell. The complainant moved for a rule on the defendant to show cause why the defendant should not be attached for contempt of court for failure to comply with the decree of divorce. The defendant moved for an amendment of the decree. Both motions were heard by the court at the same time. The decree provides as follows: "It is therefore ordered, adjudged and decreed that the defendant herein Barnett Kessell pay to complainant herein Sarah Kessell the sum of fifteen ($15) dollars per week, beginning on Saturday, the 4th day of May, A. D. 1918, as and for alimony, and for the support and maintenance of said four minor children."

The complainant, Sarah Kessell, testified that she has no income except what she receives from her daughters who live and board with her; that the defendant has not paid her anything since December 13, 1922; that there is now due her $165; that she has a real estate license from the City of Chicago for the benefit of some person whose name she refused to divulge; that she has practically rebuilt her home at large expense; that the fur coat which she had on was worth $300 and

was lent to her by a married daughter; that the defendant is the owner of real estate worth $30,000 and is part owner of a theatre - is the general manager of it and derives a large income from it. Five daughters of the complainant testified that they are working and receiving salaries varying from $10 a week to $25 a week; and that they were contributing to the support of their mother. The defendant testified that he was receiving $25 a week as a moving picture operator; that he is not manager of a theatre; that the work he does at the theatre lasts only 32 weeks of the year; that he receives a rental of $140 a month from premises at 914 South Halsted street; that besides this and his wages of $25 a week, he has no other source of income; that of the rental that he receives he pays taxes amounting to $370 a year; that he pays interest on two mortgages on the property amounting to $20[illegible] a year; that it costs $[illegible] to repair the premises at 914 South Halsted street; and that he pays $[illegible] a year for insurance.

The court ordered the defendant to pay the complainant the sum of $165 for arrears of alimony under the decree; the sum of $75 solicitor's fees in the prosecution of the motion of the complainant; such sum as may be found to be due on or before March 30, 19[illegible]3, on incumbrances on certain property, and the sum of $10 per week for alimony and for support and maintenance of one minor child. It will be observed that the court modified the decree by reducing the amount of $15 a week for alimony, provided for in the decree, to $10 a week.

In our opinion the order of the chancellor should be affirmed. Where the witnesses are produced and examined in open court, the finding of the court will not be disturbed unless the finding is manifestly and clearly against the

evidence." Miltmore v. Perry, 171 Ill. [illegible]10, [illegible].

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

107 - [illegible]

GUY J. GIBSON, for use of MATTHEWS-DEVORE & PETERSON-HELANGTON,
Appellee,

vs.

DUPUIS-HICKMAN ENGRAVING & EMBOSSING COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 644

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the DuPuis-Hickman Engraving & Embossing Company from a judgment rendered against it as garnishee in the Municipal Court of the City of Chicago. The Matthews-Devore & Peterson-Helangton Company recovered a judgment against Guy J. Gibson in the Municipal Court for $140.83. An execution was issued on the judgment and the execution was returned "no property found and no part satisfied." An affidavit for a garnishee summons was made by the Matthews-Devore & Peterson-Helangton Company. Summons was issued and served on the DuPuis-Hickman Engraving & Embossing Company as garnishee on March 8, 1923. The garnishee appeared and filed its answer denying that it was indebted to Gibson, and alleging that on the contrary Gibson was indebted to the garnishee. The Matthews-Devore & Peterson-Helangton Company was permitted to contest the answer of the garnishee. On the hearing the court rendered judgment against the garnishee for $140.83.

Only two witnesses testified on the hearing - Martin DuPuis on behalf of the garnishee, DuPuis-Hickman Engraving & Embossing Company, of which company he was president, and Harry A. Kaplan on behalf of the Matthews-Devore & Peterson-Helangton Company, of which company he was an attorney.

DuPuis testified substantially that Gibson was employed as a salesman on commission for the garnishee, the DuPuis Rickman Engraving & Embossing Company, and had been connected with the company for about a year; that Gibson had no salary account at all; that he had no stated drawing account and had not had any at any time; that between March 8, 19[illegible]3, the time of the service of the summons in garnishment, and the filing of the answer of the garnishee, no commissions were earned by Gibson; that Gibson wrote in from the road, stated that he had no money and asked for a loan; that he, DuPuis, sent him sums of money as loans after the summons in garnishment was served on March 8, 19[illegible]3; that Gibson said to him that he wanted to go out on the road, and asked for a loan of money to be paid for by his commissions on sales. An itemized statement of the account of Gibson with the DuPuis-Rickman Engraving & Embossing Company was introduced in evidence.

Kaplan testified, in substance, that on a former hearing of the case, DuPuis had testified that the sums sent to Gibson after the service of the summons in garnishment were sums of money advanced to Gibson; that they were amounts drawn by Gibson against Gibson's commissions, and that nothing was said about a loan; that DuPuis stated at that time that these amounts had been sent to Gibson as against Gibson's commissions to be earned.

The burden of proof rested upon the Matthews-Devore & Peterson-Islington Company to show that the garnishee, the DuPuis-Rickman Engraving & Embossing Company, was indebted to Gibson. 20 Cyc. 1093; Payne v. C. R. I. & P. Ry. Co., 170 Ill. 607, 609; [illegible] v. [illegible], 93 Ill. 229, 230. In our opinion the Matthews-Devore & Peterson-Islington Company have failed to show by a preponderance of the evidence that the DuPuis-Rickman

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[illegible]

[illegible]

Engraving & Embossing Company was indebted to Gibson. We do not think that DuPuis' positive statements have been overcome by Kaplan's testimony. The object of Kaplan's testimony was to show that DuPuis had made contradictory statements on a former hearing, which amounted to admissions that the sums sent to Gibson after the service of the summons in garnishment were not loans. In our view Kaplan's testimony has not that effect. Kaplan finally admitted that DuPuis had testified on a former hearing that the amounts in question had been sent to Gibson "as against Gibson's commissions to be earned." If it should be granted that DuPuis made such a statement on the former hearing, in view of his emphatic testimony that his company was not indebted to Gibson and that the amounts sent to Gibson were loans, the inference is probable that DuPuis had in mind that the loans were to be paid by Gibson out of the commissions "to be earned" by Gibson, and did not intend to convey the idea that the amounts were not loans. In fact, DuPuis testified on the present hearing that Gibson asked for a loan of money to be paid for by Gibson's commissions on sales. On our interpretation of the evidence DuPuis has not been contradicted directly by Kaplan and DuPuis' testimony has not been overcome by Kaplan's testimony. It would hardly be contended that if the garnishee, the DuPuis-Rickmann Engraving & Embossing Company, had failed or refused to pay Gibson the sums of money which the garnisheeing creditor, the Matthews-Devore & Peterson-Melangton Company, contend were paid to Gibson as advances against his commissions, that Gibson could have recovered in an action against the DuPuis-Rickmann Engraving & Embossing Company on the evidence in the case at bar. Yet the garnisheeing creditor, the Matthews-Devore & Peterson-Melangton Company, has no greater right to recover

than [illegible] Gibson, the execution debtor, in whose name the suit is brought. Richardson et al. v. Lester et al., 83 Ill. 55, 56; [illegible], Cooper & Co. v. Schmuck, 167 Ill. [illegible], [illegible]; Parmelee v. Price, 208 Ill. 544, [illegible].

We think the judgment should be reversed.

REVERSED.

Matchett, P. J., and McSurely, J., concur.

128 - 28720

SAMUEL S. WHITESIDE,
Appellee,

vs.

JOHN KRSNICH,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 64

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover $380, the balance due on the purchase price of a grocery store in Chicago, also one-half a month's rent, $30, and a bill for electric light for $2, and upon trial by the court had judgment for the amount of these items, $412, from which defendant appeals.

Plaintiff's store was in premises leased at $60 a month with fourteen months more to run. The controverted point is whether plaintiff contracted to obtain the consent of the landlord to the transfer of this lease to defendant. The purchase price was $1880 based on the inventory of the stock; plaintiff says he only told defendant that his lease was for $60 a month and that it had been transferred to him. Defendant testified that plaintiff said he would have the lease transferred to defendant at the same rental.

August 12, 1921, defendant paid $500 on account and took possession. The parties attempted to get in touch with the landlord but learned that he was out of town; on the 15th, defendant paid $1,000 more and plaintiff executed a receipt for this which also recited, "Balance to be paid when lease is transferred." Subsequently the parties had a conference with the landlord who refused to consent to the transfer of the lease

unless defendant would pay $80 a month for the balance of the term. Defendant continued in possession and paid the landlord the increase demanded of $20 a month for the balance of the term.

The trial court refused to admit in evidence the receipt of August 16th. This was competent as tending to throw light on what the understanding and agreement of the parties was with reference to the lease.

We have considered this receipt with all the evidence in the case and hold that plaintiff did not contract to obtain the consent of the landlord to the assignment of the pending lease. The contract of sale was executory and conditioned on obtaining the consent of the landlord; both parties seemed to have assumed this could be done and both together undertook to obtain it. This view is consistent with what was said and done by the parties, the writings which passed and with the inventory value of $1678, on the stock of goods, which is virtually the full amount of the purchase price.

August 20th, both parties had an interview with the landlord who was unwilling to transfer the lease unless defendant would pay $80 a month. As the condition of completing the sale had failed plaintiff then offered to take the store back and to repay what had been paid but defendant refused. Further negotiations were had by both plaintiff and defendant with the landlord and finally defendant and the landlord agreed as to rental terms. On the 15th plaintiff offered to take back the store and call the deal off, and offered to defendant the money which had been paid on account of the purchase price but defendant again refused it.

When the landlord refused to consent to an assignment

of the existing lease there was a failure of the condition of the contract of sale; defendant then had the option either to rescind the contract or to carry it out making his own terms with the landlord. When he refused to rescind and elected to retain possession of the store and the stock of goods he waived the condition with reference to the landlord's consent and became bound to pay plaintiff the balance of the purchase price.

While the trial court ruled improperly as to the admission of the receipt of August 18th, yet the finding and judgment were proper and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

160 - 38814

NATIONAL CAN COMPANY,
a Corporation,
Appellant,

vs.

WEIRTON STEEL COMPANY, a
Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

233 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff is a Michigan corporation and defendant a corporation of West Virginia. Neither has qualified to do business in Illinois. Plaintiff sued for $50,000 upon a cause of action arising outside of Illinois. The summons was returned by the sheriff of Cook county, Illinois, served "by delivering a copy thereof to H. L. Easton, Agent, of said Corporation. *** The president of said corporation not found in my county." By appropriate pleas defendant challenged the jurisdiction of the circuit court of this county, on the grounds that defendant was not doing business in Illinois so as to be subject to the service of process, and that the cause of action arose wholly outside the State of Illinois. Plaintiff filed a replication. After hearing evidence the trial court found that defendant was doing business in Illinois, but that as the cause of action arose outside of the State the court had no jurisdiction over defendant, and ordered the summons and return quashed. Plaintiff excepted to the second finding and appeals from the order. Defendant excepted to the first finding and has assigned cross-errors.

40568

The contract sued on was made in West Virginia. It contemplated a sale by defendant to plaintiff of tin plate manufactured in Ohio and West Virginia. The contract was not made in Illinois and was not to be performed in Illinois, and did not provide that the law of Illinois should govern or affect it in any way. Plaintiff, the

Michigan corporation, did not maintain an office in Chicago either when the contract was made or at the time suit was commenced. Defendant, the West Virginia corporation, had no officer or agent in Illinois at the time the contract was executed. December 16, 1918, defendant leased an office in Chicago. This suit was begun in January, 1919. The employes of defendant occupying this office were H. M. Easton, district manager of sales of the tin-plate department and H. L. Gray, district manager of sales of the strip-steel department, a stenographer, and another employe, all of whom were on salaries. The sole duties of Easton and Gray were to solicit orders in the Chicago territory, which comprised Illinois and some surrounding states. These orders were sent to the home office of defendant at Weirton, West Virginia, for acceptance or rejection. Neither Easton nor Gray had authority to make or modify any contract for defendant or obligate the company in any way, and no contract for the sale of defendant's products was ever signed in Illinois. It was no part of their duties to collect accounts and Easton never had anything to do with the collection of accounts; but Gray testified that while it was no part of his duties to collect accounts, he had occasionally, pursuant to instructions from the treasurer, dunned a delinquent customer but did not collect anything from them. The collection of accounts was looked after by a separate department located in defendant's general office in West Virginia. Defendant kept no stock or merchandise of any kind in Illinois, nor did it have any bank account in Chicago. Defendant sent checks to Gray for the purpose of paying the miscellaneous expenses of the Chicago office, which were deposited in Chicago in an account in the name of Gray and Easton. The telephone service was in the names of defendant and of Easton and Gray, and their names were on the office door. If orders were acceptable to the general office in West Virginia, they were acknowledged from that office to the customer and the goods shipped directly from de-

405(?)

fendant's factories to the customer.

The general rule is that the mere solicitation of business by agents of a foreign corporation is not such "doing business" within the state as to subject the foreign corporation to the jurisdiction of the courts of the state in which the business is solicited. Booz v. Texas & Pacific Ry. Co., 250 Ill. 376; Pembleton v. Ill. Com. Men's Ass'n, 289 Ill. 99; Green v. Chicago, B. & Q. R. R. Co., 205 U. S. 530; Stephan v. Union Pac. Ry. Co., 275 Fed. 709; Johanson v. Alaska Treadwell Gold Mining Co., 255 Fed. 270. Where orders are sent to another state in response to which the subject-matter thereof is received in the state where the order is taken and payment therefor is received in that state, this constitutes doing business in such state, rendering a corporation subject to the process of its courts. 21 R. C. L. 1344; International Harvester Co. v. Ky., 234 U. S. 579.

In the instant case neither Easton nor Gray received payments from customers. Their duties were solely to solicit orders and to forward them to defendant's home office for approval. The leasing of the office in defendant's name, the placing of its name in the telephone directory and on the office door are not of controlling importance. These things were simply incidental to the duties of the agents in soliciting orders. It is the authorized duties of the agent which determine whether a foreign corporation is doing business in the state so as to subject itself to the service of process. We hold that defendant was not doing business here, and the summons and return should have been quashed for this reason.

40570

In view of what we have said, it is not necessary to pass upon the question whether a foreign corporation, not doing business in Illinois, has a right to bring a transitory action in an Illinois court against another foreign corporation on a cause of action arising outside of Illinois. We are of the opinion, however,

that it has been definitely decided that such an action can be brought in Simpson Fruit Co. v. Railway Co., 245 Ill. 586. This also seems to be in accord with the weight of modern decisions. 12 R. C. L. 115; Oregon Mortgage Co. v. Hartford Fire Ins. Co., 210 Pac. 385; Barrow Steam Ship Co. v. Kane, 170 U. S. 100.

Counsel for defendant suggests that this raises a Federal question which was not raised or considered in the Simpson Fruit Co. case, supra. Counsel for plaintiff has stated in oral argument that he has examined a brief in this case and finds that the Federal question was raised. However this may be, we are not disposed to hold contrary to a definite decision by the Supreme Court, upon the suggestion that some point was not considered therein. M. K. & T. Ry. Co. v. Reynolds, 255 U. S. 565, seems to be opposed to the contention of defendant on this point.

However, we prefer to rest our conclusion on the reason first stated, and while we disagree with the trial court in its reasons, we agree with its finding that it had no jurisdiction of the person of defendant and affirm its order quashing the summons and the return of service thereon.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

40571

134 - 28839

WALTER M. CLEM et al., Doing Business as GLEM MANUFACTURING COMPANY,
Appellees,

vs.

SAM ABELMAN,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

233 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, bringing suit to recover balance due for merchandise sold and delivered by plaintiffs to defendant, and also for damages caused by the refusal to accept other merchandise ordered by defendant, had a verdict and judgment for $2712.93. Defendant seeks a reversal.

Plaintiffs are engaged in the manufacture of clothing at Savannah, Georgia. Defendant conducts a wholesale men's clothing business in Chicago. From the evidence presented the jury could properly believe that in September, 1919, a salesman for plaintiffs obtained a written order from defendant for fifty dozen moleskin pants at $34.50 a dozen, which was accepted by plaintiffs by letter reading: "January delivery or sooner if possible. We will give this order our best attention subject to delays and all other contingencies beyond our control."

A second order was given January 22, 1920. This was for 100 dozen moleskin pants at $40.50 per dozen.

Moleskin pants are made of heavy canton flannel or cotton fabric and are usually worn by laboring men in cold weather.

Defendant introduced some evidence tending to show that at the time the second order was given the salesman promised that the merchandise on the first order would be delivered within thirty to sixty days thereafter, but there is no evidence that plaintiffs had any knowledge of such conversation. The deliveries on the first

[illegible]

[illegible], Plaintiffs,

vs.

[illegible], Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiffs, [illegible]

[illegible]

A second order was given [illegible]

[illegible]

order were delayed, plaintiffs giving various excuses such as sickness among the factory employes; however, defendant accepted shipments as they were made and paid for all except the last shipment of 6 3/4 dozen pairs of pants shipped on July 16, 1920, and received by defendant.

July 20, 1920, defendant sent a letter to plaintiffs saying, "Please cancel our order of January 23d." This was the second order for 100 dozen pairs of pants. Defendant claims that this was cancelled because he could not rely on delivery. Plaintiffs immediately replied that the order could not be cancelled as the pants had been cut and made up according to the special scale of sizes specified by defendant. At this time there were eighty-four dozen pants of the second order cut and made up, and these were shipped to defendant, who refused to accept them and returned them about September 25, 1920. Plaintiffs then wrote that on account of the controversy concerning them they would be held subject to defendant's order and risk. There was considerable correspondence in the fall of 1920, plaintiffs insisting that the goods had been made especially for defendant and that they could not accept the cancellation of the order. Defendant, on the other hand, refused to accept any part of them, giving as its reason that it could not "use these goods in question." Defendant also wrote on October 14, 1920, that "The goods are yours and not ours and we owe you nothing. The matter is closed as far as we are concerned." From the above and all the facts and circumstances appearing in evidence, the jury was justified in concluding that defendant had breached its contract and was liable for any damages which plaintiffs suffered thereby.

A special interrogatory at the request of defendant was submitted to the jury as follows: "Was the refusal of the defendant, Sam Adelman, trading as Sam Adelman and Company, to accept the goods known upon the trial as the 'Second Order' wrongful?"

cause were delayed, plaintiffs giving perhaps greater [illegible] than is plain-
goods among the factory managers; however, defendant accepted ship-
ments in July were made and paid for all except the last delivery
of 8 5/6 dozen pairs of socks shipped on July 16, 1917, and re-
ceived by defendant.

July 28, 1917, defendant sent a letter to plaintiffs
stating, "Please cancel our order of January 5th." This was the
second order for 125 dozen pairs of [illegible]. Defendant claims that
this was cancelled because he could not [illegible] on delivery. Plain-
tiffs immediately replied that the order [illegible] be cancelled
if the goods had [illegible] and [illegible]
[illegible] of those specified by defendant. [illegible] there were
eighty-three dozen pairs of the [illegible]
these were shipped to defendant, who refused to accept them and
returned them about September [illegible]. Plaintiffs then wrote that
on account of the [illegible]
[illegible] to defendant's [illegible]. There was considerable cor-
respondence in the fall of 1918, plaintiffs insisting that the
goods had been made especially for defendant and that they would not
accept the cancellation of the order. Defendant, on the other hand,
refused to accept any part of them, giving as his reason that it
could not "use these goods in question." Defendant also wrote on
January 15, 1919, that "the goods are yours and not mine and we are
not [illegible]. The matter is closed as far as we are concerned."
From the facts and all the facts and circumstances presented in
evidence, the jury was justified in concluding that defendant had
breached his contract and was liable for the damages which plain-
tiffs suffered thereby.

A careful [illegible] of the record of [illegible]
submitted to the jury [illegible] the [illegible] of the defend-
ant, [illegible]
the goods [illegible]

And to this interrogatory the jury answered, "Yes." No motion was made by defendant to set aside this special finding of fact, nor has any error been assigned thereon. In this state of the record defendant is conclusively bound by such finding. City of Aurora v. Rockabrand, 149 Ill., 399; Voigt v. Anglo Am. Provision Co., 202 Ill., 462; Ideal Electric Co. v. Penn Mutual, 166 Ill. App., 331, and cases there cited.

A question arising on the pleadings is argued at considerable length, although we do not deem it of serious importance. The case first went to trial on plaintiffs' original and amended declarations with an affidavit of claim to the effect that plaintiffs held the eighty-four dozen moleskin pants for defendant. The evidence, however, showed that plaintiffs had sold these to a New York concern. Defendant claiming a surprise on account of this alleged variance, a juror was withdrawn and the cause continued to give defendant an opportunity to take depositions in New York touching this resale. At the same time, on motion of plaintiffs, it was ordered that the affidavit to the amended declaration be withdrawn and when the case was again called for trial it proceeded on plaintiffs' amended declaration without an affidavit of claim and on defendant's plea of general issue to the first two counts and special plea to the third count of the amended declaration. Defendant claims that the original affidavit of claim asserting that plaintiffs were holding the goods was ordered to stand as an affidavit of claim to the amended declaration, and that plaintiffs were thereby limited in their proof to the allegations therein contained and that the admission of testimony of a resale was a variance.

There are three sufficient answers to this: (1) Plaintiffs' additional abstract shows that it was not ordered that the affidavit of claim filed to the original declaration should stand as an affidavit to the amended declaration. Counsel for defendant in oral argument has stated that this is a mistake in the record which

[illegible] and in this interpretation the jury answered, "Yes." [illegible] made by defendant to set aside this special finding of fact, [illegible] has any error been assigned thereto. In this state of the record defendant is conclusively bound by such finding. [illegible] v. [illegible], [illegible] Ill., [illegible]; [illegible] v. [illegible] Co., [illegible] Ill., [illegible]; [illegible] Electric Co. v. [illegible], [illegible] Ill. App., [illegible], and cases there cited.

A question arises as to the pleadings [illegible]

[illegible]

has been corrected. However this may be, we will not go beyond the abstract and search the record for grounds for a reversal. (2) Defendant was not taken by surprise; he had taken a deposition as to the resale. (3) The objection on the ground of variance was not specifically made upon the trial either at the conclusion of plaintiffs' evidence or at the conclusion of all the evidence. Defendant thereby waived its right to assign as error the alleged variance, and it does not arise on this record before us. Harris v. Shebek, 151 Ill., 287; Ferero v. Knights and Ladies of Security, 309 Ill., 476.

This case is under the Uniform Sales Act, chap. 121a, Illinois Statute (Cahill). Under section 67, where the buyer wrongfully refuses to accept and pay for goods the measure of damages is "The estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract," or "Where there is an available market for the goods," the measure of damages is the difference between the contract price and the market price at the time when the goods ought to have been accepted, and if no time was fixed, then at the time of the refusal to accept. Defendant says that plaintiffs were limited in estimating damages to the market price of such goods in July, August and September, 1920, when defendant refused to accept the goods.

Here the jury properly could find from the evidence that there was no available market for moleskin pants, which are a particular kind of garment which varies in size and style, depending on the season and the part of the country where they are to be used. Furthermore, at the request of defendant a special interrogatory was submitted to the jury as to whether there was an available market for the goods in September, 1920, and immediately thereafter, which the jury answered in the negative. Not having moved to set aside nor assigning any error thereon, de-

has been [illegible]. Compare [illegible], we will not [illegible] the [illegible] for a reversal. (3) Defendant was not [illegible] by [illegible]; it has [illegible] a foundation in the record. (4) The objection on the ground of variance was not specifically made upon the trial either at the conclusion of plaintiffs' evidence or at the conclusion of all the evidence. Defendant thereby waived the right to assign as error the alleged variance, and it does not arise on this record before us. Pettit v. Hobbs, 153 Ill., 289; [illegible] v. [illegible] of [illegible], 366 Ill., 498.

This case is under the Uniform Sales Act, [illegible], [illegible] (121 1/2), [illegible] section 64, where the buyer "wrongfully refuses to accept and pay for goods the measure of damages is "the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract," or "where there is an available market for the goods," the measure of damages is the difference between the contract price and the market price at the time when the goods ought to have been accepted, or if no time was fixed, then at the time of the refusal to accept. Defendant says that plaintiff's [illegible] limited to [illegible] to the market price of such goods in [illegible], August and September, [illegible], which defendant refused to accept [illegible].

Here the [illegible] that there was no available market for [illegible] a particular kind of [illegible]

fendant is bound thereby. The measure of damages therefore is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract, article 2, section 67, Sales Act, supra, and the profit the seller would have made if the contract or sale had been fully performed, article 4.

It is concededly the duty of plaintiffs to mitigate the damages, and the evidence shows this was done. When defendant refused to accept the goods only eighty-four dozen of the 100 dozen ordered were made up. Plaintiffs did nothing with reference to the other sixteen dozen, and attempted to sell the eighty-four dozen at the best price obtainable, which was $9 a dozen from Bachrach Brothers of New York, to whom they were sold in July, 1921. It was the duty of plaintiffsto resell at a reasonable price after an offer of delivery to the buyer had been made. If a buyer refuses to receive the goods the seller may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer and may treat the goods as the buyer's and may maintain an action for the price; section 66, article 3, Uniform Sales Act; and a seller under such circumstances has a right to resell; section 56c. Examination of these and other provisions of the Uniform Sales Act shows that plaintiffs are not in conflict with any of its provisions. The right to resell the goods and charge the vendee with the difference between the contract price and that realized by the sale has been held in numerous cases, among them, Roebling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill., 660; White Walnut Coal Co. v. Coal Co., 254 Ill., 368; Penn Plate Glass Co. v. Rice, 216 Ill., 567.

Counsel for defendant warmly argues that the language of plaintiffs' counsel and his conduct upon the trial constitute reversible error. From the briefs it appears that both counsel indulged in considerable criticism of each other, but we cannot

determine which was the greater offender. We do not find anything, however, which is so serious as to justify a reversal.

The instructions are criticised, but while there is extensive argument about them in the brief, the instructions themselves are not given. They are referred to by number, but upon examining the abstract the instructions are not designated by number. We are therefore unable to tell just what instructions counsel questions and cannot determine whether or not his criticisms are justified. Instructions which are criticised should be stated in the brief so that the reviewing court may examine them to determine their propriety. So far as we have been able to ascertain in the instant case, there was no reversible error with reference to the instructions.

There is no substantial argument as to the merits of this controversy, which are clearly with plaintiffs, and the technical objections raised are not sufficient to necessitate a new trial. The judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

168 - 28804

OSCAR L. CUSHMAN et al.,
doing business as Knauth,
Nachod & Kuhne,
Appellants,

vs.

BOURSE SECURITY CO.,
a corporation,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 645

STATEMENT BY THE COURT. On January 19, 1921 plaintiff, doing a foreign exchange business in New York City, commenced an action in assumpsit in the Superior Court of Cook County against defendant, a corporation, doing a similar business in Chicago, to recover damages for defendant's breach of its two contracts to purchase from plaintiffs two million German marks. Plaintiffs' declaration consisted of two special counts and the common counts. In one count it is alleged that on June 24, 1920, defendant bought from plaintiffs, and plaintiffs sold to defendant at its request, said marks at the price of $3.08 per hundred for 1,800,000, and $2.88 per hundred for the remaining 200,000 marks; that, in consideration thereof and plaintiffs' promise to deliver said marks on or before December 31, 1920, defendant promised to accept and pay for the same upon delivery; and that, although plaintiffs at all times after the making of said promises were ready and willing to deliver the marks and tendered the same to defendant on December 31, 1920, and at other times prior thereto, defendant would not accept and pay for the same, or any part thereof, to plaintiff's damage, etc. Defendant filed a plea of the general issue and certain special pleas, but subsequently withdrew the special pleas and filed a plea of set-off, in which it alleged that plaintiffs were indebted to it in the sum of $5,970, which it had paid to plaintiffs "as earnest money under

152 - 26604

[illegible] L. [illegible] et al.,
doing business as Knauth,
Nachod & Kuhne,
Appellants,

vs.

BOURSE SECURITY CO.,
a corporation,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

233 I.A. 645

STATEMENT BY THE COURT. On January 10, 1921 plaintiff, doing a foreign exchange business in New York City, commenced an action in assumpsit in the Superior Court of Cook County against defendant, a corporation, doing a similar business in Chicago, to recover damages for defendant's breach of its two contracts to purchase from plaintiffs two million German marks. Plaintiffs' declaration consisted of two special counts and the common counts. In one count it is alleged that on June 24, 1920, defendant bought from plaintiffs, and plaintiffs sold to defendant at its request, said marks at the price of $3.02 per hundred for 1,500,000, and $2.80 per hundred for the remaining 500,000 marks; that, in consideration thereof and plaintiffs' promise to deliver said marks on or before December 31, 1920, defendant promised to accept and pay for the same upon delivery; and that, although plaintiffs at all times after the making of said promises were ready and willing to deliver the marks and tendered the same to defendant on December 31, 1920, and at other times prior thereto, defendant would not accept and pay for the same, or any part thereof, to plaintiff's damage, etc. Defendant filed a plea of the general issue and certain special pleas, but subsequently withdrew the special pleas and filed a plea of set-off, in which it alleged that plaintiffs were indebted to it in the sum of $5,970, which it had paid to plaintiffs "as earnest money under

two certain contracts entered into on June 24, 1920," wherein and whereby plaintiffs had promised to sell to it said two million marks at said prices, "said marks to be delivered at the option of defendant between June 24, 1920 and December 31, 1920, and written instructions for delivery of said draft were to be received by the sellers from the buyers;" that plaintiffs, disregarding their promise, failed and refused to deliver the marks under said option at defendant's request; that thereby "plaintiffs became and were in default under said contracts and breached the same;" that thereupon, by reason of said breach, "defendant rescinded the said contracts, as it might lawfully do, and demanded the return to it of said sum so deposited with plaintiffs as earnest money;" and that plaintiffs have failed and refused to return to it said sum of $5,970, etc. Plaintiffs filed a replication denying they ever received any instructions for the delivery of a draft for two million marks, or any part thereof.

The cause was tried before a jury in March, 1923. The evidence consists mainly of letters and documents, supplemented by the testimony of plaintiffs' witness, A. H. Weingardt, who during the year 1920 was in charge of plaintiffs' foreign exchange department in New York City, but who at the time of the trial was not employed by them. Isidore Jacoulow, president of defendant, was the only witness called in its behalf. Weingardt's testimony tended to show that at all times between June 24 and December 31, 1920, plaintiffs were ready, able and willing to comply on their part with the terms of the contracts, and that plaintiffs' damages amounted to $25,900, after allowing defendant credit for the $5,970 received. Under the evidence and the court's instructions the jury evidently thought that defendant was entitled to rescind the contract, because of plaintiffs' alleged breach thereof, and recover back the sum so deposited, and they returned a verdict finding the issues in its favor and assessing

[illegible]

[illegible]

its damages in said sum of $5,970, and the court, after overruling plaintiffs' motions for a new trial and in arrest of judgment, entered judgment against plaintiffs in that sum, and the present appeal followed.

On June 16, 1920, defendant wrote plaintiffs at New York asking on what terms they could execute defendant's order "for one-half million German mark check, delivery to be made in December," to which plaintiffs wired reply to Chicago: "Offer check marks delivery December, $2.88." On June 17th, defendant wired plaintiffs to "state initial payment down," to which plaintiffs replied: "Marks December 10 per cent. down, rate $2.88." On Saturday, June 19th, defendant wired plaintiffs: "Your offer accepted, half million marks December delivery, or sooner, rate $2.88; change order to one million if you make rate $2.84, same terms; wire answer; will send remittance." On Monday, June 21st, defendant wrote plaintiffs enclosing its check for $1,440 (10% of the quoted price of one-half million marks at $2.88 per hundred) and confirming said telegram. The words "or sooner" were an attempted change as to time of delivery of the marks, which was promptly protested by plaintiffs in their telegram of June 21st, as follows: "We offered marks delivery month December only; rates to-day, December, $2.90; from now to December, $3.02." On June 22nd, defendant wired plaintiffs in reply: "Accept offer; buy million and half marks, delivery December, or sooner;" and confirmed the telegram by letter in which was enclosed its check for $4,530 (10% of the quoted price of one million and a half marks at $3.02 per hundred.) Other communications passed between the parties, and on June 24th plaintiffs wrote defendant two letters, in one of which it is stated: "We beg to confirm having sold to you 500,000 marks, check on one of the principal cities of Germany, @ $2.88 per hundred marks, deliverable at your option any time between now and December 31, 1920." In the other the

[illegible]

same language is used, except that the sale mentioned is for 1,500,000 marks at $3.02 per hundred. In each letter there is the further statement that "this sale is of marks of the present currency of Germany, and written instructions for the delivery of said draft are to be received by the sellers from the buyers," and an acknowledgment of the receipt by plaintiffs of defendant's check of 10% of the amount of each sale, and a request that defendant confirm each transaction, which requested confirmations were made in defendant's two letters of June 28th. Plaintiffs' letters of June 24th are mentioned in defendant's plea of set-off, as constituting the two contracts. It is shown by the testimony of Weingardt on the trial that the meaning of the words "draft" or "check on Germany," as used in foreign trade, is "an order signed by a banker in New York City, let us say, or his correspondent in Berlin, or any other place in Germany, for a certain sum of money to be paid on demand or at sight to a certain person either here or elsewhere." In defendant's letters of June 28th, after using words expressly confirmatory of its purchases of the two million marks at the prices and terms mentioned, there is the following clause: "It is understood that we have the privilege of asking delivery in such parcels as may be found necessary at any time between now and December 31, 1920." By this clause defendant again attempted to make a change in the terms of the transaction, this time asking for a certain "privilege." Plaintiffs promptly refused to grant the requested privilege, but made a concession to defendant, as appears from their letter of June 29th, as follows: "Please take notice that our contract reads for 'check on Germany,' and not for delivery in parcels as you may deem necessary; we generally do not permit such transactions to be split up in different parts, but in order to meet you half way, we shall be willing to issue checks in the amount of 250,000 each on any day you may desire between now and December 31st in settlement of the transactions in

[illegible]

question; we cannot, however, allow you to draw an uneven amount, nor can we allow you to draw less than the amount above stipulated." On July 3rd, defendant wrote plaintiffs: "In regard to the delivery of the checks recently contracted for, we have resold these checks in various sizes and amounts, and it will be necessary that we get delivery in approximately such amounts as we are called on for delivery; * * we assure you that we will call for delivery in as large amounts, and as even amounts, as we possibly can, as it is not our desire to work any hardship upon you." To this letter plaintiffs replied on July 7th, as follows: "We regret to have to inform you that we cannot comply with your request; we must insist upon delivery as previously outlined by us." On receipt of this letter defendant made no attempt to rescind the contracts of June 24th, because of any misunderstanding of the terms thereof, but, by letter to plaintiffs, dated July 10th, again urged them to grant its request, suggesting that it was doing a good business and could in the future turn a large number of orders to plaintiffs, saying that its customers would ask for delivery at different times, and protesting that it "was not buying these marks as a speculation but as a dealer." To this letter plaintiffs replied on July 13th, as follows: "We are not speculating on the movements of the market, but have purchased equal amounts to cover ourselves; we regret, therefore, not to be able to accede to your request, and can only refer you in this respect to our letter of July 7th; kindly confirm to us that you have taken notice of the aforesaid." Defendant did not answer plaintiffs' letter and did not then make any attempt to rescind the contracts. It appears from the testimony of both Weingardt and Jasculca that on August 2nd or 3rd, the latter called at plaintiffs' New York office and had an interview with Weingardt and again verbally urged compliance with defendant's previous requests for the delivery of small parcels of marks, less than 250,000 in a parcel, as ordered, but that Weingardt refused, and

informed Jasculca that he would review the correspondence, investigate the matter and finally advise defendant by letter to Chicago. Weingardt testified that at this interview Jasculca did not, either verbally or in writing, make any requests for the delivery of any marks, in any size parcels, either 250,000 or any less number of marks. Jasculca, on the contrary, testified that he told Weingardt that defendant "wanted 100,000 marks that day in a parcel of five checks of 10,000 marks each and two checks of 25,000 marks each, but he did not testify that at the time he made any tender of money for said 100,000 marks at the contract prices, or state on which of the two contracts said 100,000 marks should be applied, and defendant failed to introduce any evidence showing that at that time, or any other time, it gave any written instructions for the delivery by plaintiffs of any number of marks, as provided in the contracts. Shortly after Jasculca's visit in New York, plaintiffs, per Weingardt, wrote defendant at Chicago on August 5th, as follows:

> "Just let us recapitulate the whole thing. There was no question about our wire to you offering German exchange for December delivery. It is understood in the New York Exchange market (not the stock exchange as you quoted in one of your letters) that contracts for future delivery must be taken up in one amount and not in installments. We have made the concession to you to allow you to dispose of your contract in amounts of 250,000 marks each in view of the fact that you had sold against these contracts in various amounts.
>
> We feel that we have tried to meet your case in a very liberal way and that you should abide by it. However, if it is absolutely necessary for your requirements, we will allow you to draw under this contract in amounts of not less than 100,000 marks, of which kindly take note."

Defendant did not reply to this letter or make any immediate attempt to rescind the contracts. About this time the price of marks had fallen considerably and was continuing to fall, and on August 23rd plaintiffs wrote defendant, stating that marks were selling around $1.90 and requesting the payment of additional margins "to keep your contracts fully covered." On September 7th they again wrote defendants requesting additional margins.

-[illegible]-

[illegible]

[illegible] as follows:

> [illegible]

[illegible]

immediate

[illegible]

Weingardt testified that no communications were received from defendant after August 5th, until defendant wired them on the day of the expiration of the contracts, December 31, 1920, demanding "return of earnest money paid." Jasoules, however, testified that on September 11th (over one month after the receipt of plaintiffs' letter of August 5th) defendant wrote plaintiffs a letter, which he (Jasoules) dictated, signed and personally mailed. A purported carbon copy of the letter was admitted in evidence as follows:

> "Replying to your recent letters, will say that due to your obstinate stand we have been compelled to execute our orders on the open market, and, inasmuch as you refused to make deliveries in such amounts as our customers wanted, we considered that you did not intend to live up to our agreement. In view of the above we would ask that you please return our payments amounting to $5,970."

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

One of the points made and relied upon by counsel for plaintiffs for a reversal of the judgment is that the court erred in giving certain instructions offered by defendant and modified by the court. One of these instructions is:

> "The Court instructs the jury that if you believe from all the evidence and under the instructions of the Court that, by the use of the language 'Deliverable at your option any time between now and December 31, 1920,' it was the intention of the parties that defendant should have the right to demand deliveries in any reasonable quantities less than the total amount between June 24, 1920, and December 31, 1920, and if you further believe from the evidence that the plaintiffs refused to make deliveries in quantities of less than 100,000 marks between said dates, then under such state of the evidence, if any, such refusal, if any, on the part of the plaintiffs was a material breach of the contracts and the defendant thereupon had a right to consider said contract rescinded, and if you believe that he did so consider said contract rescinded, he was under no obligation to thereafter furnish any requests for deliveries of such portions of the marks as he required, and in such event said defendant is entitled to have and recover from the plaintiffs such sums as shown by the evidence, it paid to said plaintiffs as deposits on said agreements."

In our opinion the giving of this instruction constitutes error prejudicial to plaintiffs. We think that in practical effect it amounts to a peremptory instruction for defendant. It directs a verdict for defendant, yet leaves out several facts or conditions upon which such a verdict could properly be predicated. It directs the jury to construe the contracts sued upon, instead of the court itself performing that duty, and particularly whether the clause in both contracts, "deliverable at your (defendant's) option any time between now and December 31, 1920," refers to something besides time of delivery, viz, "any reasonable quantities less than the total amount" of the marks mentioned. It states that, if the jury believed that defendant "considered" that it had rescinded the contracts, it was under no obligation to thereafter furnish any request for deliveries of portions of the marks and could recover back the sums

[illegible]

[illegible] by the court. [illegible]

"[illegible]"

In our opinion the giving of this instruction con-stituted error prejudicial to plaintiffs. [illegible]

deposited on the contracts, although by the terms of the contracts, admitted to be such in defendant's plea of set-off, written instructions for deliveries were required to be given by it to plaintiffs, and the evidence tends to show that at no time did it give any written instructions for deliveries in any amounts. Furthermore, as to defendant's right of rescission, the instruction is silent as to the questions, usually arising thereon, whether and when notification of rescission was given to plaintiffs, and whether given promptly, although defendant's evidence shows that its first notification of any attempted rescission of the contracts by it was not made until September 11, 19[illegible], more than one month after plaintiffs had finally refused defendant's requests as to deliveries in smaller parcels than 100,000 marks. Furthermore, the instruction is silent on the question of fact whether, at the time or times of plaintiffs' refusals, defendant made any tenders to plaintiffs in the proper amounts at the contract prices of the marks.

Because of the error in giving the instruction mentioned, the judgment is reversed and the cause remanded for a new trial. Some of the other errors assigned and argued by counsel for plaintiffs are of such a character that they will probably not arise on the new trial, and we, therefore, do not discuss them.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

173 - 28828

ABE SOLOMON,
Appellee,

vs.

LOUIS OLIFF,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A. 645

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract in the Municipal Court of Chicago, plaintiff alleged in substance that on or about December 23, 1921, he purchased from defendant a fur coat and a fur cape at the agreed prices of $100 and $250, respectively, and paid defendant the sum of $350 therefor; that defendant at the time of the sale warranted that he had good title to the furs but that he did not have good title thereto because they had been stolen; that after the delivery of the furs the rightful owner secured lawful possession thereof from plaintiff; and that defendant has refused to reimburse plaintiff for the sum so paid. There was a trial before the court without a jury at which plaintiff and four witnesses in his behalf testified. Defendant was a witness in his own behalf and he also called four witnesses. Defendant's testimony directly contradicted plaintiff's in material particulars. The court, although expressing doubt as to the credence to be given to plaintiff's story, found the issues against defendant and assessed plaintiff's damages at $350, and entered judgment against defendant on the finding and this appeal followed.

The testimony of plaintiff and his witnesses disclosed the following: Plaintiff was in the "retail second hand hardware business" at No. 163 North Halsted street, Chicago,

and was acquainted with defendant, who was engaged in the "clothing" business in the same neighborhood, but who was not a dealer in _new_ furs. In December, 1921, one Samuel Diamond, a dealer in furs at No. 939 West Roosevelt Road, Chicago, had a number of new furs stolen from him. Subsequently, two of the thieves, Robinson and Yonkowski, were apprehended and brought to trial in the Criminal court. From information furnished the police by Yonkowski two of the stolen furs, of the retail value of $775, were located, - a fur cape being found at plaintiff's home and in use by his wife, and a fur coat being found at the home of Mrs. Dave Netchin. Plaintiff testified in substance that about December 22, 1921, he and his brother-in-law, Dave Netchin, a sidewalk fruit vender, happened to be passing defendant's store, when they were met by defendant, who suggested that plaintiff purchase, from a number of furs which defendant then exhibited as being for sale by him, a fur cape as a Christmas present for plaintiff's wife; that after examining the furs plaintiff agreed to purchase a cape and a coat for $350; that he was about to write his check for $350 for the furs when defendant, saying that he was in immediate need of a loan of $300, requested plaintiff to give him a check for $650 and make the check payable to "cash;" that plaintiff, although he had never had any previous business dealings with defendant and had not before loaned him any money, delivered to defendant a check for $650, payable to "cash," _but did not then take the furs away;_ that on the next day plaintiff and Netchin again called at defendant's store and thereupon the latter delivered the furs to plaintiff and also repaid him the $300 loaned; that subsequently said check, bearing the endorsement of _Robinson_ was returned to him (plaintiff), marked paid, from the bank on which it was drawn, and shortly thereafter he destroyed it together with other returned checks; and that about three months after he had

had [illegible] defendant, [illegible] in the "[illegible]" [illegible], but [illegible] a dealer in [illegible]. In [illegible], [illegible] a dealer in furs [illegible], and a number of [illegible] [illegible] [illegible] trial in the [illegible] courts. [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] from a number of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] defendant [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

received the furs he was interrogated by a captain of police, and, on the captain's demand, he returned the furs to the police. Oliff denied having sold any furs to plaintiff, or having had any conversation with him concerning furs, or having received a check for $650 from him, or having borrowed $300 from him. He further testified, however, that both he and plaintiff were present in court on the trial of the thieves for the stealing of the furs; that Yonkowski then testified that he (Yonkowski) sold the furs to one Miller, receiving from him a check for $650 signed by Solomon (plaintiff), and that the next morning Yonkowski, Miller and Solomon went to the bank on which the check was drawn and cashed the check; that Miller first came to him (Oliff) and asked him to cash the check; and that he (Oliff) got the check from Miller, who afterwards "skipped." In rebuttal one of plaintiff's witnesses, who had heard the confession of Yonkowski in court, testified that Yonkowski stated that after "some big furs" had been stolen from Diamond's place in December, 1921, they were taken "over to a man's store, and in the back way, and Oliff gave us a check * * for $650, payable to order, signed by Solomon."

After a review of all of the testimony we think that it is apparent that both plaintiff and defendant, at the time of the alleged purchase of the two furs, had knowledge that the furs had been stolen, and that in consummating the transaction they were wrongdoers; and we are of the opinion that plaintiff, under the law, is not entitled to recover back from defendant the $360, which he claims he paid defendant for the furs. It is well settled that a wrongdoer cannot have redress or contribution from another wrongdoer where the person seeking redress must be presumed to have known that he was doing an unlawful act. (Farwell v. Becker, 129 Ill. 261, 270; Yanack v. Michels, 215 Ill. 87,

wrong

94.) In 13 Corpus Juris 829, it is said: "The rule rests on considerations of public policy, it being against the policy and maxims of the law to adjust equities between wrongdoers, or to allow a person to found an action on his own wrongdoing. The law will not raise an implied promise to contribute between wrongdoers, but the court will leave a person who asks its assistance in such a case in the position where it finds him." And in 24 R.C.L. p. 383, sec. 668, it is said: "To entitle one to protection as a bona fide purchaser he must have purchased without notice of his seller's want of title; and ordinarily, if he has notice of facts which should put him on inquiry, he will be held to have implied notice of what the inquiry if made would have disclosed." (See, also, Wiener v. Straus, 66 Ill. App. 110.) All of the circumstances surrounding the alleged purchase of the furs, as disclosed from plaintiff's extraordinary story, - the purchase of them at less than one-half of their retail value, defendant's request at the time for the loan of $300, the making of the loan by plaintiff without security in the first business transaction ever had between the parties, plaintiff's compliance with defendant's request to make the check payable to "cash" and not to defendant's order, the fact that the furs were new and that defendant was not a dealer in new furs, the further fact that after delivering the check to defendant plaintiff allowed the furs to remain in defendant's possession until the following day when plaintiff took them away and received back from defendant the amount of the loan, - all tend to show the illegitimacy of the transaction and that plaintiff must have known, or at least have had strong suspicions sufficient to warrant further inquiries, that defendant did not have good title to the furs and that the same had been stolen.

Our conclusions are that the finding of the court

511.) In 19 Corpus Juris 689, it is said: "The rule rests on considerations of public policy, it being against the policy and design of the law to [illegible] between transactions, as to place a person in [illegible] which he has [illegible]. The law will not raise an implied promise to contribute between wrongdoers, but the court will leave a person who asks its assistance in such a case in the position where it finds him." And in 24 R.C.L. p. 283, sec. 243, it is said: "To entitle one to protection as a bona fide purchaser he must have purchased without notice of his seller's want of title; and ordinarily, if he has notice of facts which should put him on inquiry, he will be held to have implied notice of what the inquiry if made would have disclosed." (Ann. cite, [illegible] v. [illegible], 45 Ill. App. 188.) All of the circumstances surrounding the alleged purchase of the dogs, as disclosed from plaintiff's contradictory story, - the purchase of them at less than one-half of their actual value, defendant's request at the same time for the loan of $200, the making of the loan by plaintiff without security in the first business transaction ever had between the parties, plaintiff's compliance with defendant's request to make the check payable to "cash" and not to defendant's order, the fact that the dogs were mean and that defendant was not a dealer in such dogs, the further fact that after delivering the check to defendant plaintiff allowed the dogs to remain in defendant's possession until the following day when plaintiff took them away and [illegible] from the defendant the amount of the loan, - all tend to show the illegitimacy of the transaction and that plaintiff must have known, or at least must have had strong suspicions sufficient to warrant further inquiry, that defendant did not have good title to the dogs and that the dogs had been stolen.

Our conclusions are that the finding of the court

is manifestly against the evidence and that the judgment should be reversed with a finding of facts and it is so ordered.

REVERSED WITH FINDING OF FACTS.

Fitch and Barnes, JJ., concur.

173 - 28828

FINDING OF FACTS.

We find as facts in this case that at the time of the alleged purchase of the furs in question from defendant, plaintiff had knowledge that defendant did not have good title to the furs and that the same had been stolen from someone.

183 - 28838

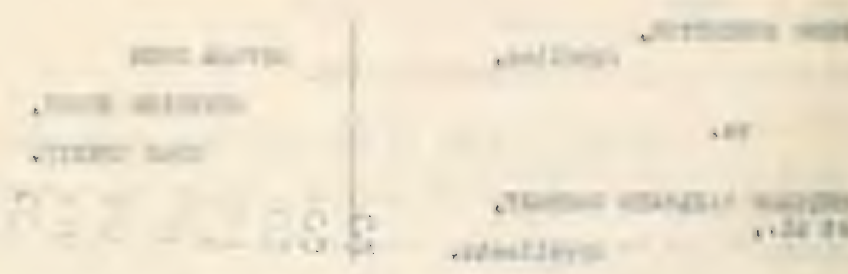
HUGO SCHUETTER, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT,
CHICAGO RAILWAYS COMPANY, et al., Appellants.	)	COOK COUNTY.

233 I.A. 646

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse a judgment for $2,500 rendered against them after verdict by the Superior Court of Cook County in an action for damages for personal injuries sustained by plaintiff, a man of mature years, on June 8, 1921, while he was riding a bicycle in a southeasterly direction, west of and about parallel with defendants' street railway tracks, in Lincoln avenue about 150 feet south of Cullom avenue in the city of Chicago. The accident occurred about 9 o'clock in the morning on a clear day, in front of a blacksmith shop located on the west side of Lincoln avenue, before which shop and near to the west curb of the street was then standing an automobile. While plaintiff, on his bicycle, was passing between the automobile and defendants' southeast-bound track, some portion of defendants' street car, moving southeast on said track and passing plaintiff, struck him or the handle bar of his bicycle, causing him to be thrown to the ground in front of the automobile and seriously injured.

Plaintiff's declaration consisted originally of five counts to which defendants filed a plea of the general issue, but subsequently the fifth count was dismissed. All of the counts alleged that plaintiff, at and immediately before the accident, was in the exercise of due care for his own safety.



The first count charged general negligence in the operation of the street car; the second, negligence in propelling the car at a high and dangerous rate of speed and without ringing any bell or giving any warning of its approach; the third, negligence in operating the car without giving plaintiff any warning of its approach; and the fourth, negligence in running the car at a high and dangerous rate of speed.

The testimony of the several eye-witnesses to the accident was somewhat conflicting as to how it happened. Plaintiff was a witness in his own behalf, and his testimony was corroborated in many particulars by that of his witness, Luenmarle, a passenger on the street car and looking out of the west window at the time. On behalf of defendants the motorman of the car testified, as did four other eye-witnesses, - a pedestrian on the west side of Lincoln avenue, a passenger inside the car, and two passengers on the rear platform of the car, one of whom said he had a view of the accident through the open rear door and west windows of the car, and the other said he saw the accident while he was near to the rear right hand step of the car, and while leaning out over it and looking ahead for a friend he expected to meet at the next stop of the car.

No complaint is made as to the amount of the verdict. The only grounds urged by defendants' counsel for a reversal of the judgment are that the verdict is not justified by the evidence and is against the manifest weight thereof on the questions of plaintiff's due care and the negligence of the motorman.

Plaintiff, whose eyesight and hearing were good and who was accustomed to ride bicycles, testified in substance that on the morning mentioned he was riding on his bicycle southeast and parallel with defendants' west track on the west side of Lincoln avenue just south of the intersection with Cullom avenue and between the west curb and the track at a speed of about 10

the first count charged general negligence in the operation of the street car; the second, negligence in propelling the car at a high and dangerous rate of speed and without ringing any bell or giving any warning of its approach; the third, negligence in propelling the car without giving plaintiff any warning of its approach; and the fourth, negligence in running the car at a high and dangerous rate of speed.

The testimony of the several eye-witnesses to the accident was somewhat conflicting as is usually [illegible]. Plaintiff was a witness in his own behalf, and his testimony was corroborated in many particulars by that of his witness, [illegible], a patrolman on the street car [illegible] of the [illegible], at the time. On behalf of defendants the [illegible] of the car testified, as did four other [illegible], a pedestrian on the east side of [illegible] avenue, a passenger inside the car, and two passengers on the rear platform of the car, one of whom said he had a view of the accident through the open rear door and [illegible] windows of the car, and the other said he saw the accident while he was [illegible] on the rear right hand step of the car, and while [illegible] it was [illegible] for a friend he [illegible] at the rear step of the car.

No complaint is made as to the conduct of the trial. The only grounds urged by defendants' counsel for a reversal of the judgment are that the verdict is not justified by the evidence and is against the manifest weight thereof on the questions of plaintiff's due care and the negligence of the motorman.

Plaintiff, whose eyesight and hearing were good and who was seventy-[illegible] years [illegible], testified in substance that on the morning mentioned he was riding on his bicycle northward and parallel with defendants' east track of the west line of [illegible] avenue just north of the intersecting with [illegible] street, and between the east rail and the track of a [illegible]

miles per hour; that as he approached the place where the accident occurred he noticed an automobile parked on the west side of Lincoln avenue and facing south near the west curb, about 150 feet, "maybe a little more," south of [illegible] avenue; that he proceeded to go around the automobile and between it and defendants' west track; that as he was passing the standing automobile and moving parallel with said track one of defendants' street cars, moving southeast on said track at a much more rapid rate of speed, caught up with him, and, as it was passing him, a slight projection on the west side of the car, "just back of where the front door slides back," hit the handle bar of his bicycle and "turned the front wheel almost square," and he was thrown "forwards and sideways" towards the curb upon the street about three feet in front of the standing automobile; that he did not hear any bell, gong or other warning of the approach of the street car until it was immediately upon him, when the motorman vigorously pounded his gong just as plaintiff was passing the automobile; that he was looking ahead and did not see the street car until he heard the gong; that the front of the car had not yet reached him when he commenced to pass the automobile; that after he heard the gong and saw the car he continued riding parallel with the car, and did not attempt to turn his bicycle either way; that the pavement was fairly even and that his bicycle did not wobble; and that when he first saw the car he judged that there was ample space for him to pass between the automobile and the moving car but that it did not prove to be ample. The testimony of defendants' witnesses, other than the motorman, was to the effect that just before the accident plaintiff's bicycle was "wabbling," and when he was about even with the center of the street car apparently his shoulder hit it, causing him to be thrown upon the street. The motorman of defendants' car, Wascher, testified in substance that he stopped

at Callom avenue; that after he had started up again he first noticed plaintiff ahead of him, riding his bicycle, and going in the same direction as the car, about 6 feet west of the west rail (the car overhangs the rail 21 inches); that later he noticed the automobile standing close to the west curb and that plaintiff evidently intended to pass between it and the track; that the street car was moving at a speed of about 15 miles per hour and he sounded his gong "to let him (plaintiff) know I was going to pass him;" that at this time plaintiff "had not yet reached the automobile," and he (Wascher) thought that his car "would get past the automobile before he (plaintiff) would have to pass it," and that "probably he (plaintiff) might slow down if he could not make it;" and that "I thought I would have a lot of room to go by him."

In our opinion, in view of all the testimony which we have carefully reviewed, it was for the jury to say whether defendants' motorman was guilty of negligence and whether plaintiff before and at the time of the accident was guilty of contributory negligence, and we do not think that the jury's verdict on these questions, or either of them, is manifestly against the weight of the evidence, as contended by counsel. Plaintiff was lawfully riding his bicycle in a public street. His movements immediately before and at the time of the accident do not disclose a want of due care on his part. He approached the narrow space between the automobile and the west track in advance of the street car. He was looking ahead and did not see the street car behind, immediately approaching. And the warning of its approach was negligently delayed by the motorman, who was in a position to see, and says he did see, the standing automobile and plaintiff approaching the narrow space. We think that the evidence tends to show that the motorman was negligent in not attempting to arrest the progress of his car. (*South Chicago*

City Ry. Co. v. Kinnare, 96 Ill. App. 21[illegible], 21[illegible]), so as to allow plaintiff to pass by the standing automobile ahead of the car, instead of ringing his gong, continuing forward and taking chances that the space between the automobile and the moving car was sufficiently wide to allow the safe passage of plaintiff and his bicycle.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

212 - 28369

ARTHUR F. ROBERTS, Appellant, vs. DENNIS J. EGAN, Bailiff of the Municipal Court of Chicago, and BRUNO DZIEGIELEWSKI, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 646

MR. PRESIDING JUSTICE RIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of replevin, commenced in the Circuit Court of Cook County on February 24, 1919, to recover the possession of a certain automobile ambulance, the sheriff took the property under the writ and delivered it to plaintiff. After a trial without a jury the court found the defendants not guilty, etc., and on March 10, 1923, entered judgment that they recover from the plaintiff the possession of the property replevied and that a writ of retorno habendo issue. Plaintiff appealed.

In the affidavit for replevin plaintiff alleged "that he is the owner of and is now lawfully entitled to the possession of" the ambulance. The declaration consisted of two counts. In the first it is alleged that on February 2[illegible], 1919, defendants took plaintiff's ambulance, of the value of $1,500, and unjustly detained the same, etc.; in the second count it is alleged that defendants unjustly detained the ambulance. Defendants filed five pleas, the first two being respectively non cepit and non detinet. The third plea alleged that the ambulance was "the property of them, the defendants, and not of the plaintiff," and the fourth plea alleged it to be "the property of one Fred F. Roberts and not of the plaintiff." The fifth plea alleged in substance that on January 23, 1919, Bruno Dziegielewski sued out

of the Municipal Court of Chicago a writ of execution, directed to the Bailiff of said court that he cause to be made of the goods, etc. of said Fred F. Roberts $624 and costs; that thereafter under the writ the bailiff levied on the ambulance and obtained the same; and that it was then "the property of said Fred F. Roberts, the defendant in said suit, and not of the plaintiff," and was subject to execution, etc. Plaintiff filed replications to these three last mentioned pleas - the replication to the fifth plea being that said ambulance was then and there "not the property of said Fred F. Roberts but * * the property of the plaintiff."

At the commencement of the trial it was agreed by counsel for the respective parties that on January [illegible], 1919, Bruno Dziegelewski recovered a judgment for $624 and costs against Fred F. Roberts in the Municipal Court; that a writ of execution on said judgment was issued on January 23rd and placed in the hands of the bailiff; that thereafter, the judgment not having been satisfied, the bailiff levied on the ambulance; that thereafter, plaintiff under the replevin writ obtained it from the possession of the bailiff; and that the only question of fact to be determined is whether the plaintiff, Arthur E. Roberts, at the time of the levying of said execution, was the owner of the ambulance. On this question the evidence was conflicting. Plaintiff, the son of Fred F. Roberts, testified in his own behalf and he claimed that at the time of the commencement of the replevin action and for several years prior thereto he was the owner of the ambulance. He was cross-examined at considerable length, both by defendants' counsel and the trial judge, during which he made so many inconsistent and contradictory statements that the judge finally expressed the belief that he was not a credible witness. No other witness was called in his behalf. The testimony of the

of the Municipal Court of Chicago a writ of execution, directed to the bailiff of said court that he cause to be made of the goods, etc. of said Fred E. Roberts $[illegible] and stating that there after under the writ the bailiff levied on the machines and attached the same; and that it was then "the property of said Fred E. Roberts, the defendant in said writ, and not of the plaintiff," and was subject to execution, etc. Plaintiff filed replications to these three last mentioned pleas - the replication to the fifth plea being that said machines [illegible] and shows that the property of said Fred E. Roberts but was the property of the plaintiff."

At the commencement of the trial it was agreed by counsel for the respective parties that on January 17, 191[illegible], [illegible] recovered a judgment for [illegible] and costs against Fred E. Roberts in the municipal court; that a writ of execution on said judgment was issued on January [illegible] and placed in the hands of the bailiff; that thereafter, the judgment not having been satisfied, the bailiff levied on the machines; that thereafter, plaintiff under the replevin writ obtained it from the possession of the bailiff; and that the only question of fact to be determined is whether the plaintiff, Arthur D. Roberts, at the time of the levying of said execution, was the owner of the machines. On this question the evidence was conflicting. Plaintiff, the son of Fred E. Roberts, testified in his own behalf and he claimed that at the time of the commencement of the replevin action and for several years prior thereto he was the owner of the machines. He was cross-examined at considerable length, both by defendants' counsel and the trial judge, during which he made so many inconsistent and contradictory statements that the judge finally expressed the belief that he was not a credible witness. No other witness was called by the plaintiff. The testimony of the

defendant, Bruno Dziegelewski, corroborated in some particulars by that of another witness, called by defendants, tended to show that plaintiff was not and never had been the owner of the ambulance, but that it was owned by Fred F. Roberts.

The only errors assigned and argued by counsel for plaintiff are that the finding and judgment are manifestly against the weight of the evidence and contrary to the law. Under the pleadings and the evidence, which we have carefully reviewed, there is no merit in either point. Plaintiff had the burden of proving that, at the time of the commencement of this action, he was the owner of the ambulance or entitled to its possession, and this he failed to prove by a preponderance of the evidence. In Pease v. Ditto, 189 Ill. 456, 466, it is said: "The question, raised by a plea of property in the defendant, is not whether the property is in the defendant, but whether the right of property and the right to immediate possession are in the plaintiff. Under such a plea, the plaintiff must recover on the strength of his own title, and the burden of proof is upon him to establish his right. (Anderson v. Talcott, 1 Gilm. 365; Chandler v. Lincoln, 52 Ill. 74; Constantine v. Foster, 57 Ill. 36; Reynolds v. McCormick, 62 Ill. 412.)" In Kee & Chapell Co. v. Pennsylvania Co., 291 Ill. 343, 351, it is said: "Under a plea of property in a third person in an action of replevin, with a denial of right of property in the plaintiff, the only issuable fact is the right of property in the plaintiff. The plea of property in the defendant, or a third person, is a matter of inducement to the formal traverse of the right of property in the plaintiff. Under such plea the plaintiff must recover on the strength of his own title and the burden of proof is on him. Such plea does not raise a new issue."

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

defendant, Frank Grindsteadt, corroborated in some particulars by that of another witness, called by defendants, tended to show that plaintiff was not and never had been the owner of the automobile, but that it was owned by Fred W. Roberts.

The main errors argued and argued in support of a reversal are that the finding and judgment are manifestly against the weight of the evidence and contrary to the law. Under the pleadings and the evidence, which we have carefully reviewed, there is no merit in either point. Plaintiff had the burden of proving that, at the time of the commencement of this action, he was the owner of the automobile in question and entitled to its possession, and this he failed to prove by a preponderance of the evidence. In Casey v. Kilgo, 199 Ill. 176, 182, it is said: "The question, raised by a plea of property in the defendant, is not whether the property is in the defendant, but whether the right of property and the right to immediate possession are in the plaintiff. Under such a plea, the plaintiff must recover on the strength of his own title, and the burden of proof is upon him to establish his right. (Anderson v. Talcott, 1 Gilm. 365; Thompson v. Mitchell, 16 Ill. 78; Hamerslaugh v. Farrior, 77 Ill. 103; Reynolds v. McCormick, 62 Ill. 412.)" In Cox & Stemmlin Co. v. Fitzsimmons Co., 222 Ill. 592, 595, it is said: "Under a plea of property in a third person in an action of replevin, with a traverse of right of property in the plaintiff, the only disputed fact is the right of property in the plaintiff. The plea of property in the defendant, or a third person, is a matter of inducement to the formal traverse of the right of property in the plaintiff. Under such plea the plaintiff must recover on the strength of his own title and the burden of proof is on him. Such plea does not raise a new issue."

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

225-1/2 - 28883

LILLIAN CHRASTKA,
Appellee,

vs.

JOHN T. CHRASTKA,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

233 I.A. 646

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a separate maintenance proceeding, on motion of complainant's solicitor, the Circuit Court, on July 14, 1925, entered an order finding that, "from an inspection of the master's report filed herein," complainant's solicitor, [illegible] Gallion, has earned and is entitled to the sum of $250 for fees and that defendant is amply able to pay said sum, and adjudging that defendant pay complainant said sum on or before August 14, 1925, on account of her solicitor's fees. From this order defendant perfected the present appeal. No brief on behalf of complainant has been filed in this appellate court.

There is no evidence as to what services complainant's solicitor performed for her during the hearings before the master, and no testimony as to their reasonable value, except such as is disclosed in the master's report, and the evidence accompanying the report taken before him at the several hearings. The only point made and argued for a reversal of the order are in substance: (1) that there was no evidence heard by the court upon which to base the order; and (2) that the amount fixed, in the absence of proof as to the value of the services, is more than a nominal amount and is unreasonable. We do not think that the points have any merit.

On January 12, 1922, complainant filed her bill against defendant, her husband, for a separate maintenance and

for other relief. Thereafter she filed an amended bill by her solicitor, Gallion, to which defendant filed an answer. On June 19, 1922, on motion of said solicitor, the court ordered defendant to pay complainant $40 per week, commencing June 20th, as temporary alimony, until further order; and on the same day, on motion of said solicitor, the court ordered the cause to be referred to the master for the purpose of determining what additional amount, if any, should be paid complainant for temporary alimony. On July 13, 1923, on motion of defendant's solicitors, the master's report was ordered filed, together with a transcript of the evidence taken and the proceedings had before the master, certified by him. This transcript contains about 100 typewritten pages, showing that complainant and one other witness for her testified before the master, and that defendant and one other witness for him also testified, and that all witnesses were examined and cross-examined at length and that complainant's said solicitor was present and took an active part at the several hearings. From the master's report it appears that, commencing on November 14, 1922, and ending February 7, 1923, hearings were had before him from time to time. After making various findings the master recommended that "no increase of alimony be ordered or allowed but that complainant be allowed a reasonable solicitor's fee for the services rendered in connection with this hearing." Objections to the master's report were made by complainant and overruled, but no objections were filed on behalf of defendant. It thus appears that defendant did not object to the allowance by the court of a "reasonable" fee for the services of complainant's solicitor at said hearings. The transcript of the record also discloses that on July 13, 1923, on motion of defendant's solicitors, the master's report was in all things approved and confirmed. The order appealed from was entered on the following day. While it is well settled

-4-

for other relief. Thereafter she filed an amended bill by her solicitor, [illegible], to which defendant filed an answer. On June [illegible], 19[illegible], on motion of said solicitor, the court ordered defendant to pay complainant $[illegible] per week, commencing June [illegible], as temporary alimony, until further order, and on the same day, on motion of said solicitor, the court ordered the cause to be referred to the master for the purpose of determining what additional amount, if any, should be paid complainant for temporary alimony. On July [illegible], 19[illegible], on motion of defendant's solicitor, the master's report was ordered filed, together with a transcript of the evidence taken and the proceedings had before the master, certified by him. This transcript contains about [illegible] typewritten pages, showing that complainant and one other witness testified before the master, and that defendant and one other witness testified for the other side [illegible], and that all witnesses were examined and cross-examined at length and that complainant's main solicitor was present and took an active part in the several hearings. From the master's report it appears that, commencing on December [illegible], 19[illegible], and ending February [illegible], 19[illegible], hearings were had before him from time to time. After setting forth findings the master recommended that the increase of alimony be ordered as claimed but that complainant be allowed a reasonable solicitor's fee for the services rendered in connection with said hearings." Objections to the master's report were made by complainant and overruled, but no objections were filed on behalf of defendant. It thus appears that defendant did not object to the allowance by the court of a "reasonable" fee for the services of complainant's solicitor at said hearings. The transcript of the record also discloses that on July [illegible], 19[illegible], on motion of defendant's solicitor, the master's report was in all things approved and confirmed. The order appealed from was entered on the following day. While it is well settled

law in this state that an allowance of a solicitor's fee cannot be sustained where no evidence showing what services the solicitor performed is preserved in the record (Mathony v. Behm, 164 Ill. 495), we think that the present transcript, and particularly the master's report and certificate of evidence accompanying the same, sufficiently discloses evidence of services performed by said solicitor to the reasonable value of $250, as fixed by the court. And we are of the opinion that, under the facts and circumstances disclosed, the court did not err in making said allowance, without hearing opinions from attorneys as to the value of the services of complainant's solicitor. From the master's report and the evidence accompanying the same, and by reason of the chancellor's skill and knowledge, he could form a correct judgment as to what sum would be a fair and reasonable compensation to the solicitor for his services, taking also into consideration the ample financial ability of defendant, as also disclosed from evidence. (Goodwillie v. Millimann, 56 Ill. 523, 528.) In Reinke v. Sanitary District, 260 Ill. 380, 391, it is said: "The allowance of attorney's fees should be the usual charge for services between parties under like circumstances, and not what is reasonable or proper for a given attorney in a particular case. In taxing such fees the chancellor should exercise his own judgment, based on his knowledge and experience in such matters, and not necessarily be governed by the opinions of attorneys as to the value of the services." (See, also, McMannomy v. Chicago D. & V. R. Co., 167 Ill. 497, 510; Lee v. Lomax, 219 Ill. 218, 221.)

For the reasons indicated the order of the Circuit Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

240 - 28898

WILLIAM NAVICKIS, Appellee,	)	
vs.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
J. B. AGLYS, Appellant.	)	

233 I.A. 646

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a carpenter by trade, sued defendant in the Municipal Court of Chicago to recover for work done and labor performed in making certain book shelves for defendant at the latter's request, claiming $125 to be due therefor. On the trial without a jury plaintiff and defendant were the only witnesses and their evidence was conflicting as to the amount per hour which plaintiff was to receive for his labor, the number of hours he worked and on which particular days he worked. The court found the issues against defendant and assessed plaintiff's damages at $90. Judgment against defendant was entered on the finding and this appeal followed. Plaintiff has not filed any brief in this appellate court.

Counsel for defendant contends that the finding and judgment are against the manifest weight of the evidence, and, further, that they cannot be justified upon either theory of the parties as disclosed from their testimony. After reviewing the evidence we are unable to say that there is any merit in either contention, and accordingly the judgment will be affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

251 - 28909

FLOYD R. MURRAY, Appellee,

vs.

ARTHUR C. JONES, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 647

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 14, 1921, plaintiff commenced an action in *assumpsit* in the Superior Court of Cook County against Arthur C. Jones and three other defendants, claiming that they owed him a balance of $429.20, for moneys expended and for legal services rendered at their request. Plaintiff's declaration consisted of the common counts, to which each defendant filed a separate plea of the general issue and a plea denying joint liability. Subsequently, plaintiff filed an itemized bill of particulars, showing a total amount of $1,348.96 for moneys advanced and legal services rendered, cash credits to the aggregate amount of $919.76, and the aforesaid balance due; and alleging that the legal services were rendered between about December 1, 1920 and May 19, 1921, and were for dissolving a common law trust, known as the Taylor Tractors Oil Motors Company, changing it into a corporation, expenses incident thereto, and for securing for defendants the right to sell the stock of the corporation in the State of Indiana. At the commencement of the trial before a jury plaintiff dismissed the action as to all defendants except Arthur C. Jones. Plaintiff was a witness in his own behalf and two other witnesses, J. Leonard Taylor (originally a defendant) and Daniel Veries, testified for him. On behalf of defendant, Jones, he alone testified. Certain letters and documents were also received in evidence. The jury returned a verdict for

plaintiff, assessing his damages at $409.20 (disallowing only one item of $20 contained in his bill of particulars) and the court, on June 23, 1923, after overruling a motion for a new trial, entered judgment on the verdict against defendant for $409.20, and this appeal followed.

Prior to December, 1920, J. Leonard Taylor and others were endeavoring to promote the manufacture and sale of an oil engine. To that end the Taylor Tractors Oil Motors Company (hereinafter referred to as the Taylor Co.) had been organized as a common law trust, and was seeking to raise money by selling its shares. Taylor and his associates had entered into negotiations with the Jones, Thayer, Vories Company (hereinafter referred to as the Jones Co.) with a view of having it act as agent in selling shares of the Taylor Co. in the State of Indiana. The Jones Co. was also a common law trust and its declaration of trust had been recorded in Lake County, Indiana, and it had established an office in Hammond, Indiana, in the same building in which plaintiff had his law office. George H. Thayer, Jr., was its president, Daniel Vories its secretary, and defendant Arthur C. Jones, one of its trustees. Before it could act as broker in the sale of securities in Indiana it was necessary for it to secure a permit so to do from the Securities Commission of that State, under a statute commonly known as the "blue sky" law, and all parties concerned desired that such a permit be obtained as soon as possible and that all necessary legal steps be immediately taken. Accordingly, some time during December, 1920, Taylor, Thayer and Vories called at plaintiff's office and engaged his services, contingent upon the approval of defendant, Jones. It appears that for his services rendered during December, 1920, he charged the sum of $85. It also appears that neither Taylor nor the other persons interested in the Taylor Co. were then financially able, or willing, to become individually

liable for plaintiff's services; that, of the parties interested in the Jones Co., defendant was the only one financially responsible; and that about January 10, 1921, a further conference concerning the matters in hand was held at plaintiff's office, at which plaintiff, Taylor, Thayer, Veries and defendant were present. Plaintiff testified at length as to what occurred at this conference and he was corroborated in some particulars by the testimony of Taylor and Veries. Plaintiff testified:

> "Mr. Jones said: 'We wish to employ you to do this work for us and you will go ahead and take the necessary steps.' * * I told Mr. Veries and Mr. Jones that in all probability it would be necessary for us to secure local legal counsel in Indianapolis some time during the proceedings; * * that in doing so we would save time and money, and he (Jones) said that would be satisfactory to him. * * Jones said, 'go ahead and get it done as quickly as possible and send your bill to me.' Jones said, 'Mr. Thayer and Mr. Veries and I are together on this, but they haven't any money. We are going to raise the money for them, and I guess we will have to advance the money for them.'"

Plaintiff also testified as to each item in the bill of particulars concerning the services rendered, the reasonableness of the several charges, and the several amounts of money advanced by him. It was not contended on the trial that the services were not performed or that the charges were not reasonable. As to the moneys advanced, one item, for "entertainment, $20," was not included in the jury's verdict, plaintiff admitting that this expenditure was unauthorized. Another item, "paid Garth B. Nelson, attorney at Indianapolis for legal services, $250," was questioned as to the authority and necessity of the employment of Nelson. Plaintiff further testified in substance that immediately after said conference of January 10, 1921, he commenced the work he was engaged to do and finally successfully accomplished it; that he ascertained that in order to obtain the required permit it was necessary to incorporate the Taylor Co. in Indiana, which was done, defendant, Jones, becoming one

liable for plaintiff's services; that, of the parties interested in the Bowen [illegible], defendant was the only one financially responsible; and that about January 14, 1943, a further conference concerning the matters in suit was held at plaintiff's office, at which plaintiff, Taylor, Thayer, Yarling and defendant were present. Plaintiff testified at length as to what occurred at this conference and he was corroborated in some particulars by the testimony of Taylor and Yarling. Plaintiff testified:

> "Mr. James said: 'I wish to employ you to do this work for me and you will go ahead and take the necessary steps.' * * * I said Mr. Yarling and Mr. James that in all probability it would be necessary for me to employ local counsel in Indianapolis some time during the proceedings; * * * that in doing so we would have that understanding [illegible] that would be satisfactory to him. * * * James said, 'Go ahead and get it done [illegible] as quickly as possible.' James said, 'Mr. Taylor and Mr. Yarling and I are [illegible], this is James's own matter. * * * [illegible] take care of it for him, and I guess we will have to advance the money for him.'"

Plaintiff also testified as to each item in the bill of particulars concerning the services rendered, the disbursements of the several charges, and the several amounts of money advanced by him. It was not contended on the trial that the services were not performed or that the charges were not reasonable. As to the amount advanced, one item, the 'Investigation, $50,' was not included in the jury's verdict, plaintiff admitting that this expenditure was unauthorized. Another item, "paid [illegible] B. Roberts, attorney at Indianapolis for legal services, $100," was questioned as to the authority and necessity of the employment of Roberts. Plaintiff further testified in substance that immediately after said conference of January 14, 1943, he commenced the work he was engaged to do and finally successfully accomplished it; that he ascertained that in order to obtain the required permit it was necessary to incorporate the Taylor Co. in Indiana, which was done, defendant, James, becoming one

of its five directors; and that he also found it necessary to employ said Nelson as an associate attorney, as anticipated, and that the latter's charges for the services performed were reasonable and proper.

Defendant, Jones, denied that at said conference he told plaintiff to "send his bill to him" (Jones). His testimony as to what he said was: "We are not a large concern; I am the only one putting up any money yet; the rest don't seem to have any, and I would like to have you 'temper the wind to the shorn lamb,' and make the bill as reasonable as you can, and hurry up because we want to sell shares and get some money in; I said when you get your work complete so that there are no flaws, take the bill to the office of Jones, Thayer, Veries Co., and there will be a check waiting for you." He also denied that at said conference plaintiff said anything as to the probable necessity of employing another attorney at Indianapolis to assist him, and he further denied that he ever became a director of the Taylor Co. It appears that the moneys, paid to plaintiff through Thayer or Veries from time to time on account of services and during the continuance thereof, were furnished by defendant. It further appears that, before plaintiff had completed the work on which he was engaged and without notice to him, defendant severed his connection with the Jones Co., notified Thayer and Veries that he would not be liable for any further expenditures, but told them to get plaintiff's bill and gave them money to liquidate it; that some of the amount so given them for that purpose was used by Thayer for other purposes; that on April 11, 1921, plaintiff sent an account to the Taylor Co. showing the charges for the services and expenses thus far rendered or made and crediting a payment received on account; that on April 28th he sent a similar account, showing additional charges, etc., to both the Taylor Co.

and the Jones Co.; and that on April 20th he sent a similar account, accompanied with a letter, to defendant, Jones.

Counsel for defendant contends that the verdict is against the manifest weight of the evidence on the question of defendant's individual liability to plaintiff for the services performed and moneys advanced. While there is some force in counsel's position and argument, we are of the opinion that, under all the facts and circumstances in evidence, plaintiff, in doing all of the work, acted on the assumption that defendant had promised that he individually would make payment therefor, and that the jury was warranted in taking this view of the matter and in effect finding that defendant did individually promise to pay for the services and expenses which plaintiff performed and made. And while it is the law that an attorney employed to perform a certain specific service for his client has no implied authority to employ assistant counsel and charge the client for said assistant's services, still we think the jury were warranted in finding, as to the services performed by said attorney Nelson at Indianapolis at plaintiff's request, that defendant had sufficiently authorized Nelson's employment and payment for the services he rendered.

And we do not think there is any merit in counsel's further contention that "the verdict is contrary to the instructions given by the court at the request of both parties." No particular instruction is complained of. We think the jury were fully and fairly instructed under the evidence.

The judgment of the Superior Court should be affirmed, and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

176 - 28831

ANNE DEEGAN, Administratrix of the estate of John F. Deegan, deceased,
Appellee,

vs.

HYDROX COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

233 I.A. 647

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of $7500 for defendant's negligence in so operating its electric automobile truck as to cause the death of a minor, plaintiff's intestate.

To the declaration defendant filed only the plea of general issue which, it is conceded, had the effect to admit the capacity in which plaintiff sued.

One of the errors assigned and argued is that the court erred in refusing leave to defendant to file a special plea denying that letters of administration had been issued to plaintiff in this case.

Such leave was asked during the course of the trial and denied after plaintiff had testified that she was "acting as administrator." Defendant called a deputy clerk of the Probate Court and offered to prove by him that no letters of administration had been issued to plaintiff as such administratrix. The court sustained an objection to such offer as it was bound to do in that state of the pleadings.

As outside of the defense of want of negligence on its part and contributory negligence on the part of the minor, defendant had no other defense, and plaintiff herself having

by her testimony injected doubt as to whether she had been duly appointed administratrix, it is thought by a majority of this court (of which the writer is not one) that upon the reasoning of the Supreme Court in Carlson v. Johnson, 263 Ill. 556, and Clark v. Wisconsin Central Ry. Co., 261 Ill. 407, it was an abuse of discretion and error for the court to refuse leave to file such plea under the circumstances, and that, therefore, the judgment should be reversed and the cause remanded. Such conclusion renders it needless to discuss other alleged grounds of error, upon some of which, however, as well as the ground of reversal, the members of this court are divided.

REVERSED AND REMANDED.

Gridley, P.J., and Fitch, J., concur.

306 - 28863

ROBERT MALCOLM, Appellee, vs. FLORENCE J. MALCOLM, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 647

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill for divorce. Defendant answered thereto taking issue upon the alleged cause, and asking for alimony, suit money, solicitors' fees and an injunction against his selling and disposing of his property and molesting her and the children. After the granting of the injunction complainant was permitted to file an amended and supplemental bill of complaint, to which defendant answered. An order was entered allowing defendant $70 a week for alimony until further order, and the sum of $500 "for and on account" of temporary solicitors' fees. The case was then referred to a master in chancery to report his conclusions as to alimony, solicitors' fees, suit money and expenses, the order already entered for the same to continue effective pending the reference to the master. Later there were contempt proceedings and denial of complainant's motions for a change of venue. Pending the hearing before the master the court on March 31, 19[illegible], dismissed the bill without prejudice on the motion of complainant. At the same term defendant moved to vacate the order and for leave to file a cross bill for divorce, and the same was continued to and heard on April 10, when, the court having remarked that the order of dismissal should be vacated on the ground that it did not provide for the payment of costs, defendant immediately,

before entry or direction of any order on such motion to vacate, filed her cross bill and complainant asked the court to amend or modify the order so as to cover costs.

It was conceded that the order was erroneous in omitting to tax complainant with the costs, and the court being doubtful as to the effect of filing the cross bill and what order should be entered continued the matter until April 13th. It came up for further hearing on the 14th, when the court announced his conclusion to entertain and grant complainant's motion. Further discussion ensued and the matter was considered at various adjournments until May 22, 1925, when complainant's motion to modify the order of dismissal was allowed.

The order dismissing the bill without providing at complainant's costs, as the statute requires (Sec. 18, Chap. 22, Cahill's Stats.), was merely erroneous and not void, as contended by defendant. (*Langlois* v. *Matthiessen*, 155 Ill. 230; *McDavid* v. *McLean*, 202 Ill. 354, 361.) Not being void the bill still stood dismissed, and unless the order was vacated defendant acquired no right to file a cross bill either by reason of such error, or because of the court's remark. No order to vacate the order of dismissal was entered or directed, and the whole matter was still under the control of the chancellor until the final order was filed or recorded. Until that time he might disregard all he had said. (*Waggoner* v. *Saether*, 267 Ill. 32.)

It is a settled rule in chancery practice that where no cross bill has been filed the complainant has the right at any time before final decree to dismiss his bill on payment of costs. The fact that complainant asked to have the order of dismissal modified after defendant had moved to vacate it did not, in our judgment, require the court to pass upon the motion to vacate first, for complainant's motion to dismiss would still have had priority over the motion to file the cross bill. (*Blair*

before entry or direction of any order on such motion to vacate, filed her cross bill and complainant asked the court to vacate or modify the order so as to [illegible].

It was conceded that the order was erroneous in [illegible] the complainant with the costs, and the matter being [illegible] as to the effect of filing the cross bill [illegible] order should be entered continuing the motion until April 11th. It came up for further hearing on the 11th, when the court announced his conclusion to [illegible] and grant complainant's motion. Further discussion ensued and the matter was considered at various adjournments until May 25, 1931, when complainant's motion to modify the order of dismissal was allowed.

The order dismissing the bill without providing as to complainant's costs, as the statute requires (Cahill's Stats. ch. [illegible]; Smith's Stats. [illegible]), was merely erroneous and not void, as contended by defendant. (Leonard v. [illegible], 149 Ill. [illegible]; Roberts v. [illegible], [illegible] Ill. 354, [illegible].) Not being void the bill still stood dismissed, and unless the order was vacated defendant acquired no right to file a cross bill either by reason of such order, or because of the court's consent. No order to vacate the order of dismissal was entered or directed, and the whole matter was still under the control of the chancellor until the final order was filed or recorded. Until that time he might disregard all he had said. ([illegible] v. Gaehler, [illegible] Ill. [illegible].)

It is a general rule in chancery practice that where no cross bill has been filed the complainant has the right at any time before final decree to dismiss his bill on payment of costs. The fact that complainant asked to have the order of dismissal modified after defendant had moved to vacate it did not, in our judgment, require the court to pass upon the motion to vacate first, for complainant's motion [illegible] would still have had priority over the motion to file the cross bill. [illegible]

v. Reading, 99 Ill. 600, 611.)

Appellant, however, contends that her answer in asking for alimony, solicitors' fees, suit and expense money, and for an injunction "and other relief," contains all the necessary elements of a bill for separate maintenance and amounted to a cross action for affirmative relief. It contained no averments which complainant was required to answer and sought no affirmative relief other than such as was incidental to her defense. Such a pleading does not constitute a cross action. (Purdy v. Henslee, 97 Ill. 389.)

It is further contended that as the order of dismissal was not modified at the same term at which it was entered, the court had no authority to allow the correction. It appears, however, that the motion to amend and modify the order was made at the same term that the order was entered and remained under the consideration of the court until thus disposed of.

Pending consideration of such motion defendant filed a petition asking for additional expense money and solicitors' fees. That and all other pending motions of defendant were overruled at the same time the order of dismissal was modified, and properly because no money was due defendant under the order then in force.

Accordingly the order appealed from will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

215 - 28872

MARY KEENAN, Appellee, vs. E. G. FULLER COMPANY, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

233 I.A. 647

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment awarding to plaintiff the right to retain property replevied, upon which defendant held a first chattel mortgage for $3,750, the balance of the purchase price for a machine, which defendant had sold to the mortgager on the payment down of $1700. The property was described in said mortgage as "One standard sized Crawley Rounding and Backing Machine, serial No. 380."

Plaintiff held a second mortgage on certain chattels of the mortgagor, including "Equity $1700 in one Crawley Backer No. 380."

Claiming that defendant's mortgage did not provide for the mortgager's possession and was, therefore, invalid as to third parties, plaintiff replevied the property in question.

While defendant's mortgage contains no specific provision permitting the mortgagor to retain possession of the property such intent is clearly implied from its language. The mortgage provided that the mortgagee, its successors and assigns, might, on default, enter wherever the property was placed, take it away and dispose of it at the best price obtainable, retaining the money therefrom in payment of the sum mentioned, rendering the surplus, if any, to the mortgagor, and also that if the mortgagee at any time deemed itself unsafe

or there was any interference with said property to its prejudice might "take possession of such property and sell the same," etc. In Letcher v. Norton, 4 Scam. 575, it was argued that the chattel mortgage before the court was invalid because it did not contain an express provision that the mortgagor was to retain possession. That mortgage likewise contained a similar provision for taking possession of the property in case of default to pay the sum for which it was given as security. The court said:

> "Why should the mortgagor authorize the mortgagee, on default of payment of the note of the former, to enter upon and seize the mortgaged property, if at the time of the execution of the mortgage, he (the mortgagee) was intended to and did take possession of it? Such a construction of the mortgage would do violence to its provisions. The mortgage then does contain authority to the mortgagor to retain possession of the property in dispute until the happening of a certain contingency. To have authorized him expressly, in so many words, to do so, could not have more certainly expressed the intention of the parties that he should do so."

In a mortgage before the court in Babcock v. McFarland, 43 Ill. 381, the scrivener erased from the printed form the clause expressly providing that the mortgagor might retain possession of the property. The mortgage, however, contained like provisions to the one at bar, and that in Letcher v. Norton, supra, giving the mortgagee authority to enter where the property might be and take possession of it in case of default. The court said:

> "How could the mortgagee enter upon the mortgagor's premises and take possession of the property, when it was already in his hands? We are unable to perceive even a doubt, that it was the intention of the mortgagor to retain possession."

The court said that notwithstanding the erasure of the provision for the mortgagor's possession the intention therefor was so clearly expressed as to be manifest to anyone inspecting the instrument. The same conclusion must be reached with respect to the instrument at bar.

Appellee's contention that defendant's chattel mortgage is invalid because not under the corporate seal of

as there was any interference with said property to his prejudice might "take possession of such property and sell the same," etc. In Lindsay v. Garvin, 4 Cush. 179, it was argued that the chattel mortgage before the court was invalid because it did not contain an express provision that the mortgagor was to retain possession. That mortgage likewise contained a similar provision for taking possession of the property in case of default to pay the sum for which it was given as security. The court said:

> "They clearly [illegible] authorize the mortgagee, on default of payment of the debt of the [illegible], to enter upon and take the mortgaged property, if at the time of the execution of the mortgage, he [the mortgagee] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]. The mortgage [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] of the parties that he should so be."

In a mortgage before the court in Bullock v. Williams, 16 Pick. 33, the covenant [illegible] from the [illegible] [illegible] the clause expressly providing that the mortgagor might retain possession of the property. The mortgage, however, contained like provisions to the one at bar, and held in Lindsay v. Garvin, supra, giving the mortgagee authority to enter where the property might be and take possession of it in case of default. The court said:

> "How could the mortgagee enter upon the mortgagor's premises and take possession of the property, when it was already in his hands? It [illegible] [illegible] to [illegible] a doubt, that it was the intention of the mortgagor to retain possession."

The court said that notwithstanding the absence of the provision for the mortgagor's possession the [illegible] [illegible] was so clearly expressed as to be sufficient to [illegible] [illegible] the instrument. The same [illegible] will [illegible] with respect to the [illegible] at bar.

Appellee's contention that defendant's chattel mortgage is invalid because not under the corporate seal of

the mortgagor is wholly untenable. (Green Co. v. Blodgett, 159 Ill. 169, 174; Cook v. Harrison, 19 Ill. App. 402.) Equally so are appellee's other points, that defendant's mortgage is invalid because of the ungrammatical substitution of the pronoun "my" instead of "its;" that it could not be properly acknowledged by its president; that the description of the property mortgaged is uncertain, and that the mortgage could not be given for an antecedent debt. As to the last point see Jones on Chattel Mortgages, 5th Ed., sec. 81, p. 129.

We deem it unnecessary to discuss these points or the further point made by appellant that plaintiff's mortgage being for "equity $1700 in one Crawley Backer No. 500," merely conveyed to plaintiff the mortgagor's equity of redemption.

The court having erred in holding that defendant's prior mortgage was void in not containing an express provision for possession of the mortgagor and that plaintiff's mortgage became a first lien on the property in question, the judgment must be reversed. The court should have granted defendant's motion to find that the property should be returned to it with its cost of suit, and that a writ of retorno habendo be issued for the return of the property. Such a finding and judgment will be entered here and the cause will be remanded with directions for the issuance of such a writ and the execution for costs. (Osgood v. Skinner, 186 Ill. 491, 496.)

REVERSED WITH JUDGMENT HERE AND
REMANDED WITH DIRECTIONS.

Gridley, P. J., and Fitch, J., concur.

the mortgagor is wholly exonerable. (Barrett Co. v. Fiedorek, 166 Ill. 249, 256; Hand v. Schuchardt, 18 Ill. App. 208.) Equally so are appellee's other points, that defendant's mortgage is invalid because of the typographical substitution of the pronoun "my" instead of "its;" that it could not be properly acknowledged by its president; that the description of the property mortgaged is uncertain, and that the mortgage could not be given for an antecedent debt. As to the last point see Jones on Chattel Mortgages, 5th Ed., sec. 83, p. 115.

We deem it unnecessary to discuss those points or the further point made by appellant that plaintiff's mortgage being for "equity in one Crowley Lumber No. 288," merely conveyed to plaintiff the mortgagor's equity of redemption.

The court having erred in holding that defendant's prior mortgage was void in not containing an express provision for possession of the mortgagor and that plaintiff's mortgage became a first lien on the property in question, the judgment must be reversed. The court should have granted defendant's motion to find that the property should be returned to it with its costs of suit, and that a writ of retorno habendo be issued for the return of the property. Such a finding and judgment will be entered here and the cause will be remanded with directions for the issuance of such a writ and the execution for costs. (Comstock v. Andrews, 163 Ill. 478, 484.)

REVERSED WITH FINDINGS HERE AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Fitch, J., concur.

215 - 28872

FINDING OF FACT.

We find that appellant, H. C. Fuller Company, had a prior lien upon and a right to the possession of the property in question, and that the writ of _retorno habendo_ should be issued for its return.

231 - 28389

SOPHIA POHM,
Appellee,

vs.

GERTRUDE MAROCK and
LOUIS BEST,
Appellants.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

233 I.A. 648

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Only two questions are raised on this appeal from a decree of foreclosure of a trust deed, whether there was an agreement for the extension of the notes secured by the trust deed, and the court erred in including complainant's solicitor's fees as part of the costs.

As to the first point the decree confirms the master's report finding that there was no such agreement. We have carefully reviewed the evidence, and see no good reason for disturbing that finding. The trust deed and notes were given by appellant Gertrude Marock and her then husband. She paid the interest semi-annually at the Home Bank & Trust Company. Just before the notes fell due she spoke to the clerk at the window where she paid her interest, and he told her the notes would be renewed, but he had no specific authority to renew them. After the notes became due her attorney conferred first with Mr. Haas, who had power to negotiate loans for the bank, and who said the notes would be renewed, but after loans matured it appears Haas had no authority to negotiate for a renewal. Said attorney had two conferences with the president of the bank after that time. While there is some conflict in their testimony, it appears that Mrs. Marock had a suit for divorce pending against her husband at that time, and without her husband's release of right of dower,

the president, as he testified, would not make the extension and accordingly made no definite agreement for renewal. No commission was paid, no consideration passed, and no papers were executed. The testimony, too, of Mrs. Marock as to the extension is vague and indefinite. The burden was on her to prove such an agreement, and we do not think it was sustained by a preponderance of evidence, and that the court was justified in finding that before maturity of the loan no authorized agreement for extension was made, and that after that time the only person authorized to extend the loan conferred with on the subject was the bank's president, and that while he indicated a willingness for extension if satisfactory arrangements could be made, no agreement was reached.

The trust deed provided that in case of foreclosure a reasonable sum should be allowed for solicitor's fees, which was then found to be $500, and that they should become an additional indebtedness secured by the trust deed, to be paid out of the proceeds from the sale of the premises, if not otherwise paid. In view of such provision it can make no difference to appellants whether the solicitor's fees were taxed as costs or part of the indebtedness. In either event, payment thereof was necessary to prevent a sale for their satisfaction. The master was directed to see that all costs were paid to the persons entitled to receive them, and that in case of a deficiency after sale, to satisfy the amount found due it should be applied as far as it would reach. We find no error in the form of the decree.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

243 - 28901

KAZMIERZ PAWLAK, Appellee, vs. A. J. WLODARSKI, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 648

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued to recover the sum of $281.25 which he had paid to appellant Wlodarski in March, 1920, to be exchanged into Polish marks and remitted to certain designated payees.

For such money appellant gave receipts upon a form he had previously used while agent for the Finance Express Syndicate, incorporated, but with which he had ceased to do business. Said Syndicate was also made defendant but dismissed out of the suit.

The receipts, one dated March 9, 1920, and two on March 17, 1920, acknowledged the receipt of such moneys to be transmitted for payment to the designated payees, 14,000 and 15,000 marks to one, and 10,000 marks to another, and stated that the remittances would be effected "by our European correspondents * * * and that all claims for erroneous delivery or non-delivery must be filed within three months from that date," thus apparently contemplating immediate transmission. While the receipt purported to be given by Wlodarski as agent for said Syndicate, as he had ceased to be its agent at that time it must be construed as a personal obligation on his part. He had, as he claimed, an account with a bank in Poland upon which he drew a check on September 24, 1920, for 15,000 Polish marks, payable to the order of one of the payees, and 10,000 Polish marks to the order of the other payee, and on January 31, 1921, his check for 72,100 Polish marks to the

order of one of said payees. He claimed that these checks were transmitted to said bank. The mark had continued to depreciate in value after defendant received plaintiff's money. Defendant's excuse for not attempting transmission earlier was because of what he claimed was the unsettled state of affairs of Poland at that time, and that he was trying to find out the best system under which to send the money. Just why he delayed sending the last check after sending the others, or why he could not have sent them all before he did, is not satisfactorily explained, in view of the fact that he was enabled to make a profit of over $120, according to the value of the marks when he claims to have sent the checks, and also in view of uncontradicted evidence by those engaged in similar business at that time that remittances could be made to Poland on an average of from three to eight weeks from March, 1920, until June, 1921. Defendant claims that when he remitted in January, 1921, he undertook to remit on the basis of the value of the mark at that time, when it was greatly depreciated and practically valueless.

Defendant produced in his hand-writing what he claimed were duplicates of the orders on said bank. In form each directed the bank to pay "this check" to the order of the designated payee. It apparently called for the payee's endorsement thereof. But defendant made no proof that any of the orders were received or endorsed by the respective payees, or that they gave any receipt of payment. It was shown by the testimony of others engaged in similar business that a receipt was customarily required from the payee. Defendant relied entirely on a mere statement from said bank purporting to show it had paid certain checks drawn on it, including those intended to be paid to said payee. But such statement was a mere declaration in defendant's favor that was not binding on defendant or said payees, and of itself constituted no proof of payment to them.

after of one of said payees. It claimed that these drafts were transmitted to said bank. The mark had continued to depreciate in value after defendant received plaintiff's money. Defendant's excuse for not attempting transmission earlier was because of what he claimed was the unsettled state of affairs of Poland at that time, and that he was trying to find out the best system under which to send the money. [illegible] sending the last check after reading the orders, as why he could not have sent them all earlier as was, is not satisfactorily explained, in view of the fact that he was enabled to send a credit at that time, according to the price of the marks when the orders he then had the money, and also in view of uncontradicted evidence by those engaged in similar business at that time that remittances could be made to Poland at an average of from three to eight weeks from March, 1920, until June, 1921. Defendant claims that when he remitted in January, 1921, he undertook to remit on the basis of the value of the mark at that time, when it was greatly depreciated and practically valueless.

Defendant produced in his hand-writing what he claimed were duplicates of the orders to said bank. In form each directed the bank to pay "this amount" to the order of the designated payee. It apparently called for the payee's endorsement thereof. But defendant made no proof that any of the orders were received or endorsed by the respective payees, or that they gave any receipt of payment. It was shown by the testimony of others engaged in similar business that a receipt was customarily required from the payee. Defendant relied entirely on a later statement from said bank purporting to show it had paid certain orders drawn on it, including those claimed to be paid to said payees. And such statement was a mere declaration in defendant's favor that was not binding on defendant or said payees, and of itself constituted no proof of payment to them.

We think, therefore, that the court's finding and judgment were justified because of the failure of defendant to prove delivery of the marks. This view of the case dispenses with the necessity of discussing other evidence or points of the case.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

282 - 28940

IN RE ESTATE OF JOHN W. WALKER,
deceased,

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

WILLIAM L. MARTIN, individually
and administrator of the estate
of JOHN W. WALKER, deceased,
Appellant.

APPEAL FROM

PROBATE COURT,

COOK COUNTY.

233 I.A. [illegible]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Probate Court of Cook County committing William L. Martin for contempt of court. The case is before us on a praecipe record which shows that appellant was appointed administrator of the estate of John W. Walker, deceased, February 8, 1916, and that on April 15, 1916, he was removed and Lewis [illegible]. Cayner appointed administrator _de bonis non_. The order of removal required him to file his final account within ten days.

It appears that he appealed from such order and that it was affirmed, and, presumably in compliance therewith, he on June 18, 1919, filed as administrator of said estate what purported to be his final account. On July 2, 1920, the court on "the cause coming to be heard on the final account" referred to the same as a "current" account, found that he had not filed a final account, and stating his account therein found that he had committed waste of assets of the estate to the amount of $837.63 and ordered him to turn over that sum with interest from February 8, 1916, to the administrator _de bonis non_ within ten days. On January 24, 1923, an order was entered on the petition of the administrator _de bonis non_ for a rule on said Martin to

show cause why he should not be attached and punished for contempt of court for failure to comply with the order of July 2, 1920. The petition set forth prior proceedings of that court in the estate and that Martin had appealed from a denial of his motion to vacate the order of July 2, 1920, to the Circuit Court and later to this court from an order of that court dismissing the appeal, that this court remanded the cause to the Circuit Court for trial upon its merits, that after remandment the appeal was again dismissed by the Circuit Court, and, the order becoming final, a certified copy of the same was filed in the Probate Court January 18, 1923.

To the rule so entered Martin filed an answer, raising issues of fact as to whether the estate owned certain personal property with which he was charged, and whether he should not be credited with his alleged payment of the funeral bill, and setting forth other matters which need not be recited.

The order appealed from states that he was brought before the court on attachment and the rule to show cause, and that "on oral proof taken in open court submitted by the people and said defendant" the court found that he has not complied with the order of July 2, 1920, and failed to show good cause why he did not comply with said order, and why he should not be so adjudged in contempt of court.

There is no bill of exceptions in the record to show the oral proof so taken. That being the case we must presume it was sufficient to support the court's findings.

We must also presume, in the absence of any showing to the contrary, that when the appeal from the order of July 2, 1920, came before the Circuit Court on remandment of the cause by this court it was properly dismissed for want of prosecution.

Upon these presumptions we have no other alternative than to affirm the order of commitment.

Appellant raises only two points in his brief: One rests upon his assertion as to what were the facts of the case, and the other, upon the contention that the order of commitment should recite that the disobedience to the decree was wilful. The former point is not open to discussion because as stated, appellant failed to preserve the testimony had at the hearing, and as to the second point, the authorities cited by him do not sustain the proposition. They do hold that it must appear from the record that disobedience is wilful. The findings of fact by the court sustain the inference that it was.

Accordingly the order will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

31552

88 - 28739

STANDARD TRUST AND SAVINGS BANK, a Corporation, Appellant,

vs.

W. E. MIELLY et al., Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

233 I.A. 648

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the defendants in a suit brought against the maker, the indorsers and the alleged guarantors of a promissory note for $6,000. The note is dated October 17, 1919, is payable thirty days after its date, at the plaintiff's bank, and is signed by H. J. Petersen Company, a corporation, and indorsed by the defendants H. J. Petersen, Otto Fetting and Josiah L. Rice. Two days before it was executed the defendants W. E. Mielly and R. H. Agate signed a written agreement, in which they guaranteed the payment of any and all indebtedness and liability of every kind of said H. J. Petersen Company to the plaintiff, to the extent of $6,000, with interest and costs of collection.

To a declaration setting up the note and the agreement above mentioned, the defendants Mielly, Fetting and Rice filed separate sworn pleas denying any joint liability. The defendants Fetting and Rice also pleaded that they were discharged from liability because of the alleged failure of the plaintiff to give them notice of the non-payment of the note as required by law. The maker of the note was defaulted. The defendants Petersen and Agate were not served with process, nor did they enter their appearance.

Upon the trial, which was before the court without a jury, plaintiff introduced the note and the guaranty agreement

signed by Mielly and Agate; also testimony tending to prove that the plaintiff never held any obligation of the Petersen company other than the note in question and the prior note which it renewed; that during the forenoon of the day the note matured, the indorsers Petersen and Fetting called at the plaintiff's bank and asked that the note be renewed, but their request was refused by the president of the bank, who called their attention to the fact that they were liable as indorsers and told them the note must be paid; that after banking hours on that day the president of the bank dictated letters to the defendants Rice and Mielly telling them of the non-payment of the note, which letters (he testified) he left with his secretary to be mailed, after he signed them, and that he last saw them on the secretary's desk. The secretary did not testify. The plaintiff was also permitted to introduce a letter from Rice to the president of the bank, dated in January, 1930, offering to convey to the bank certain New Mexico land valued at $2,500 "in release of my liability and that of W. B. Mielly as indorsers of the Petersen Company note." The defendants offered no evidence.

Defendants' counsel contend that this evidence is not sufficient to charge Rice and Fetting as indorsers, that there is no joint liability upon the note between those who indorsed it and those who signed the separate general guaranty of indebtedness, and that the Act of 1895, permitting all persons liable upon a promissory note to be sued in one action, has no application to facts such as are here shown.

After a study of the evidence contained in the record, we fail to find any competent evidence that the letters dictated by the president of the bank to Rice and to Mielly were ever mailed by anyone, or were ever received by them. The oral notice to Fetting and Petersen can hardly be called a notice of non-payment, even if

signed by Kielly and Agnew; also testimony tending to prove that the plaintiff never held any obligation of the Paterson company other than the note in question and the prior note which it renewed; that during the afternoon of the day the note matured, the defendants Paterson and Kettner called at the plaintiff's bank and asked that the note be renewed, but their request was refused by the president of the bank, who called their attention to the fact that they were liable as indorsers and told them the note must be paid; that after banking hours on that day the president of the bank dictated letters to the defendants Rice and Kielly telling them of the nonpayment of the note, which letters the plaintiff he left with his secretary to be mailed, after he signed them, and that at least one of them was on the secretary's desk. The secretary did not testify. The plaintiff was also permitted to introduce a letter from Rice to the president of the bank, dated in January, 1931, offering to convey to the bank certain New Mexico land valued at $1,500 "in release of my liability and that of W. H. Kielly as indorsers of the Paterson company note." The defendants offered no evidence.

Defendants' counsel contend that this evidence is not sufficient to charge Rice and Kettner as indorsers, that there is no joint liability upon the note between those who indorsed it and those who signed the separate general guaranty of indebtedness, and that the Act of 1931, permitting all parties liable upon a promissory note to be sued in one action, has no application to facts such as are here shown.

After a study of the evidence contained in the record, we fail to find any competent evidence that the letters dictated by the president of the bank to Rice and to Kielly were ever mailed by anyone, or were ever received by them. The oral notice to Kettner and Paterson can hardly be called a notice of non-payment, even if

it had been given at the proper time. It was merely a hint to them to see that the note was paid during that day, by calling their attention to their liability as indorsers. There is no other evidence of any notice to Fetting of non-payment, and therefore, by the express terms of the statute (Article VII, Negotiable Instruments Act), both Fetting and Rice were discharged by the failure of the plaintiff to give them notice of the non-payment of the note at maturity, unless, as to the defendant Rice, the offer that was made by him, two months later, for a release of his liability, can be held to be a waiver of such notice. We do not think it can be so held, for the reason that there is no proof that at that time Rice had any knowledge that he was discharged as indorser by the failure of plaintiff to give him notice at once, by mail or otherwise, of the fact that the note had not been paid at maturity. If the letter written by Rice in January, 1920, be considered as an unequivocal offer of payment, it has been held in this state that such an offer is not a waiver of the statutory notice of dishonor, unless it is shown that the offer was made with a full knowledge of the facts which would discharge him, and the burden of proving such knowledge is on the plaintiff. (Morgan v. Peet, 32 Ill. 281, 285; S. C. 41 Ill. 347; Walker v. Rogers, 40 Ill. 278.) No presumption arises from the fact alone that Rice did not receive any notice (if such was the fact) that he must have known no notice was mailed. If the notice had been put in the mail, it would be presumed that he had notice, even if he never received it. (Neg. Insts. Act, Sec. 104.) But he could not be charged with knowledge that no notice was ever mailed, in the absence of evidence to that effect.

We are also inclined to agree with defendant's counsel that the defendants Kielly and Agate could not be joined in one action with the other defendants. Section [illegible] of the Act of

it had been given at the proper time. It was merely a hint to them to see that the note was paid during that day, by calling their attention to their liability as indorsers. There is no other evidence of any notice to Fortney of non-payment, and therefore, by the express terms of the statute (Article III, Negotiable Instruments Act), both Fortney and Wise were discharged by the failure of the plaintiff to give them notice of the non-payment of the note at maturity, unless, as to the defendant Wise, the offer that was made by him, the [illegible] letter, was a [illegible] of his liability, can be held to be a waiver of such notice. We do not think it can be so held, for the reason that there is no proof that at that time Wise had any knowledge that he was discharged as indorser by the failure of plaintiff to give him notice of dishonor, by mail or otherwise, of the fact that the note had not been paid at maturity. If the letter written by Wise in January, [illegible], be considered as an unconditional offer of payment, it has been held in this state that such an offer is not a waiver of the statutory notice of dishonor, unless it is shown that the offer was made with a full knowledge of the facts which would discharge him, and the burden of proving such knowledge is on the plaintiff. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible].) No presumption arises from the fact alone that Wise did not receive any notice (if such was the fact) that he must have known no notice was mailed. If the notice had been put in the mail, it would be presumed that he had notice, even if he never received it. (Neg. Instr. Act, sec. [illegible].) But he could not be charged with knowledge that no notice was ever mailed, in the absence of evidence to that effect.

We are also inclined to agree with defendant's counsel that the defendants [illegible] and [illegible] could not be joined in the action with the other defendants. Section [illegible] of the Act of

1895 relating to suits on promissory notes (Cahill's Statutes, Chap. 98, Par. 6) authorizes the holder of a promissory note to include in one action all persons who are "severally liable upon" the promissory note which is the foundation of the suit. We think it cannot be held that the liability of the defendants Kielly and Agate, if any, is a liability upon the note. The note is payable to the order of the plaintiff and is negotiable. The guaranty is to the plaintiff only and is not negotiable. The liability of such guarantors is upon their guaranty, which is a distinct and separate and wholly different contract from that of the other defendants. The latter are liable upon the note itself, which is not the case with these guarantors.

The trial court offered to permit the plaintiff, if it desired, to take a judgment against the corporation (which was in default), but the plaintiff declined the offer. From the view we take of the facts shown by the record, the situation thereafter was such that no other finding or judgment except one in favor of the defendants could have been entered.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

149 - 28801

ANITA PATTI BROWN, Appellee, vs. THE OWL DRUG COMPANY, a corporation, et al., On Appeal of THE OWL DRUG COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 618

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for a statutory penalty of $75 for an alleged violation of the "Civil Rights Act." Upon this appeal defendant claims the verdict is contrary to the evidence.

Plaintiff and a friend, both colored women, entered defendant's drug store, in Chicago, soon after noon on August 9, 1921. They asked the porter if coffee was served there. He gave an affirmative answer and directed them to a counter at the soda fountain, where two waitresses were attempting to serve twenty-five or thirty customers seated on stools in front of the counter. As fast as the seats were vacated, they were taken by other customers. Plaintiff found a stool at one end of the counter, and her friend found one near the other end. Plaintiff testified that after waiting a while she asked one of the girls behind the counter to wait on her; that the girl "paid me no mind and didn't answer;" that as the seats were emptied she would change her seat and "move along," until she and her friend had seats together; that a customer seated next to the plaintiff was served and went away, and another was served and went away, and plaintiff then said to the waitress: "Why don't you wait on me?;" that the girl,

who at that moment was wiping glasses, replied: "I am busy;" that plaintiff then said: "You are not too busy to wipe off those glasses and things;" that when the girl made no reply to this remark, plaintiff spoke to the porter and he pointed out the manager, whereupon the waitress went over and spoke to the manager, who "must have felt something coming" and disappeared; that the waitress returned to her work behind the counter, and said in an undertone to another customer: "The manager doesn't allow us to serve colored people;" that plaintiff then complained to the floorman, who, after hearing her story, walked to the counter and asked the girl to wait on plaintiff, but the girl made no answer and kept on serving other customers; that plaintiff then left the counter and demanded her "money back" for some purchases she had made earlier that day, which was given her, and then - half an hour after she entered - she left the store. The story of plaintiff's companion is to the same effect, in less detail. These were plaintiff's only witnesses.

On behalf of defendant, the waitress whom plaintiff accused flatly denied that she refused to serve the plaintiff and denied that she made the remark attributed to her about not being allowed to serve colored people. She testified that plaintiff asked several times to be waited upon, and that twice the witness replied that she would wait on her; that she was busy at the time "waiting on trade" and washing glasses - which, she said, "was sometimes necessary" while customers were waiting; that after waiting possibly ten minutes, plaintiff left the fountain; that, soon after, she came back with the floorman, who asked her to be seated and asked the waitress to wait on her, but plaintiff refused his request and walked away.

The floorman testified that after helping the plaintiff to get her "money back" from the cashier, he told the

who at that moment was wiping glasses, replied: "I am busy;" that plaintiff then said: "You are not too busy to wipe off those glasses and things;" that when the girl made no reply to this remark, plaintiff spoke to the porter and he pointed out the manager, whereupon the waitress went over and spoke to the manager, who "must have felt something coming" and disappeared; that the waitress returned to her work behind the counter, and said in an undertone to another customer: "The manager doesn't allow us to serve colored people;" that plaintiff then complained to the floorman, who, after hearing her story, walked to the counter and asked the girl to wait on plaintiff, but the girl made no answer and kept on serving other customers; that plaintiff then left the counter and demanded her "money back" for some purchases she had made earlier that day, which was given her, and then - half an hour after she entered - she left the store. The story of plaintiff's companion is to the same effect, in less detail. These were plaintiff's only witnesses.

On behalf of defendant, the waitress whom plaintiff accused flatly denied that she refused to serve the plaintiff and denied that she made the remark attributed to her about not being allowed to serve colored people. She testified that plaintiff asked several times to be waited upon, and that twice the witness replied that she would wait on her; that she was busy at the time "waiting on trade" and washing glasses - which, she said, "was sometimes necessary" while customers were waiting; that after waiting possibly ten minutes, plaintiff left the fountain; that, soon after, she came back with the floorman, who asked her to be seated and asked the waitress to wait on her, but plaintiff refused his request and walked away.

The floorman testified that after helping the plaintiff to get her "money back" from the cashier, he told the

colored women that if they would be seated he would see that they were served, but both refused his offer. The manager in charge of the store at the time testified that he did not try to avoid the plaintiff, but that on the contrary, the plaintiff's friend complained to him that she had asked for service and had been refused, whereupon he took her to the counter, found seats for both women, and called on one of the dispensers to serve them.

Plaintiff and her companion were recalled in rebuttal. They denied that they spoke to the manager or he to them. As to the floorman's story, however, they did not deny that the floorman offered to serve them and that they had refused, as he testified. They merely denied that the floorman asked them "to sit down," or "to be seated." They were not asked whether he offered "to serve them," or "to see that they were served," (as he testified) and his testimony in that respect is not otherwise in any manner contradicted by any evidence in the record.

In view of the floorman's testimony, corroborated, as it was, by the testimony of the waitress, and not squarely contradicted by either of plaintiff's witnesses, we cannot say that the plaintiff sustained the burden resting on her to prove her case by a preponderance of the evidence. On the contrary, in view of that evidence, we are constrained to hold that the verdict is manifestly against the weight of the evidence. The court, without objection, instructed the jury that if they believed that defendant's manager offered to serve the plaintiff, and that she refused such service, the defendant must be found not guilty. Apparently, the jury overlooked, or disregarded, this instruction.

When this court has reached the conclusion that a

verdict is manifestly against the weight of the evidence, it is its duty to set it aside, (Donelson v. E. St. Louis & S. Ry. Co., 235 Ill. 625) and enter the proper finding in this court. (Segal v. C. C. Ry. Co., 216 Ill. App. 11.)

For the reasons stated, the judgment of the Municipal Court will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

149 - 23801

FINDING OF FACT.

The court finds that the defendant did not deny to the plaintiff, on account of her color, service at the soda fountain or its place of business, as charged in the plaintiff's statement of claim.

167 - 28821

SAM and BEN GOLD,
Appellees,

vs.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 6 9

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In an action brought upon a burglary insurance policy issued by the defendant, plaintiffs recovered a judgment for the value of two fur coats lost by burglary. On this appeal defendant claims that the trial court erred in refusing an instruction offered by it, which, if given, would have reduced the amount of the verdict from $825 to $550. The only question here involved is whether the court erred in such refusal.

The facts are undisputed. Plaintiffs are partners in the "ladies' - ready-to-wear" business, with a place of business in Chicago. They had two fur coats in their show window, valued at $825. One night, when their store was closed, a burglar broke the window with a brick and carried off the coats. Plaintiffs' stock of ladies' suits, cloaks, furs and silks was covered by a policy of burglary insurance to the aggregate amount of $3,500. In one paragraph of the insurance policy it is provided that defendant shall not be liable for more than $25 on any one article of merchandise stolen from a show window by one who breaks the window from the outside, "unless additional coverage is specifically provided under "Item C, General Provisions 14." The paragraph thus referred to as Item C" provides specifically for $1,000 additional insurance on merchandise contained in a show window

if the loss thereof is occasioned by one who breaks the window from the outside when the premises are not open for business, with the proviso that defendant's liability "for loss of, or damage to, any one article shall not exceed twenty-five per cent of the amount of insurance provided specifically under this item, nor, in any event, in excess of $500 as respects loss on any one article."

At the close of the evidence, defendant asked the court to instruct the jury that "it is provided by the policy that the amount of insurance on any one item shall not exceed $275, and you cannot allow more than $275 on either of the two items in question in this case." The court refused to give the instruction to the jury, and defendant duly excepted. Thereupon, the court orally instructed the jury, in substance, that the jury should examine the insurance policy in evidence "and judge for yourselves what amount is due to the plaintiffs;" that the plaintiffs' claim "they should recover $835;" that "it is for you to say, gentlemen, what the amount should be;" and that "it is for you to construe, if you can, the meaning of that policy."

The facts being admitted - or, at least, not disputed - it was the duty of the court, and not that of the jury, to construe the written contract between the parties. Plaintiffs' counsel contend that the provisions of the policy are ambiguous, and should be construed most strongly against the insurance company. This contention begs the question at issue, which is, whether the court erred in refusing to construe the policy as requested. However, we find nothing ambiguous in the language of the policy, when the whole contract is read and considered together. "Item 6, of General Provisions 14," was evidently intended to fix a limit upon the liability of defendant for such a loss as is therein described, to an amount which for any one article should not exceed twenty-five per cent of the additional insurance

[illegible] with the proviso that defendant's liability "for loss of, or damage to, any one article shall not exceed twenty-five per cent of the amount of insurance provided specifically under this item, nor, in any event, in excess of (the) actual cash value of any one article."

At the close of the evidence, defendant asked the court to instruct the jury that "It is provided by the policy that the amount of insurance on any one item shall not exceed 25%, but you cannot allow more than $250 on either of the two items in question in this case." The court refused to give the instruction to the jury, and defendant duly excepted. Thereupon, the court orally instructed the jury, in substance, that the jury should examine the insurance policy in evidence "and judge for yourselves what amount is due to the plaintiffs;" that the plaintiffs' claim "they should recover $500;" that "it is for you to say, gentlemen, what the amount should be;" and that "it is for you to construe, if you can, the wording of that policy."

The facts being admitted — or, at least, not disputed — it was the duty of the court, and not that of the jury, to construe the written contract between the parties. Plaintiffs' counsel contend that the provisions of the policy are ambiguous, and should be construed most strongly against the insurance company. This contention brings the question at issue, which is, whether the third rider is ambiguous. However, we find no such ambiguity in the language of the policy, when the whole contract is read and construed together. "Clause 5, of General Provisions 11," was evidently intended to fix a limit upon the liability of defendant for each of the items so therein described, in an amount which for any one article should not exceed twenty-five per cent of the aggregate insurance

specified in that item, and in no event should exceed $500 on any one article. Clearly, the meaning of the second condition or qualification is that if twenty-five per cent of the amount of additional insurance as specified exceeds $500, defendant shall not be liable for more than that amount for the loss of any one article. The instruction offered was in accordance with this construction of the policy, and should have been given. It was manifest error to refuse it.

Plaintiffs' counsel also contend that the question here presented is not properly preserved for review, for the alleged reason that no motion for a new trial was made. The contrary was held in Yarber v. Chicago & Alton Ry. Co., 235 Ill. 589.

It is finally contended that the affidavit of merits filed in the Municipal Court did not raise the defense made by the offered instruction. The statute does not require any affidavit of merits to be filed in the Municipal Court, and we cannot take judicial notice of any rules of that court which are not in the record.

If, therefore, the plaintiffs shall, within ten days from the date this opinion is filed, file in the clerk's office a remittitur to the amount of $375, the judgment for the remainder, viz., $500 will be affirmed; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED IF REMITTITUR IS FILED,
OTHERWISE REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

or the loss thereof is calculated by [illegible] the [illegible] from the [illegible] which the [illegible] are put upon the business, with the proviso that defendant's liability for loss of, or damage to, any one article shall not exceed twenty-five per cent of the amount of insurance provided specifically under this item, and, in any event, an amount of [illegible] each any one article.'

At the close of the evidence, defendant asked the court to instruct the jury that "It is provided by the policy that the amount of insurance on any one item shall not exceed 25%, and you cannot allow more than 25% on either of the two items in question in this case." The court refused to give the instruction to the jury, and defendant duly excepted. Moreover, the court orally instructed the jury, in substance, that the jury should examine the insurance policy in evidence "and judge for yourselves what amount is due to the plaintiffs;" that the plaintiffs' claim "they should recover [illegible];" that "it is for you to say, gentlemen, what the amount should be;" and that "it is for you to construe, if you can, the wording of that policy."

The facts being admitted - [illegible] -
it was the duty of the court, and not that of the jury, to construe the written contract between the parties. Plaintiffs' counsel contend that the provisions of the policy are ambiguous, and should be construed most strongly against the insurance company. This contention begs the question at issue, which is, whether the court erred in refusing to construe the policy as requested. However, we find nothing ambiguous in the language of the policy, when the whole contract is read and considered together. Clause 2, of General Provisions 13, was evidently intended to fix a limit upon the liability of defendant for such a loss as is therein described, to an amount which for any one article should not exceed twenty-five per cent of the additional insurance

specified in that item, and in no event should exceed $500 on any one article. Clearly, the meaning of the second condition or qualification is that if twenty-five per cent of the amount of additional insurance so specified exceeds $500, defendant shall not be liable for more than that amount for the loss of any one article. The instruction offered was in accordance with this construction of the policy, and should have been given. It was manifest error to refuse it.

Plaintiffs' counsel also contend that the question here presented is not properly preserved for review, for the alleged reason that no motion for a new trial was made. The contrary was held in Yarber v. Chicago & Alton Ry. Co., 235 Ill. 589.

It is finally contended that the affidavit of merits filed in the Municipal Court did not raise the defense made by the offered instruction. The statute does not require any affidavit of merits to be filed in the Municipal Court, and we cannot take judicial notice of any rules of that court which are not in the record.

If, therefore, the plaintiffs shall, within ten days from the date this opinion is filed, file in the clerk's office a remittitur to the amount of $275, the judgment for the remainder, viz., $550 will be affirmed; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED IF REMITTITUR IS FILED,
OTHERWISE REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

87 - 28738

L. A. WASHBURN,
Appellant,

vs.

D. J. HAYES,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

235 I.A. 649

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, L. A. Washburn, from a judgment in the Municipal court of Chicago, in favor of the defendant, D. J. Hayes, in an action brought by the plaintiff to recover real estate brokerage commissions alleged to have been earned by the plaintiff for procuring a purchaser for certain property owned by the defendant.

The principal question in the case is one of fact, and that is, what were the terms on which the defendant agreed to sell his property to any purchaser which the plaintiff might procure. The plaintiff is a real estate broker in the city of Chicago. A salesman of the plaintiff named Connolly obtained from the defendant the authority to sell defendant's property. The plaintiff procured a purchaser by the name of Petersen, who signed a contract to purchase the property at a price of $35,000; $10,000 to be paid in cash; a first mortgage of $14,000 to be assumed; a second mortgage for $11,000 to be given back, to be paid in quarterly payments of $375 or more on or before the expiration of five years; and $1,000 deposited as "earnest money." The defendant refused to sell his property on the terms proposed.

The plaintiff contends that the terms contained in the proposed contract are substantially the terms on which the defendant agreed to sell his property to any purchaser which the plaintiff might procure. The defendant denies that these were the terms agreed upon between him and the plaintiff.

According to the testimony of Connelly, the salesman of the plaintiff, he went to the defendant's residence and asked him if the property in question was for sale, and if so, what was the price which the defendant asked; that the defendant told him the property was for sale at $35,000, and that he would allow $1,000 as a commission on a sale of the property for $35,000, and that he wanted $10,000 as a cash payment; that the trade price of the property was $37,500; that there was a first mortgage of $14,000 on the property; that Petersen first signed a proposed contract for $33,000, but that the defendant "wouldn't listen to it;" that the defendant said he wanted $35,000; that later Petersen signed the contract for $35,000, previously referred to; that the contract was submitted to the defendant by him, Connelly, in the presence of the plaintiff, and that the defendant said, "That looks all right;" that the plaintiff asked the defendant to sign the contract and that the defendant said, "I won't sign it now, but I will call you up about five o'clock;" that the defendant did not call up; that "we" called him up and his wife said that he would call "us" the next morning; that the defendant called up the following Sunday and asked to see him, Connelly, in person that afternoon; that he, Connelly, went to see the defendant, took the contract with him and talked over the details with the defendant; that the defendant said he "couldn't take it;" that he would "have to have $36,000;" that the defendant said, "You go back and get Petersen on the contract for $36,000;" that he, Connelly, said, "We could not get him;" that "we had as much as we could do to get him on it for $35,000;" that the defendant said, "It is my property and I will do as I please with it; I don't have to sign; you can't bluff me."

The plaintiff's testimony is substantially the same as Connelly's as to the terms. The plaintiff testified that the defendant in a conversation with the plaintiff stated that he would

According to the testimony of Connelly, the salesman of the plaintiff, he went to the defendant's residence and asked him if the property in question was for sale, and if so, what was the price; that the defendant stated that the following [illegible] the property was for sale at $[illegible], and that he would allow $1,000 as a commission on a sale of the property for $[illegible], and that he wanted $[illegible] as a cash payment; that the trade price of the property was $[illegible]; that there was a first mortgage of $[illegible] on the property [illegible] signed a contract for $[illegible], but that the defendant [illegible] it;" that the defendant said he wanted $[illegible]; that later [illegible] signed the contract for $[illegible], containing [illegible], and the contract was submitted to the defendant by Mr. Connelly, in the presence of the plaintiff, and that the defendant said, "That looks all right;" that the plaintiff asked the defendant to sign the contract and that the defendant said, "I won't sign it now, but I will wait for about five minutes;" that the defendant did not call [illegible] that "he called him up and said that he would call [illegible] the next morning; that the defendant called up the following Monday and talked to Mrs. Connelly, in person [illegible]; that Mr. Connelly went to see the defendant, took the contract with him and talked over the details with the defendant; that the defendant said [illegible] that he would [illegible] $[illegible];" that the defendant said, "[illegible] the contract for $[illegible];" that Mr. Connelly said, "We might not get him;" that "we had as much as we could do to get him on it for $[illegible];" that the defendant said, "It is my property and I will do as I please with it; I won't come to terms; you would [illegible] me."

The plaintiff's testimony [illegible] the same as Connelly's as to the terms. The plaintiff testified that the defendant in a conversation with the plaintiff stated that he would

take $35,000 with $10,000 cash and a second mortgage payable in installments of $1000 or $1500 a year; that the defendant refused to sign the proposed contract for the sale of the property at $33,000, but said that he would sign a contract in which the price was $35,000; that the proposed contract signed by Petersen, in which the price was $35,000, was submitted to the defendant; that he read it and said it looked all right to him; that when he was asked to sign the contract he said, "I will talk this over with my wife and you can call me about five o'clock;" that while the defendant was reading the contract his attention was called to the fact that the terms in regard to the second mortgage were better than the defendant requested; that the next morning the defendant stated over the telephone that he had raised the price to $36,000 and would not accept the contract; that the terms were satisfactory otherwise.

The defendant testified that the terms he gave to Connelly were $35,000; $12,000 cash and $150 a month, and that Connelly said, "All right" and "put it down;" that Connelly said, "You understand our charge is three per cent.," and that he, the defendant, said, "Yes;" but that he did not agree to pay $1050 commission; that when the $33,000 contract was offered to him he said "nothing doing;" that later the plaintiff called him up and said, "I know a party that will pay you $34,000;" that he, the defendant, said "nothing doing;" that when he was offered the contract signed by Petersen, he, the defendant, said, "The price looks all right;" that the plaintiff said, "What are you going to do about it?" that he, the defendant, said, "I will talk it over with my wife when I get home and will consider it and call you up and let you know what I am going to do;" that the plaintiff left and took the contract; that the next morning the plaintiff got in touch with him, and that he told the plaintiff, "I won't accept the contract;" that he said to the

[illegible] with $1[illegible] cash and a second mortgage payable in installments at [illegible] a year; that the defendant refused to sign the proposed contract for the sale of the property at $1[illegible], but said that he would sign a contract in which the price was $1[illegible]; that the proposed contract signed by [illegible], in which the price was $1[illegible], was submitted to the defendant; that he read it and said it looked all right to him; that when he was asked to sign the contract he said, "I will talk this over with my wife and you can tell me about five o'clock," that while the defendant was reading the contract his attention was called to the fact that the terms he agreed to [illegible] the second mortgage were [illegible] than the defendant requested; that the next morning the defendant stated over the telephone that he had raised the price to $1[illegible] and would not accept the contract; that the terms were satisfactory otherwise.

The defendant testified that the terms he gave as [illegible] were $1[illegible], $1[illegible] cash and $[illegible] a month, and that [illegible] said, "All right" and "Put it down;" that [illegible] said, "The salesman's charge is three per cent.," and that he, the defendant, said, "Yes;" but that he did not agree to pay such commission; that when the $1[illegible] contract was offered to him he said "Nothing doing;" that later the plaintiff called him up and said, "I have a party that will pay you $1[illegible];" that he, the defendant, said "Nothing doing;" that when he was offered the contract signed by [illegible], he, the defendant, said, "The price looks all right;" that the plaintiff said, "What are you going to do about it?" that he, the defendant, said, "I will talk it over with my wife when I get home and will consider it and will let you know what I am going to do;" that the plaintiff left and [illegible]; that the next morning the plaintiff got in touch with him, and that he told the plaintiff, "I won't accept the contract;" that he paid to the

plaintiff, "From now on my price will be $36,000;" that Connelly called at his, defendant's, house the following Sunday and asked him, the defendant, what was the matter; that the defendant told Connelly that he had told him that he, the defendant, wouldn't take $125 a month; that Connelly said that he had, and the defendant said that he had not; that he, the defendant, said to Connelly, "I said $12,000 cash and $150 a month. You ought to remember that;" that Connelly said, "We are going to hold you;" that he, the defendant, said, "Well, I am through, get out;" that Connelly said, "There is no use taking offense;" that he, the defendant, said, "All right, you get me my price of $36,000 on the original terms, $12,000 and $150 a month and I will hold it good with you for a week."

We think that enough of the testimony has been stated to show that there is a conflict on the controlling issue of fact in the case. In our opinion the finding of the trial court is not manifestly against the weight of the evidence; and in view of the conflict of the evidence we do not feel that we should disturb the finding. "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." Illinois Central R.R.Co. v. Gillis, 68 Ill., 317, 319; Bradley v. Palmer, 193 Ill., 15, 30. The same force and effect should be given to the finding of a judge as to the verdict of a jury. Field v. Chicago & Rock Island R. R. Co., 71 Ill., 458, 461.

It is contended by counsel for the plaintiff that the trial court committed reversible error in admitting improper evidence on behalf of the defendant. The evidence consisted of the testimony of two real estate agents to the effect that the defendant had

Donnelly, "From now on we are partners [illegible]" and Donnelly called White, defendant's, [illegible] the following [illegible] and asked him, the defendant, what was the matter; that the defendant told Donnelly that he had told him that he, the defendant, wanted a raise [illegible] a month; that Donnelly said that he had, and the defendant said that he had not; that he, the defendant, said to Donnelly, "I made $25,000 cash and $150 a month. You ought to remember that;" that Donnelly said, "We are going to fire you;" that he, the defendant, said, "Well, I am through, get out;" that Donnelly said, "Where is my [illegible] witness?" that he, the defendant, said, "All right, you put me up [illegible] of $50,000 on the original terms, $25,000 and $250 a month and I will [illegible] it good with you for a week."

We think that enough of the testimony has been stated to show that there is a conflict on the controlling issue of fact in the case. In our opinion the finding of the trial court is not manifestly against the weight of the evidence; and in view of the conflict of the evidence we do not feel that we should disturb the finding. "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." Illinois Central R.R. Co. v. Gillis, 68 Ill. 317, 320; Reuter v. [illegible], 243 Ill., 18, 21. The same force and effect should be given to the finding of a judge as to the verdict of a jury. Field v. Chicago & Rock Island R.R. Co., 71 Ill., [illegible].

It is contended by counsel for the plaintiff that the trial court committed reversible error in admitting improper evidence on behalf of the defendant. The evidence complained of the testimony of two real estate agents to the effect that the defendant had

"listed" his property with them for sale on terms that included a cash payment of $12,000; and of the written memoranda which the agents had made of the terms of sale, which memoranda were admitted in evidence. Without deciding whether the evidence was admissible or inadmissible, we are of the opinion that even though the evidence should be held to be improper, its admission would not constitute reversible error. The case was heard by the trial court without a jury; and it will be presumed, therefore, that the court did not consider improper evidence in reaching a decision. Transportation Company v. Joesting, 89 Ill., 152, 155; Kreiling v. Nortrup, 215 Ill., 195, 198; Pratt v. Davis, 224 Ill., 300, 309.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

166 - 28820

HARRY KOLBER,
Appellee,

vs.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Limited, of London, England,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 649

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the Employers' Liability Assurance Corporation, limited, from a judgment in the Municipal court of the City of Chicago, in favor of the plaintiff, Harry Kolber, in an action brought by him to recover benefits under a disability insurance policy issued by the defendant.

The plaintiff alleges that he became ill and disabled from hernia, and was compelled to undergo an abdominal operation for hernia. The defendant resists the plaintiff's action on two grounds: First, that the insurance policy provides that the insurance does not cover disability from any disease which was contracted within fifteen days from the date the policy was issued; and that the plaintiff contracted hernia within fifteen days from the date the policy was issued. Second, that at the time the application for the insurance was signed and the policy for insurance was issued, the plaintiff was suffering from hernia of long standing, and had had a ruptured kidney, for which an operation had been performed; and that in answer to questions in the application whether he had had any bodily infirmity or constitutional disease, or had received any medical attention within the past two years, or when he had had a serious illness, the plaintiff answered falsely.

In answer to the contention of counsel for the defendant that the hernia was contracted within fifteen days from

the date the policy was issued, counsel for the plaintiff maintains that the burden of proof rested on the defendant to show that the illness or disease was contracted within that period; and furthermore that the evidence does not show that the hernia was contracted within that period.

Irrespective of the question whether the burden of proof rested on the defendant, we are of the opinion that the evidence clearly shows that the hernia was contracted within fifteen days from the date the policy was issued.

The plaintiff testified that he noticed "a little something pushing out of me and I was getting kind of weak standing on my feet, walking around, so I went to the doctor;" that he went to the hospital on January 1, 1922; that on January 5, 1922, he was operated on for hernia; that the first time he noticed the swelling was five or six weeks before the operation; that when he obtained the policy of insurance he was not suffering from hernia. The policy was issued November 5, 1921.

Giving the testimony of the plaintiff the most favorable construction for him, he noticed the swelling five weeks before the operation; and five weeks before the operation would be about November 30, 1921. That date would not be within the period which is not covered by the insurance; and on that date, therefore, the policy would be operative and effective. Opposed to the testimony of the plaintiff is that of a physician, Dr. Rush, and an investigator and adjuster of the defendant named Berry. Dr. Rush, who was an interne at the hospital where the plaintiff was a patient, testified that while the plaintiff was in the hospital, where he was operated on for hernia, he, Dr. Rush, wrote the history of the plaintiff on January 5, 1922; that the plaintiff told him that he, the plaintiff, had a bulging in the left inguinal region the size of an egg; that he, the plaintiff, said he could not eat anything; that the plaintiff said that he wore a truss for

the date the policy was issued, whereas the plaintiff maintains that the burden of proof rested on the defendant to show that the illness or disease was contracted within that period; and furthermore that the evidence does not show that the hernia was contracted within that period.

Irrespective of the question whether the burden of proof rested on the defendant, we are of the opinion that the evidence clearly shows that the hernia was contracted within fifteen days from the date the policy was issued.

The plaintiff testified that he noticed "a little something pushing out of me and I was getting kind of weak standing on my feet, walking around, as I went to the factory" that he went to the hospital on January [illegible], [illegible]; that on January [illegible], [illegible], he was operated on for hernia; that the first time he noticed the swelling was five or six weeks before the operation; that when he obtained the policy of insurance he was not suffering from hernia. The policy was issued December [illegible], [illegible].

Using the testimony of the plaintiff the most favorable construction for him, he noticed the swelling five weeks before the operation; and five weeks before the operation would be about December [illegible], [illegible]. That date would not be within the period which is not covered by the insurance; and on that date, therefore, the policy would be operative and effective. Opposed to the testimony of the plaintiff is that of a physician, Dr. [illegible], and an investigator and adjuster of the defendant named [illegible]. Dr. [illegible], who was an interne at the hospital where the plaintiff was a patient, testified that while the plaintiff was in the hospital, where he was operated on for hernia, he, Dr. [illegible], wrote the history of the plaintiff on January [illegible], [illegible]; that the plaintiff told him that he, the plaintiff, had a swelling in the left inguinal region the size of an egg; that he, the plaintiff, told me [illegible] not anything; that the plaintiff said that he wore a truss for

six months "previous to this," and then consulted a doctor; that the plaintiff said further that he hadn't felt good since an accident which he had on a street car about five years before.

Berry testified that he went to see the plaintiff when the plaintiff was in the hospital and took his statement; that the plaintiff told him everything that he had written in the statement; that the statement was read to the plaintiff and that the plaintiff signed it; that the plaintiff stated that he noticed the hernia about November 18, 1921, and consulted his doctor. The statement was introduced in evidence and is as follows:

> "Outside of being disabled for a period of 4 or 5 weeks during the year 1916 I have never suffered from any serious illness. At that time I was injured by being struck by an automobile.
> "About Nov. 18th I noticed a slight swelling on left side and consulted Dr. Luken (my family doctor.) He advised me that the only cure could be effected by an operation but did advise me that I could try wearing a truss for temporary relief of the hernia.
> "I secured a truss and wore it for some time but pains began to develop and I again saw Dr. Luken who examined me and advised an operation. This last interview was on Jan. 2nd, 1922, and I entered St. Elizabeth's Hospital on Jan. 3rd, 1922, and the operation took place Jan. 4th, 1922.
> "I was first aware that I had a hernia when the swelling appeared on my left side on or about Nov. 18th, 1922. I expect to be able to leave the hospital this Saturday - Jan. 21st, 1922."

The plaintiff denied that he had stated to Berry that he noticed the hernia about November 18, 1921, but that he, the plaintiff, said, "I don't mention any dates." The plaintiff also testified that he didn't have any trouble about November 18, 1921; that he didn't notice any swelling on his side on that date; that he, the plaintiff, does not know whether he read the statement before he signed it or after; that he made some of the statements in the statement and that others he did not make; that after Berry read the statement through he, the plaintiff, said, "That is not so;" that Berry answered, "That don't mean anything; that is merely to show that I was to see you."

In considering the evidence on the issue in question

and in reaching our conclusion that the plaintiff had hernia within fifteen days from the date of the issuance of the policy, we are influenced largely by the testimony of Dr. Rush. There is nothing in the testimony of Dr. Rush which shows that he had any bias in the matter. On the record he appears to be a wholly disinterested witness. The admissions made by the plaintiff to Dr. Rush and Berry are substantive evidence against the plaintiff. Johnson v. Peterson, 166 Ill. App., 404, 405; Sloan v. Dudley, 288 Ill., 46, 47. The testimony of Dr. Rush is, we think, controlling.

On the question as to the alleged false answers of the plaintiff in the application for insurance, the only testimony is that of the plaintiff. He testified substantially that at the time that the agent spoke to him about the policy of insurance he, the plaintiff, signed some blank papers; that the agent did not ask him any questions about himself; that there was some "printing on the paper;" that it was something like the back of the policy; that he couldn't say whether there was writing on it in longhand or not; that there was no typewriting; that it was just a printed form and he signed it; that he didn't write anything on the application except his signature; that he did not read the application.

It will be seen from the plaintiff's testimony that the plaintiff did not testify that the agent wrote the answers to the questions in the application. On the evidence it does not appear affirmatively who did write the answers. The question could only be determined by inference. We do not consider it necessary to decide the question, in view of our opinion that the evidence clearly shows that the hernia of the plaintiff was contracted before the expiration of fifteen days after the date of the issuance of the policy.

We think the judgment should be reversed, with a finding of facts.

JUDGMENT REVERSED WITH FINDING OF FACTS.

Matchett, P.J., and McSurely, J., concur.

and in reaching our conclusion that the plaintiff had cancer within fifteen days from the date of the issuance of the policy, we are influenced largely by the testimony of Dr. Rush. There is nothing in the testimony of Dr. Rush which shows that he had any bias in the matter. On the record he appears to be a wholly disinterested witness. The admissions made by the plaintiff to Dr. Rush and Beaty are substantive evidence against the plaintiff. [illegible] v. [illegible], [illegible] Ill. App. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]. The testimony of Dr. Rush is, in itself, substantial.

On the question as to the alleged false answers of the plaintiff in the application for insurance, the only testimony is that of the plaintiff. He testified substantially that at the time that the agent wrote it out the policy of insurance he, the plaintiff, signed some blank papers; that the agent did not ask him any questions about himself; that there was some "printing on the paper;" that it was something like the back of the policy; that he couldn't say whether there was anything on it in longhand or not; that there was no typewriting; that it was just a printed form and he signed it; that he didn't write anything on the application except his signature; that he did not read the application.

It will be seen from the plaintiff's testimony that the plaintiff did not testify that the agent wrote the answers to the questions in the application. On the evidence it does not appear affirmatively who did write the answers. The question could only be determined by inference. We do not consider it necessary to decide the question, in view of our opinion that the evidence clearly shows that the cancer of the plaintiff was contracted before the expiration of fifteen days after the date of the issuance of the policy.

We think the judgment should be reversed, with a finding of facts.

JUDGMENT REVERSED WITH FINDING OF FACTS.

[illegible], P.J., and [illegible], J., concur.

166 - 28820 FINDING OF FACTS.

The court finds as a fact that the policy of insurance issued by the defendant to the plaintiff contains a provision that the insurance does not cover disability from any disease contracted within fifteen days from noon of the date of the policy of insurance; and the court further finds as a fact that the plaintiff contracted the disease of hernia within fifteen days from noon of the date of the policy of insurance.

31
194 - 28853

WLADYSLAW ZABIERSK,
Appellee,

vs.

ANTON LISOWSKI,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 649

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Anton Lisowski, from a judgment in the Municipal court of the City of Chicago in favor of the plaintiff, Wladyslaw Zabierak, in an action of forcible detainer.

The only question in the case is whether the defendant tendered the plaintiff $76.00, which was the amount of the arrears for two months rent, within five days after a five-day notice was served on the defendant by the plaintiff. The notice was served June 2, 1923. From the abstract of the defendant it appears that the defendant testified that he tendered the rent to the plaintiff within five days after the notice was served. From the additional abstract filed by the plaintiff, and also from the record, we find that by the defendant's own testimony he did not tender the rent to the plaintiff within five days after the notice was served. The court asked the defendant what day the defendant handed the plaintiff the money. The defendant answered the first of May. The court then asked the defendant why he did not hand the plaintiff the money during the five days. The defendant answered as follows: "I was home and come down there; he had the lease, he throw it on his street. I never find it." The defendant was asked the following question by counsel for plaintiff: "After you received this notice, you never saw the plaintiff after that, did you?" The defendant answered, "I never seen him." The further question was asked by

counsel for the plaintiff: "You never talked to him after you received that notice?" The defendant answered: "No, I never stayed down there."

We think it is evident that no tender was made within five days after the notice was served.

The judgment is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

214 - 28871

HOWARD ARMSTRONG,
Appellant,

vs.

E. H. SHEPPLEY and C. W. SHEPPLEY, Trading as SHEPPLEY BROTHERS REALTY COMPANY,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 649

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for the possession of a mortgage bond for $500, which had been deposited with defendants as security for payment of rent due to defendants from Charles Kimball. Before suit plaintiff made a tender of $75, claiming this was the amount for which the bond was put up as security. Defendants refused this, claiming that the bond was security for a larger amount of rent due and for all that might subsequently become due from Kimball. Upon trial the court found that there was due to defendants from "plaintiff" $225 for rent, and that when this was paid defendants should deliver the bond to him. Judgment was entered finding that defendants did not unlawfully retain the bond, and from this judgment plaintiff appeals.

Kimball was employed by plaintiff, Armstrong, and became a tenant of defendants. Although there is some controversy, the preponderance of the evidence shows that on August 3rd Kimball owed $75 for rent, and defendants were threatening to oust Kimball from the apartment which he had leased. To secure the rent Armstrong put up the bond in question. One of the defendants dictated a receipt to the effect that the bond was received as security for rent, "said rent to be paid not later than August 15, 1922," but at the request of plaintiff that the receipt should show specifically the amount of rent due for which the bond was security, this receipt was changed by defendants to read, $75 rent to be paid not later than

ANDREW [illegible],
Appellant,

vs.

A. M. [illegible] and [illegible], [illegible], trading as [illegible],
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 640

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for the possession of a mortgage bond for $500, which had been deposited with defendants as security for payment of rent due to defendants from [illegible]. Before suit plaintiff made a tender of $75, claiming this was the amount for which the bond was put up as security. Defendants refused this, claiming that the bond was security for a larger amount of rent due and for all that might subsequently become due from [illegible]. Upon trial the court found that there was due to defendants from [illegible] $[illegible] for rent, and that when this was paid defendants should deliver the bond to him. Judgment was entered finding that defendants did not unlawfully retain the bond, and from this judgment plaintiff appeals.

[illegible] was employed by plaintiff, apparently, and became a tenant of defendants. Although there is some controversy, the preponderance of the evidence shows that he [illegible] $75 for rent, and defendants were threatening to [illegible] from the apartment which he had leased. To secure the past rent [illegible] put up the bond in question. One of the defendants executed a receipt in the nature that the bond was received as security for rent, "said rent to be paid not later than August [illegible], 1922," but at the request of plaintiff that the receipt should show specifically the amount of rent due for which the bond was security, this receipt was changed by defendants to read, "$75 rent to be paid not later than

August 15, 1922."

Taking into consideration the writing which it is conceded was changed so as to express the understanding of the parties, and the positive testimony of Kimball and plaintiff as against the rather indefinite statements of defendants as to the amount of rent due when the bond was deposited with defendants, we conclude that the trial court was in error in finding that there was more than $75 due at that time.

As the tender to defendants of the amount which we hold was due is not denied, plaintiff was entitled to the return of his bond. The judgment is therefore reversed and judgment for plaintiff will be entered in this court.

REVERSED AND JUDGMENT FOR PLAINTIFF HERE.

Matchett, P. J., and Johnston, J., concur.

224 - 28881

SAM SCHMALHAUSEN, Appellant,
vs.
ALEX GOLDSTEIN, Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

233 I.A. 650

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment against him for $1537.50, entered on a verdict in favor of defendant's plea of set-off.

Plaintiff obtained a judgment by confession on ten judgment notes made by defendant and delivered to plaintiff. Defendant was later given leave to plead to the declaration and to file a plea of set-off, the judgment theretofore entered against him to stand as security. Defendant pleaded the general issue and also filed special pleas to the effect that the notes were given as part of the purchase price of a Pan-American automobile purchased by defendant from plaintiff on December 6, 1920; that plaintiff had falsely and fraudulently represented that this automobile was built of the best possible material, would be serviceable under any conditions, would make a mileage of seventeen miles to the gallon of gasoline, that it was mechanically perfect in all its parts and in perfect condition, that all its parts were of good quality, in good condition and properly constructed, the gears made of case hardened steel; that said representations were made by plaintiff knowing they were false and were made for the purpose of inducing defendant to purchase the car, who, relying thereon, executed the said notes and delivered the same to plaintiff. Defendant also pleaded that as part payment of the purchase price of the Pan-American automobile he gave plaintiff $750 cash and a Studebaker car at an agreed value of $500; also twelve promissory notes for $143.75 each; that by

reason of the breach of warranties defendant rescinded the contract March 7, 1921, and tendered the Pan-American automobile to plaintiff, demanding the return of the cash paid, the Studebaker car and his notes, which was refused by plaintiff. Replication was filed and the issue as to representations and defects was submitted to the jury.

Although there are variant stories in detail, the jury could properly believe that in the latter part of 1920 plaintiff was seeking to induce defendant to buy a Pan-American automobile; that defendant objected on the ground that this car was new in the market without any reputation. Plaintiff guaranteed that it was not only perfect and of the best material, but that it would satisfy defendant. Plaintiff repeatedly represented that it was "one of the most perfect cars on the market," that the parts used were the same as those used in the Packard, Pierce-Arrow, and other high priced cars; that it was guaranteed as not defective and in perfect condition; that he would guarantee seventeen miles to the gallon of gasoline, and that it was perfectly constructed of the very best material obtainable. Relying upon these representations and guarantees, defendant on December 8, 1920, purchased the car, paying $750 cash and turning in his Studebaker car at $500 and the balance of the purchase price by his twelve notes, payable monthly thereafter, aggregating $1725.

When the car was removed from the salesroom preliminary to driving it to defendant's home, a mechanic noticed that the motor had "an awful knock in it," and reported this to plaintiff, who replied, "I know that but don't say anything about it and we will fix it later." Defendant at this time was still in the office and did not hear this conversation. This mechanic, Muns, took defendant home in the car, a distance of three or four miles, and when defendant went into the house, Muns, pursuant to his duty to see that cars were running properly before they left the shop,

examined it as it stood in the street. He found nine or more defects, which he entered in a note book kept by him. Afterwards [illegible] reported these defects to plaintiff, reading to him from the entries made in his note book.

Within the next few weeks defendant began to notice defects. The speedometer, battery motor, and oil crank would not work, rear axel caught fire, wheels creaked and a wrist pin was loose. Within two weeks after its purchase the car was taken back to plaintiff's salesroom four or five times to be put in condition. Plaintiff would assure defendant that such defects were inevitable in a new car, and asked defendant to continue driving it "to give the car a chance to loosen up." Defects appeared in the water radiator and the water pump leaked. Five attempts were made to repair the radiator without success. Defects continued to appear. It was also found by a test that the car would make only nine miles to the gallon of gasoline instead of seventeen miles, as guaranteed. Repairs were made on the car almost every day for two or three months Defendant protested to plaintiff, saying "You sold me a lemon," and insisted that plaintiff take the car back and call the deal off. Plaintiff still insisted that as a favor defendant should "carry on with this car and I will protect you if you are dissatisfied, I will make good."

Having paid nearly $3,000 for the car defendant attempted to have it insured for $2800, but the Insurance company reported that after an examination of Pan-American cars they had concluded that such were not of the value represented and they had limited the amount of insurance which they would place on them to $1,000, which was what, in their judgment, the car was worth. March 7, 1921, the car was taken to plaintiff's salesroom and defendant formally rescinded the contract, requesting the return of what he had paid on the purchase price, the Studebaker car and his notes.

Upon the trial, at the request of plaintiff, six special

interrogatories were submitted to the jury, and by the answers to these the jury found that the automobile was not in good and proper condition and not fit for driving at the time it was sold to defendant, and that it was not built of the best materials for the size and character of the car. No motion appears to have been made to set aside these findings.

From the above facts and numerous other details which would unduly extend this opinion to narrate, the jury were justified in concluding that the car was not as represented, that defendant had been misled by such misrepresentations, and that defendant was justified in rescinding the sale.

Where a buyer attempts to rescind a sale, offering to return the goods to the seller, the goods must be substantially in as good condition as they were in at the time of the sale, otherwise it cannot be rescinded. Plaintiff argues that while the car was in the possession of defendant it suffered two or three accidents which damaged it, and that therefore when defendant attempted to rescind he did not and could not offer to return it in as good condition as when it was delivered to him. These accidents were not serious, but were slight bumps which dented a fender, a hub-cap and part of the body. All of these damages were completely repaired and the car restored to its original condition. None of these injuries affected in any way the mechanical parts of the car. A buyer electing to return the goods is required to return them only in substantially as good condition as when received. *Sandrich Mfg. Co.* v. *Kelly*, 26 Ill. App., 394.

The retention by defendant of the car after the defects developed was at the repeated request and solicitation of plaintiff. When one, by statements, lulls another into a sense of security as to his existing rights, such party cannot then take advantage of this. *Stone* v. *Molby Boiler Co.*, 185 N. Y. Supp., 551; *Lanham* v. *Plano Mfg. Co.*, 55 N. Western 583.

Interrogatories were submitted to the jury, and by the answers to these the jury found that the automobile was not in good and proper condition and not fit for driving at the time it was sold to defendant, and that it was not built of the best materials for the size and character of the car. No motion appears to have been made to set aside these findings.

From the above facts and numerous other details which would unduly extend this opinion to narrate, the jury were justified in concluding that the car was not as represented, that defendant had been misled by such misrepresentations, and that defendant was justified in rescinding the sale.

Where a buyer attempts to rescind a sale, offering to return the goods to the seller, the goods must be substantially in as good condition as they were in at the time of the sale, otherwise it cannot be rescinded. Plaintiff argues that while the car was in the possession of defendant it suffered injury through accidents which damaged it, and that therefore when defendant attempted to rescind he did not and could not offer to return it in as good condition as when it was delivered to him. These accidents were not serious, but were slight bumps which bent a fender, a runner and part of the body. All of these damages were completely repaired and the car restored to its original condition. None of these injuries affected in any way the mechanical parts of the car. A buyer electing to return the goods is required to return them only in substantially as good condition as when received. [illegible] Etc. Co. v. Smith, 14 Ill. App., [illegible].

The retention by defendant of the car after the defects developed was at the repeated request and solicitation of plaintiff. When one, by [illegible], lulls another into a sense of security as to his existing rights, such party cannot then take advantage of this. Wiley v. [illegible] Roller Co., 188 N. Y. Supp., [illegible]; [illegible] v. Piano Mfg. Co., 88 N. Western [illegible].

The verdict is criticised as not disposing of the judgment entered in favor of plaintiff and in not disposing of the two automobiles, the Pan-American and the Studebaker. As to the first point the judgment was not before the jury and there was no issue with reference to it. The parties stood as if the judgment had been vacated. It was merely security for any judgment which the plaintiff might obtain. When the plaintiff failed to obtain a judgment there was nothing left for the judgment to secure and defendant became entitled to have the judgment by confession vacated and set aside.

The disposition of the automobiles was not for the jury to determine or for the judgment to recite. The effect of the rescission was to revest the title to the Pan-American car in the plaintiff. When the sale was rescinded for fraud, it was as though no sale had been made, and the title afterwards became revested in the seller as though it had never been divested. Doane v. Lockwood, 115 Ill., 490. Defendant's set-off is not a suit for a rescission; this took place on March 7, 1921, by the act of the defendant. This suit is for the recovery of the purchase price, to which defendant became entitled when he rescinded the sale.

The verdict found the issues for defendant "on his plea of set-off." There were several pleas filed and plaintiff asserts that there should have been a verdict as to all of them. This is not necessary and is not the usual practice. If a defendant pleads and proves one plea in bar he is entitled to judgment. McClure v. Williams, 65 Ill., 390; Holmes v. Tarble, 77 Ill. App., 114.

We see no reason to disagree with the verdict, and as there is no reversible error in the record the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

The verdict is criticised as not disposing of the judgment entered in favor of plaintiff and is not disposing of the two automobiles, the Pan-American and the Studebaker. As to the first point the judgment was not before the jury and there was no issue with reference to it. The parties stood as if the judgment had been vacated. It was merely security for any judgment which the plaintiff might obtain. When the plaintiff failed to obtain a judgment there was nothing left for the judgment to secure and defendant became entitled to have the judgment by confession vacated and set aside.

The disposition of the automobiles was not for the jury to determine or for the judgment to recite. The effect of the rescission was to revest the title to the Pan-American car in the plaintiff. When the sale was rescinded for fraud, it was as though no sale had been made, and the title afterwards became revested in the seller as though it had never been divested. [illegible] v. [illegible], [illegible] Ill., [illegible]. Defendant's set-off is not a suit for a rescission; this took place on March 7, 1921, by the act of the defendant. This suit is for the recovery of the purchase price, to which defendant became entitled when he rescinded the sale.

The verdict found the issues for defendant "on the plea of set-off." There were several pleas filed and plaintiff asserts that there should have been a verdict as to all of them. This is not necessary and is not the usual practice. If a defendant pleads and proves one plea in bar he is entitled to judgment. [illegible] v. [illegible], 68 Ill., 382; [illegible] v. [illegible], 77 Ill. App., [illegible].

We see no reason to disagree with the verdict, and as there is no reversible error in the record the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

233 - 28891

MARY MANTHIE,
Appellee,

vs.

OLE OLSON and HANNAH OLSON,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

233 I.A. 650

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment on a verdict awarding plaintiff $500 as compensation for personal injuries suffered by her by reason of the alleged negligence of defendants.

Plaintiff's declaration alleged that on February 3, 1921, defendants were owners of a certain flat building in Chicago with common passageways and stairways, landings and entrances, for use of the divers tenants of the defendants occupying the building; that disregarding their duty to keep said stairways and landings reasonably safe for persons using them, defendants suffered a carpet on the stairs to become torn, worn out, and with holes therein, so that when plaintiff, by invitation, was using the passageway, and using due care and caution, she caught her foot in one of the holes or torn portions of said carpet or rug, causing her to fall and throwing her violently to the bottom of the stairs, inflicting divers injuries.

The entrance to the building was through a vestibule and from the vestibule door rose six or seven steps to the landing which led to the upper floors. The vestibule and steps and landing were under control of defendants and were used in common by the tenants occupying the flats. One of the tenants was a family named West, friends of plaintiff, and on the evening of February 3rd they invited plaintiff and her husband to call and spend the evening with them. About eight o'clock that evening plaintiff and her husband, her son and her daughter-in-law arrived at the building and plain-

tiff and the daughter-in-law entered a few seconds in advance of the two men. After plaintiff had gone through the vestibule and its doorway and up the steps onto the landing, the vestibule door closed, and as plaintiff's husband and son had no means of opening it from the outside they rapped on the glass for plaintiff to return and open the door from the inside. She retraced her steps, but when near the edge of the landing she caught the toe of her shoe in the worn or torn edge of the carpet which covered the steps and was thrown forward to the bottom of the steps, receiving the injuries in question.

The carpet had been used on these steps for ten years. Defendants had lived for eleven years in one of the apartments and frequently used this landing and steps where the carpet lay.

About two weeks before the accident defendant Ole Olson removed the carpet, cleaned it and cut off six inches at the bottom by the door and replaced it for the purpose of having the worn parts come against the risers of the steps and not on the treads. There is a sharp dispute between the various witnesses as to the condition in which this left the carpet at the top of the steps at the landing where plaintiff tripped and fell. The jury properly could believe that the upper end of this carpet, where it came near the edge of the landing, was threadbare and worn so that it would not lie flat, but curled up, one witness says about a half inch for a space of three or four inches. Others described it as worn and torn at this spot so that it turned up. The declaration describes the place as "in a torn and worn out condition and had holes therein." This condition of the carpet was sufficiently proven.

Defendants knew of this condition, or should have known. They passed over this place daily, and defendant Ole Olson tells of the removal, inspection and relaying of the rug by him a

very short time before the accident happened.

It is said that there is a fatal variance in that it is not shown by a preponderance of the evidence that the carpet "had holes therein," as alleged in the declaration. Some of the witnesses appear to have used the word "holes" with reference to the torn and worn out condition of the carpet. Others seem to have used the word in a narrow, strict sense. However this may be, defendants did not, either at the conclusion of plaintiff's case or of all the evidence, raise the point of variance by specifically pointing out the same; hence they cannot now avail themselves of this point upon appeal. Harris v. Shebek, 151 Ill., 287; Ferrero v. Knights and Ladies of Security, 309 Ill., 476.

In the absence of a special plea defendants' plea of general issue admitted ownership of the building. Schultz v. Lockridge, 137 Ill., 270; Chicago Union Trac. Co. v. Jerka, 227 Ill., 95; Carlson v. Johnson, 263 Ill., 556.

Plaintiff was not upon the premises as a trespasser or licensee; she was an invitee calling upon one of the tenants and defendants owed her the duty of using reasonable and ordinary care to protect her from injury while using the common stairs and passageways. 18 Amer. and English Ency. of Law, 2nd ed., 245; Fisher v. Jansen, 30 Ill. App. 91; Boden v. Thomas, 192 Ill. App. 348; Reynolds v. John Brod Chemical Co., 192 Ill. App., 157; Metcalfe v. Pierce, 196 Ill. App., 360.

Whether plaintiff was guilty of contributory negligence was a question for the jury to determine. The entrance was dimly lighted and it appears that as plaintiff started to go back to the vestibule door to let in her husband and son, her shadow fell on the edge of the landing, tending to make the torn place in the carpet less visible. We cannot say that the conclusion of the jury that she was not guilty of contributory negligence is against the weight of the evidence.

Upon the entire record we see no reason to disapprove of the verdict, and the judgment is affirmed. AFFIRMED.

Matchett, P.J., and Johnston, J., concur.

very short time before the accident happened.

It is said that there is a fatal variance in that it is not shown by a preponderance of the evidence that the carpet "had holes therein," as alleged in the declaration. Some of the witnesses appear to have used the word "holes" with reference to the torn and worn out condition of the carpet. Others seem to have used the word in a narrow, strict sense. However this may be, defendants did not, either at the conclusion of plaintiff's case or of all the evidence, raise the point of variance by specifically pointing out the same; hence they cannot now avail themselves of this point upon appeal. Harris v. Shebek, 151 Ill., 287; [illegible] v. [illegible] and Ladies of [illegible], 202 Ill., 475.

In the absence of a special plea defendants' plea of general issue admitted ownership of the building. [illegible] v. [illegible], 1?? Ill., 270; Chicago Union Trac. Co. v. Jerka, 227 Ill., 95; [illegible] v. [illegible], 225 Ill., 236.

Plaintiff was not upon the premises as a trespasser or licensee; she was an invitee calling upon one of the tenants and defendants owed her the duty of using reasonable and ordinary care to protect her from injury while using the common stairs and passageways. 29 Cyc., 2nd English Ency. of Law, 2nd ed., 468; [illegible] v. [illegible], 56 Ill. App. 92; [illegible] v. [illegible], 192 Ill. App. 148; [illegible] v. [illegible] Supply Co., 193 Ill. App. 125; [illegible] v. [illegible], 188 Ill. App. 469.

Whether plaintiff was guilty of contributory negligence was a question for the jury to determine. The entrance was dimly lighted and it appears that as plaintiff started to go back to the vestibule door to let in her husband and son, her shadow fell on the edge of the landing, tending to make the worn place in the carpet less visible. We cannot say that the conclusion of the jury that she was not guilty of contributory negligence is against the weight of the evidence.

Upon the entire record we see no reason to disturb the verdict, and the judgment is affirmed. AFFIRMED.

Barnes, P.J., and [illegible], J., concur.

242 - 28900

JOSEPHINE MAKSYMOWSKI, by FRED MAKSYMOWSKI, her Father and Next Friend,
Appellee,

vs.

MIKE PRZYBYLA,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

233 I.A. 650

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that defendant committed an assault and battery on Josephine Maksymowski, a minor, by striking her on the jaw, and claimed damages. A verdict was returned assessing plaintiff's damages at $1,000. Plaintiff remitted $400 and judgment was entered against defendant for $600, from which he appeals.

There is a sharp contradiction in the testimony as to the occurrence. Plaintiff, on September 5, 1921, was twelve years old. She and her parents and the defendant lived in the same neighborhood in Chicago. Each family had young children and the trouble seems to have started among them. Apparently angered at something which occurred between the children, defendant approached Josephine and, according to the testimony of herself, a younger sister, and two men, disinterested witnesses, defendant grabbed her by the shoulder and struck her in the face with his fist, knocking her backward against a fence. She then ran home but when she arrived in the front hallway dropped over in a faint. A doctor was summoned and she received treatment. Some of the teeth were loose and the doctor bound the jaw with adhesive plaster. It is claimed that the jaw was fractured.

Defendant denied that he struck the child and said

he only told her to go home, although he admitted at the preliminary hearing that he "just shook her up." Other witnesses gave testimony tending to corroborate defendant's story. It is claimed that the statements and testimony of plaintiff and her witnesses are so extravagant and improbable as to be unbelievable. However this may be, we can disturb the verdict only if it is manifestly against the preponderance of the evidence. The jury, with its opportunity for determining the credibility of the respective witnesses, can better determine the facts than can we. The fact that plaintiff's jaw and face were injured, as the proof shows, tends to establish the truthfulness of plaintiff's story and negatives defendant's disclaimer. We cannot say that the verdict of the jury is manifestly against the weight of the evidence.

Defendant offered as a witness his little daughter, who was five years old at the time of the occurrence and seven years old at the time of the trial. The court examined her as to her qualifications as a witness and concluded that she did not have sufficient intelligence and ability to comprehend the meaning of an oath and the moral obligation to speak the truth, and did not permit her to testify. Examination of the questions to the little girl and her answers justify the position of the court. The admission of testimony of small children is largely discretionary with the court and its conclusion will not ordinarily be disturbed unless there is a clear abuse of this discretion. Shannon v. Swanson, 208 Ill. 52; Eisner v. Jesuin, 174 Ill. App., 198.

It was not error to refuse defendant's instruction number three. A mere reading of it shows this. For instance, it told the jury if they believed any witness had sworn falsely they should disregard all the testimony in the case except in the matters where the testimony of the false witness was corroborated. Apparently this instruction had been incorrectly copied from a proper instruction, similar in general form.

Upon the motion for a new trial it is said that certain affidavits were presented in support of the motion. No such affidavits have been preserved in any bill of exceptions and hence they are not properly before us for consideration. We might also addthat we do not find any authentic affidavits any place in the record.

We cannot say that after the remittitur the damages were excessive, and no convincing argument is presented on this point. We are not justified in disturbing the verdict, and as there were no errors upon the trial the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

259 - 28917

HARRY A. ABBOTT,
Appellee,

vs.

LINCOLN AVENUE MOTOR SALES COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 650

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff left his automobile with defendant to have it repaired and two days later was told that it had been stolen. He brought suit, alleging that the theft occurred through defendant's negligence, and upon trial had a verdict for $1029. A reversal of the judgment is sought.

Did defendant so negligently care for the car as to make the theft possible?

Defendant's place of business faces on Clark street in Chicago. The rear of the building was about thirty or forty feet from Halsted street and in this rear yard some of the cars which defendant was repairing were kept. There was a runway from Halsted street into the building. Donald Walsh, defendant's foreman, testified that when plaintiff's car came in for adjustment, Daggett, an employe, was ordered to take it outside and test it to determine what repairs were needed. Walsh says he saw him drive the car out of the garage into the rear yard, test it, and then locking it he brought the key in and laid it on Walsh's desk while he went to get some tools. Daggett returned, got the key, went outside, came back in a "couple of minutes," and said, "The car is gone." Walsh immediately went out with him, but the car was gone. Walsh says that while Daggett was in the garage the car was in the parking space just outside the door, not over ten feet from the door, and visible from the entrance; that it took Daggett only about two or three minutes to get his tools; that the lock on the

car was a regular Yale lock and the car could not be started without the key. A large signboard tended to hide the yard from the view of anyone walking on Halsted street. On cross-examination Walsh was somewhat uncertain as to the location of the car when Daggett came into the building for the tools.

Plaintiff introduced a portion of the affidavit of defense made by William R. Lewis, president of the defendant company, in which he said that at the time plaintiff's car was stolen:

> "In order to move other cars out of said service station, it was necessary to temporarily put the plaintiff's car in Halsted street, just outside the entrance to defendant's premises, which was accordingly done and the car of the plaintiff was locked and the key delivered to defendant's superintendent. Before defendant could put the car of plaintiff back in said service station and shortly after it was placed in said Halstdd street, and while it was locked, said car was stolen by some person or persons unknown to the defendant."

Considering Walsh's uncertainty as to the exact position of the car when Daggett left it outside the building, the improbability that the obstructing signboard would allow the car while in the yard to be seen by any prospective thief on Halsted street, the affidavit of defendant's president that the car was placed on Halsted, where this signboard would tend to hide it from the view of those in the garage, thus giving opportunity for the theft, and considering that this affidavit was made at a time much nearer to the occurrance than the time of the trial, the jury could properly believe that the car was left unguarded on Halsted street, where it was stolen, and that this was negligence causing the loss of the car. Erickson v. Graham & Daniel, 227 Ill. App., 390; Siegel v. Eiszner, 138 N. Y. S., 174.

It was not error to admit the affidavit of defense made by the defendant's president. This was like any other writing admitting a fact, and was legitimate evidence. [illegible] v. [illegible] R. R. Co., 243 Ill., 332; Daub v. Engelbach, 109 Ill., 267; Stevenson v. Avery Co., 143 Ill. App. 307; [illegible] v. Eichberg, 42 Ill. App., 375.

car was a regular time [illegible] and that car would not be started without his key. A large signboard served to hide the yard from the view of persons walking on Halsted street. On cross-examination Walsh was somewhat uncertain as to the location of the car when [illegible] came into the building for the [illegible].

Plaintiff introduced a portion of the affidavit of defense made by William A. Lewis, president of the defendant company, in which he said that at the time plaintiff's car was stolen:

"The garage [illegible] more than [illegible] machines, it was necessary to temporarily put the plaintiff's car in Halsted Street, [illegible] the defendant's premises, which [illegible] the plaintiff [illegible]. Before defendant [illegible] placed in said Halsted Street, and while it was located, said car was stolen by some person or persons unknown to the defendant."

Considering Walsh's uncertainty as to the exact location of the car when [illegible] left it outside the building, the improbability that the obstructing signboard would allow the car while in the yard to be seen by any [illegible] on Halsted street, the affidavit of defendant's president that the car was placed on Halsted, where this signboard would tend to hide it from the view of those in the garage, thus giving opportunity for the theft, and considering that this affidavit was made at a time much nearer to the occurrence than the time of the trial, the jury could reasonably believe that the car was left unattended on Halsted street, where it was stolen, and that this negligence was the cause of the loss. [illegible] v. [illegible], 177 Ill. App., [illegible]; [illegible] v. [illegible], 128 N. Y. S., 172.

It was not error to admit the affidavit of defense made by the defendant's president. [illegible] admitting a fact, and was [illegible] evidence. [illegible] v. [illegible], [illegible] Ill., [illegible]; [illegible] v. [illegible], [illegible] Ill., [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible].

There is considerable argument as to alleged improper remarks of plaintiff's counsel and by the court, but we find nothing sufficiently prejudicial to necessitate a reversal. Indeed the remarks of the court under the circumstances are hardly open to criticism.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

274 - 28932

ANTON MARNIK,
Appellant,

vs.

BERNICE CUSACK, a Minor, et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

233 I.A. 651

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant by his bill sought to have a judgment against him set aside on the ground that he had not been served with summons. Answer was filed and the cause was referred to a Master in Chancery who took evidence and reported, recommending that the bill be dismissed for want of equity. Objections and exceptions to the report were filed, and after hearing the Chancellor affirmed the Master's report and decreed that the bill be dismissed. Complainant appeals.

The Master's findings, supported by the evidence, were that October 16, 1920, Bernice Cusack, a minor, by Thomas Cusack, her father and next friend, commenced an action in the Superior court of Cook county against Anton Marnik in a plea of trespass on the case; that by her declaration she alleged that August 21, 1920, she was injured by an automobile truck running into her, which truck was negligently operated by an employe of Marnik, who owned the truck. A summons was issued directing the sheriff to summon Marnik to appear before the Superior court of Cook county on the first Monday of November, 1920. The summons was returned endorsed as having been properly served on Marnik October 20, 1920, signed "Charles W. Peters, sheriff, by Alfred J. Larson, deputy." Marnik testified before the master that this return was false; that the summons had not been served upon him and that he had no knowledge or notice of any kind of the pendency

ANTON KARNIK, Appellant, vs. ROSALIE ULRICH, a minor, et al., Appellees.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

293 I.A. 651

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Complainant by his bill sought to have a judgment against him set aside on the ground that he had not been served with summons. Answer was filed and the cause was referred to a master in chancery who took evidence and reported, recommending that the bill be dismissed for want of equity. Objections and exceptions to the report were filed, and after hearing the Chancellor affirmed the master's report and decreed that the bill be dismissed. Complainant appeals.

The master's findings, supported by the evidence, were that October 15, 19[illegible], Rosalie Ulrich, a minor, by Thomas Ulrich, her father and next friend, commenced an action in the superior court of Cook county against Anton Karnik in a plea of trespass on the case; that by her declaration she alleged that August 21, 19[illegible], she was injured by an automobile truck running into her, which truck was negligently operated by an employe of Karnik, the owner of the truck. A summons was issued directing the sheriff to summon Karnik to appear before the superior court of Cook county on the first Monday of November, 19[illegible]. The summons was returned endorsed as having been properly served on Karnik October [illegible], 19[illegible], signed "[illegible], Sheriff, by Alfred J. [illegible], deputy." Karnik testified before the master that this return was false; that the summons had not been served upon him and that he had no knowledge or notice of any kind of the pendency

of said cause in the Superior court until April 20, 1922, when he received a letter from Callahan & Callahan, the attorneys for Bernice Cusack, advising him that on March 15, 1922, a judgment had been rendered against him in this law suit for $2500. Larson, the deputy, while testifying at first that he did not remember serving Marnik with the summons, subsequently, after examining his records, stated positively that the summons was served on him. It was also shown by the evidence, and the master found, that on September 2, 1920, Bernice Cusack's attorneys addressed a letter to Marnik, duly stamped and deposited in the United States mail, informing him of the claim for damages for personal injuries sustained by Bernice Cusack on August 21, 1920, by a delivery truck owned by Marnik, who was requested to confer with these attorneys for an amicable adjustment of the claim. Again, October 9, 1920, these attorneys sent another letter to Marnik calling attention to their former communication and requesting a reply within five days or suit would be commenced. There was also in evidence and the Master found that very shortly after the accident Thomas Cusack, the father of Bernice, called on Marnik and informed him of the accident and that Marnik then stated that he would inquire of his driver whether his truck hit the little girl, and if his driver admitted it he would settle the claim. Although Marnik denies having received these letters, the Master was justified in finding that both of the letters were received by him and that he had notice of the claim prior to the suit, and that the summons in the law suit was properly served upon him, as shown by the return.

Complainant argues that he has a meritorious defense for the reason that the truck which injured the little girl did not belong to him but belonged to the North Western Packing Company, who had taken over his business. It is not shown at what time this corporation took over the business and the trucks which had belonged to Marnik, so that, as far as the record discloses, this transfer

of said case in the Superior Court until April 20, 1932, when he received a letter from Pullman & Goldstein, the attorneys for Frederick [illegible], advising him that on March 15, 1932, a judgment had been rendered against him in this law suit for $[illegible]. [illegible], the deputy, while testifying at first that he did not remember serving Hamlik with the summons, subsequently, after examining his records, stated positively that the summons was served on him. It was also shown by the plaintiff, and the master found, that on October 3, 1931, Frederick [illegible]'s attorneys addressed a letter to Hamlik, duly stamped and deposited in the United States mail, demanding [illegible] of the claim [illegible] for personal injuries sustained by [illegible] on August 11, 1931, by a delivery truck owned by Hamlik, [illegible] he was requested to confer with those attorneys for an amicable adjustment of the claim. Again, February 5, 1932, these attorneys sent another letter to Hamlik calling attention to their former communication and requesting a reply within five days or suit would be commenced. There was also in evidence and the master found that very shortly after the accident Thomas [illegible], the father of [illegible], called on Hamlik and informed him of the accident and that Hamlik then stated that he would inquire of his driver whether his truck hit the little girl, and if his driver admitted it he would settle the claim. Although Hamlik denies having received these letters, the master was justified in finding that both of the letters were received by him and that he had notice of the claim prior to the suit, and that the summons in the law suit was properly served upon him, as shown by the return.

Complainant argues that he has a meritorious defense for the reason that the truck which injured the little girl did not belong to him but belonged to the [illegible] Company, who had taken over his business. It is not shown at what time this corporation took over the business and the trucks which had belonged to Hamlik, so that, so far as the record discloses, this transfer

may not have taken place until after the accident.

In a number of respects Marnik's testimony was disingenuous and unconvincing, so that the Master's conclusions were in accord with the preponderance of the evidence.

There is good ground for believing that Marnik hoped that in some way during the transfer of his business to the North Western Packing Company he could avoid liability for the accident by ignoring the letters of the attorneys for Bernice Cusack and the service of summons.

It is not important that no execution was taken out on the judgment, which was a lien on Marnik's real estate, and the plaintiff might properly have been content with that.

The record amply justified the decree dismissing the bill, and it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

281 - 28039

3111a

JAMES H. WILLIAMS,
Appellee,

vs.

GRAYCE L. GRANT,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 651

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of an adverse judgment in a forcible detainer suit tried by the court.

The trial was conducted very informally. The stenographic report is almost entirely filled with statements and colloquies of counsel. The only item of legitimate evidence is a lease from Davidson, the owner of the premises in question, to Williams, the plaintiff, for a period of one year from May 1, 1923. Plaintiff then should have followed this with evidence that the defendant, Grayce Grant, was in possession, but no formal evidence of this seems to have been offered. However, her possession may be fairly implied from the statements and admissions of defendant's attorney. Plaintiff thus made out a _prima facie_ case.

The attorney for defendant made repeated and extended statements, but while he asserts that he was sworn as a witness, we do not understand that these statements were in the nature of testimony, as they consist largely of conclusions and arguments.

We find no evidence supporting any defense. Defendant offered what purported to be a lease of the premises from Davidson to the defendant, Grayce Grant, expiring April 30, 1923, with an option to lessee for an extension for a period of one year upon giving certain notice, the failure to give the notice to operate as a renewal, at the option of the lessor. There was no offer to show any notice or the exercise of the option of the lessor to extend the period.

Defendant's attorney also offered to prove a suit brought by Davidson against Grayce Grant. The connection of such suit with the instant case is not clear and certainly no connection appears from the way the offer was made at the trial. Apparently, after the trial, in making up the stenographic report certain papers relating to such suit were included, but these were not presented at the trial. The proper method of introducing oral evidence is by witnesses answering questions, and if documents are to be introduced they should be in court and properly identified and then offered and submitted for the inspection and ruling of the court.

Defendant's attorney also stated that the plaintiff, Williams, was a lessee from defendant of a part of the premises in question. Whether this is true or not, we cannot tell.

Defendant's attorney created a surmise that there was an adequate defense to the action but, in the absence of formal proof, it was not before the court. Cases cannot be tried upon the claims and statements of the attorneys.

As no sufficient reason appears for reversal, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

302 - 28960

PYRAMID COMPANY, a Corporation,
Appellee,

vs.

EARL L. COOK,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 651

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover payment for work and labor furnished defendant in installing Pyramid Composition Floors and had a verdict for $528. Defendant appeals from the judgment thereon.

The work was done pursuant to a written proposal and acceptance.

One of the defenses was that the job was not completed and the floors became broken and disintegrated. There was a conflict among the witnesses as to the character of the work. Some witnesses testified that the new floors were good with no defects. One witness described them as perfect. On the other hand, defendant and his witnesses state that the floors were "spotted and dirty like." After considering these variant opinions the jury evidently concluded the preponderance of the evidence showed that the floors were laid in a good workmanlike manner according to the contract.

The contract provided that the finished floors should be protected by defendant from other workers in the building in other trades by felt or a thick layer of sawdust "until the final hardness is reached." It was shown that the floors were walked upon and used by other workmen after they had been put down, and that the defendant did not protect them as required. It is also a fair inference that the spots or dirt on the floors were caused by the manner of cleaning.

The point most strongly urged in defense is the failure

of plaintiff to procure an architect's certificate showing that the work was properly done and that this was a condition precedent to payment of the contract price. Inspection of the proposal and the acceptance shows that no architect's certificate is mentioned therein, so that this factor is not in the case. Apparently acting under a mistaken impression of the contract, a salesman for plaintiff did apply to one of defendant's architects for a certificate, which was given to him, and this eventually came into the hands of defendant. Although plaintiff offered to introduce the certificate in evidence, defendant, who had it in his possession, refused to produce it. However, as the contract did not provide for the issuance of any certificate as a condition of payment to the plaintiff, this was immaterial.

The president of the plaintiff company, Frazier, testified that he met defendant by appointment a few days before the date set for trial and examined the floors with defendant and plaintiff's superintendent. On defendant complaining of the floors he was shown how to scrub them with steel wool, and defendant said if plaintiff would clean the floors he would pay the amount due. Frazier insisted on the money being paid first and defendant promised to have the money in court on the following Monday morning, when this case was set for trial. This promise was not kept. It is argued that the admission of this testimony was reversible error under the general rule that proposals made in a conference to effect a compromise are not binding as admissions. We do not think this conference was for the purpose of effecting a compromise. It was to ascertain what, if anything, was wrong with the floors and how the dirt could be removed. The rule invoked is not applicable, and the trial court properly permitted the testimony to stand.

The verdict is not manifestly against the weight of the

of plaintiff to procure an architect's certificate showing that the work was properly done and that this was a condition precedent to payment of the contract price. Inspection of the contract and the specifications shows that no architect's certificate is required therein, so that this defense is out of the case. Apparently acting under a mistaken impression of the contract, a witness for plaintiff did apply to one of defendant's architects for a certificate, which was given to him, and this eventually came into the hands of defendant. Although plaintiff offered to introduce the certificate in evidence, defendant, who had it in his possession, refused to produce it. However, as the contract did not provide for the issuance of any certificate as a condition of payment to the plaintiff, this was immaterial.

The president of the plaintiff company, Frawley, testified that he met defendant by appointment a few days before the date set for trial and discussed the figures with defendant and plaintiff's representatives. On defendant complaining of the figures he was shown how to check them with plaintiff's book, and defendant said if plaintiff would stand on the figures he would pay the amount due. Frawley testified as to money being paid there and defendant promised to have the money in court on the following Monday morning, when this case was set for trial. This promise was not kept. It is urged that the admission of this testimony was erroneous under the general rule that proposals made in a conference in effort at compromise are not binding or admissible. We do not think this conference was for the purpose of effecting a compromise. It was to ascertain what, if anything, was wrong with the figures and how any fault could be removed. The rule invoked is not applicable, and the trial court properly permitted the testimony to stand.

The verdict is not manifestly against the weight of the

evidence, and as there were no reversible errors upon the trial, the judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

311 - 28969

377[illegible]

LAKE & EXPORT COAL CORPORATION, a Corporation, Appellee, vs. CHICAGO FUEL COMPANY, a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

23[illegible]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover payment for sixteen cars of coal sold and delivered by plaintiff to defendant, whose affidavit of merits, upon motion, was stricken; defendant electing to stand by the same, an order of default was entered against it for want of an affidavit of merits, damages were assessed by the court, and judgment entered for $30[illegible]0.36, from which defendant appeals.

By plaintiff's statement of claim it is alleged that June 20, 1922, it received from defendant a written order for twenty-five cars of coal at $3 a ton f. o. b. mines, twenty-three to be shipped to defendant at Chicago and two cars to be shipped to Mt. Carroll, Illinois; that plaintiff sent its written acceptances and defendant assented to the terms and conditions contained in said acceptances; that in accordance with the agreement plaintiff, between June 22, 1922, and July 3, 1922, shipped to defendant twenty-five cars of the kind of coal specified; that on the reverse side of the written acceptances of the order by plaintiff were certain conditions which were part of the contract; that section one of these terms and conditions is as follows:

> "Terms of payment, cash on or before the 10th of each month for all coal shipped during the preceding month. Bill subject to sight draft if not paid when due. Interest at rate of 6% per annum will be charged on all past due accounts. Terms of payment being the essence of contract, non-compliance therewith shall give the sellers the privilege of cancellation and

waiver in any case shall not be construed as destroying this right. If at any time, in the judgment of the seller the credit of the purchaser shall become impaired the seller shall have the right to require payment in advance before making future shipment."

It is also alleged that June 30th plaintiff sent defendant a statement of sixteen cars shipped to defendant during June but defendant totally failed and neglected to pay for the coal delivered during June by July 10, 1923, and that because of this failure plaintiff wrote defendant on July 11th calling attention to the statement and the failure of defendant to remit, insisting that payment must be made promptly and asking that check be mailed at once. July 14th, defendant still having failed to pay for the coal shipped in June, plaintiff wired, calling attention to the terms of payment and asking for assurance that check would be mailed that day, as it was necessary to meet heavy obligations, including pay-roll. On the same day a letter was sent repeating the telegram and explaining the necessity for defendant to remit promptly. Plaintiff also on the same day by long distance telephone asked defendant for immediate payment and a check by return mail. June 15th plaintiff received a letter from defendant dated June 13th, saying: "We are not in a position to mail you a check at once, but will take care of your account just as quickly as possible." Plaintiff alleges that, by reason of the failure and neglect of defendant to pay for the coal shipped in June by the 10th of July, according to the conditions and terms of the agreement, plaintiff on July 16th rescinded and cancelled the agreement and diverted from their destination nine of the twenty-five cars then en route to the defendant and refused to deliver them to defendant. Plaintiff's statement gave the car numbers and weights of the sixteen cars shipped in June, which at the contract price of $3 a ton aggregated $2357.20, which plaintiff claimed was the amount due with interest.

On the face of plaintiff's two acceptances, one for the

Waiver in any case shall not be construed as destroying this right. If at any time, in the judgment of the seller the credit of the purchaser shall become impaired the seller shall have the right to require payment in advance before making future shipments."

It is also alleged that June [illegible] plaintiff sent defendant a statement of [illegible] shipped to defendant during June [illegible] totally failed and neglected to pay for the wood delivered during June by July 10, 1920, and that because of this failure plaintiff wrote defendant on July 12th calling attention to the statement and the failure of defendant to remit, insisting that payment must be made promptly, and asking that check be mailed at once. July 14th, defendant still having failed to pay for the wood shipped in June, plaintiff wired, calling attention to the terms of payment and asking for assurance that check would be mailed that day, as it was necessary to meet heavy obligations, including pay-rolls. On the same day a letter was sent repeating the telegram and explaining the necessity for defendant to remit promptly. Plaintiff also on the same day by long distance telephone [illegible] and a check by return mail. June 15th plaintiff received a letter from defendant dated June 14th, saying: "We are not in a position to mail you a check at once, but will take care of your account just as quickly as possible." Plaintiff alleges that, by reason of the failure and neglect of defendant to pay for the wood shipped in June by the 10th of July, according to the conditions and terms of the agreement, plaintiff on July 15th rescinded and cancelled the agreement and [illegible] from their destination [illegible] of the twenty-five cars [illegible] to the defendant and refused to deliver them to defendant. Plaintiff's [illegible] of the [illegible] shipped in June, which at the contract price of [illegible] a ton aggregated [illegible], which plaintiff claimed was the amount due with interest.

On the trial of plaintiff's [illegible]

twenty-three cars to Chicago, the other for the two cars to Mt. Carroll, were the words, "Shipment --- At once." Defendant argues that the statement of claim is defective in failing to allege that the entire twenty-five cars were shipped, "At once." The words "At once" were not an integral part of the agreement. The order sent by defendant says nothing of the time for shipment and there is nothing to indicate that defendant ever requested a shipment at once. These words are evidently plaintiff's own memorandum for its guidance as to the time of shipment. Furthermore, the terms and conditions refer to payments of coal by "the 10th of each month for all coal shipped during the preceding month." Section three refers to the failure of the purchaser "To accept this coal month by month, as agreed." These provisions negative any construction of the words "At once" as an obligation upon plaintiff.

There is also force in the point that the statement of claim alleges that shipments of the twenty-five cars were made before July 3rd, which, so far as appears to the contrary, is sufficient compliance with any agreement to ship "At once."

Defendant made no motion to carry back to the statement of claim the motion to strike the defendant's affidavit of merits, therefore it cannot on appeal question the sufficiency of the statement of claim. People v. Strawn, 265 Ill., 292; Town of Scott v. Artman, 237 Ill., 394; Heimberger v. Elliott F. & B. Co., 245 Ill., 443.

The crucial question is, does defendant's affidavit of merits state a legal defense to plaintiff's statement of claim.

The larger part of the affidavit is a recital of conclusions and of immaterial matters. It asserts that plaintiff's acceptance provided for shipment "at once," but that this was a condition of the contract; that the shipments were not made at once, or within a reasonable time. Plaintiff was not required to ship at once, and as all the cars were shipped within thirteen days

after receipt of the order defendant should have alleged facts, if any, which might show that this is not a reasonable time.

There are sixteen paragraphs in defendant's affidavit of merits. Most of them are properly open to the criticism of being argumentative, evasive, or inconsistent with each other. They are predicated upon an alleged breach by plaintiff in diverting the nine cars originally consigned to defendant. It is alleged that because plaintiff thus first breached the contract, defendant to fill orders already secured was obliged to go into the open market to buy nine cars of coal at an increased price, to its damage in the sum of $2912.17, which it was entitled to recoup.

The assumption of a breach of the contract by plaintiff is fallacious. By the terms of the agreement payment for coal shipped in one month should be made by the 10th of the following month, and a failure to do this gave plaintiff the privilege of cancelling the agreement. Defendant failed to pay for June shipments by July 10th, and after requests by letters, telegram and telephone, and after receiving defendant's written notice that it could not then pay, and could only do so at some indefinite time in the future, plaintiff cancelled the contract and diverted the nine cars in transit. Defendant was confessedly in default and plaintiff exercised the right of cancelling the contract in accordance with its terms. When time is the essence of a contract a party not in default can treat the contract as discharged when the other party defaults as to time. 4 Page on Contracts, section 2103. A vendor can properly refuse to deliver goods under a contract when the vendee has not made payments as required by the contract. Hess Co. v. Dawson, 149 Ill., 138.

Defendant being in default in his payments cannot recoup. Consumers Mutual Oil Co. v. Western Petroleum Co., 216 Ill. App., 382; Waldschmidt v. Marsh & Bingham Co., 203 Ill. App., 365. In order to maintain recoupment defendant should have alleged that

after receipt of the goods defendant should have alleged that, if any, which would show that this is not a reasonable time.

There are sixteen paragraphs in defendant's affidavit of merits. Most of them are properly open to the objection of being argumentative, evasive, or inconsistent with each other. They are principally used, as alleged therein by plaintiff in [illegible] the [illegible] were [illegible] employed in defendant. It is alleged that because plaintiff [illegible] first [illegible] the contract, defendant [illegible] [illegible] [illegible] [illegible] [illegible] by [illegible] [illegible] as an [illegible] [illegible], in the [illegible] of [illegible], [illegible] [illegible] [illegible] [illegible].

The assumption of a breach of the contract by plaintiff is [illegible]. By the terms of the agreement payment for each shipment in one month should be made by the tenth of the following month, and a failure to do this gave plaintiff the privilege of cancelling the agreement. Defendant failed to pay for the shipments on [illegible], and after requests by letters, telegrams and telephone, and after receiving defendant's written promise that it would not [illegible], and would only do so at some indefinite time in the future, plaintiff cancelled the contract and stopped the goods in transit. Defendant was unnecessary to [illegible] that plaintiff exercised the right of cancelling the contract in accordance with its terms. When time is the essence of a contract a party not in default may treat the contract as discharged when the other party defaults as to time. ([illegible] on Contracts, section [illegible].) A vendor can properly refuse to deliver goods under a contract when the vendee has not made payments as required by the contract. Kemp Co. v. Hammer, 146 Ill., 125.

Defendant being in default in its payments cannot recover. [illegible] Coal Co. v. [illegible] Co., [illegible] Ill. App., 449; [illegible] v. [illegible] Co., 204 Ill. App., 522. In order to maintain recoupment defendant should have alleged that

it was not in default under the contract, but this default is admitted. Purcell Co. v. Sage, 200 Ill., 342; Chicago [illegible] Coal Co. v. Whitsett, 278 Ill., 623.

Defendant was not obliged to sue in quantum meruit, but could properly sue for the contract price of the coal. Kesler v. Clifford, 165 Ill., 544; Edward Thompson Co. v. Decker, 200 Ill. App., 179.

Defendant contends that having filed a demand for a jury, damages could not have been assessed against it by the court. It was held otherwise in Pelvich v. Gledich, [illegible] Ill., 149; also Keith & Co. v. Keevan, 183 Ill. App., 187.

Other points are suggested in argument by defendant, but they are not of controlling importance.

The essential defect in defendant's affidavit of merits is that it admits its failure to pay for the June shipment of coal at the time required by the terms of the agreement, and does not set forth specifically any facts which might excuse or avoid its obligation to comply with these terms. It was properly stricken, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

359 - 28997

3780a

EDWARD F. VAUGHN and JEFFERSON T. TRUBLOOD, Copartners Trading as CHICAGO INSTITUTE OF ACCOUNTANCY, Appellees,

vs.

ALICE B. ROMMER, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 651

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for $80 against her upon a directed verdict in an action upon a promissory note made by defendant and delivered to plaintiffs, who are still the holders.

The defenses were that the note was given without valid consideration, for no consideration, and that the consideration had failed, and, substantially, that the note was procured by fraudulent misrepresentations.

It is the well established rule that these are matters of defense against the original holder of a note. Chap. 98, Negotiable Instruments, sec. 48, Illinois Statute (Cahill). Powers Reg. Co. v. Hoffmann, 159 Ill. App. 637; Luttrell v. Wyatt, 305 Ill. 274; Hicks v. Stevens, 121 Ill., 186, and numerous other decisions.

Defendant introduced evidence tending to show that she signed and delivered her note relying on certain fraudulent misrepresentations made by the plaintiffs in some twenty-one particulars stated in her brief. These involved questions of fact upon which the jury should have been permitted to pass; for if the facts were as she claims they constitute a sufficient defense to this suit.

It was also reversible error, when defendant called the plaintiff, Vaughn, to examine him in accordance with the provisions of section 33 of the Municipal Court Act, to permit plaintiffs' attorney to cross examine him as to matters about which he

had not been interrogated.

Numerous other errors occurred which would necessitate a reversal.

Defendant was entitled to have the jury pass upon her evidence, which seems to be conceded by the fact that plaintiffs have not appeared in this court to contest this appeal. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and Johnston, J., concur.

370 - 29028

37810

H. E. SELLMAN,
Appellant,

vs.

JOSEPH HUTTER and DENNIS J. EGAN, Bailiff, etc.,
Appellees.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

233 I.A. 652

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment in a replevin suit ordering the return of the property replevied, an automobile, to defendants.

The order of events seems to be about as follows: On or about February 14, 1921, defendant levied on an automobile under special execution against Otto Kube sued out of the Municipal court of Chicago.

March 3, 1921, Alexander J. Braun and John Shuerger brought a replevin suit in the County Court of Cook County against these defendants, and, filing a bond, the automobile taken under the replevin writ was turned over to the plaintiff's attorneys. September 22, 1921, judgment was entered in that suit awarding the property to defendants, and a writ of retorno habendo issued under which the sheriff seized the automobile October 6, 1921, and turned it over to the defendants, who are also the defendants in the present case.

October 28, 1921, J. E. Sellman commenced the present replevin suit and the automobile was again taken from defendants under the replevin writ and turned over to Sellman's attorneys, who are the same attorneys who represented Braun and Shuerger in the prior suit.

Plaintiff Sellman introduced evidence herein tending to show that he bought the automobile by bill of sale from Braun and Shuerger on July 1, 1921, when it was held pending the prior

replevin suit. There was also evidence that Braun had received a bill of sale from Kube on December 7, 1920.

From these facts it is clear that when Braun and Shuerger attempted to sell the automobile to Sellman it was in _custodia legis_ pending the determination of the replevin suit brought by them. It is the rule where property is taken under a writ of replevin, that, pending the action, the plaintiff cannot pass the title to a third person, but the plaintiff holds it subject to the final determination of the replevin suit and the purchaser from him acquires no better title than he has. 23 R. C. L. 903; _Pease_ v. _Ditto_, 189 Ill., 456; _Bruner_ v. _Dyball_, 42 Ill., 34; _Behr_ v. _Morgan_, 162 Mo. 474.

It follows therefore that whatever title plaintiff acquired from Braun and Shuerger was subject to the final disposition of the replevin suit then pending, and when it was determined adversely to them plaintiff Sellman lost all right to the automobile.

The judgment in the prior replevin suit in the County court was properly proven in the instant suit.

The finding and judgment were proper and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

379 - 29037

DAVID SODERBORG,
Appellee,

vs.

R. A. APPELLAND,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 652

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a contract for the purchase, by exchange, of an automobile, upon trial by the court had judgment for $235, from which defendant appeals.

Defendant is in the business of buying and selling automobiles and maintains a garage in which plaintiff's Chevrolet car was kept.

March 17, 1917, the parties executed a written contract whereby it was agreed to exchange plaintiff's Chevrolet car for a Dodge car; the Chevrolet to be taken by defendant at $335, the Dodge to be taken by plaintiff at $575, and the balance of $240 to be paid by plaintiff in cash.

Some days after the signing of the contract plaintiff called on defendant and asked for the Dodge car, and was told by defendant that his deal to procure a Dodge car had fallen through and that he could not deliver it. Plaintiff then asked for the return of his Chevrolet car but defendant said that he had sold it and wanted plaintiff to take another car, but plaintiff demanded $335, the price for which it was agreed that defendant would take the Chevrolet car. Plaintiff repeatedly attempted to collect the money and eventually received $100 from defendant. The suit for the balance followed.

Plaintiff, David Soderborg, and his brother, C. J. Soderborg, were in business together and they bought the Chevro-

[illegible]

DAVID SEDERBERG,
Appellee,

vs.

[illegible],
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

233 I.A. 652

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a contract for the purchase, by exchange, of an automobile, upon trial by the court had judgment for $225, from which defendant appeals.

Defendant is in the business of buying and selling automobiles and maintains a garage in which plaintiff's Chevrolet car was kept.

March [illegible], [illegible], the parties executed a written contract whereby it was agreed to exchange plaintiff's Chevrolet car for a Dodge car; the Chevrolet to be taken by defendant at $[illegible], the Dodge to be taken by plaintiff at $[illegible], and the balance of $[illegible] to be paid by plaintiff in cash.

Some days after the signing of the contract plaintiff called on defendant and asked for the Dodge car, and was told by defendant that his deal to procure a Dodge car had fallen through and that he could not deliver it. Plaintiff then asked for the return of his Chevrolet car but defendant said that he had sold it and wanted plaintiff to take another car, but plaintiff demanded $225, the price for which it was agreed that defendant would take the Chevrolet car. Plaintiff repeatedly attempted to collect the money and eventually received $[illegible] from defendant. The suit for the balance followed.

Plaintiff, David Sederberg, and his brother, [illegible] Sederberg, were in business together and they bought the Chevro-

let car jointly. C. J. Soderborg testified that he agreed with plaintiff regarding the exchange of the car and consented to his selling it, and that he did not claim anything from defendant on account of the car.

The principal point urged for reversal is that as C. J. Soderborg had an interest in the Chevrolet car, he was a necessary party to this suit and that plaintiff alone could not maintain it. It is undoubtedly the rule that where a contract is joint and not several, all the joint obligees must be joined as plaintiffs. But the interests of the parties, whether joint or several, must appear upon the face of the obligation. *International Hotel Co.* v. *Flynn*, 238 Ill., 636. In the instant case the contract upon which suit is brought was made with defendant by plaintiff alone. C. J. Soderborg was a stranger to it and could not join with plaintiff in an action thereon even though he may have an interest therein. 15 Enc. of Pleading and Practice, 527. An action cannot be brought jointly upon a contract by a party thereto and a stranger, as there is no privity between the stranger and the defendant. *Kadish* v. *Young*, 108 Ill., 170.

It is a matter of no consequence so far as defendant is concerned who may have an equitable interest in the contract if he has no defense to an action thereon. *Caldwell* v. *Lawrence*, 84 Ill., 161; *Hutchinson* v. *Crane*, 100 Ill., 269; *Faulner* v. *Gillen*, 211 Ill. App., 348.

The evidence shows that plaintiff was ready, able and willing to perform his agreement under the contract. Furthermore, when defendant notified plaintiff that he could not deliver the Dodge car this dispensed with proof by plaintiff of his readiness to perform. *Wolf* v. *Willitis*, 35 Ill., 82; *Goldstein* v. *Hasch*, 195 Ill. App. 1.

Defendant sought to introduce evidence that in 1920, three years after the contract was made, he had a conversation

ten was paid. G. J. Soderberg testified that he agreed with plaintiff regarding the repairing of the car and concurred in his setting it, and that he did not claim anything from defendant on account of the car.

The principal point urged for reversal is that as G. J. Soderberg had an interest in the Chevrolet car, he was a necessary party to this suit and that plaintiff alone could not maintain it. It is undoubtedly the rule that where a contract is joint and not several, all the joint obligees must be joined as plaintiffs. But the interests of the parties, whether joint or several, must appear upon the face of the obligation. Chicago National Bank Co. v. Clark, 266 Ill., 579. In the instant case the contract upon which suit is brought was made with defendant by plaintiff alone. G. J. Soderberg was a stranger to it and could not join with plaintiff in an action thereon even though he may have an interest therein. 15 Enc. of Pleading and Practice, 517. An action cannot be brought jointly upon a contract by a party thereto and a stranger, as there is no privity between the stranger and the defendant. Smith v. Young, 293 Ill., 175.

It is a matter of no consequence so far as defendant is concerned who may have an equitable interest in the contract if he has no defense as to such interest. Caldwell v. Lawrence, 84 Ill., 161; Hawkinson v. Green, 170 Ill., 587; Leonard v. [illegible], 316 Ill. App., 198.

The evidence shows that plaintiff was ready, able and willing to perform his agreement under the contract. Furthermore, when defendant notified plaintiff that he would not deliver the Dodge, such notice dispensed with proof by plaintiff of his readiness to perform. Ford v. [illegible], 73 Ill., 80; [illegible] v. [illegible], 185 Ill. App. 1.

Defendant sought to introduce evidence that in 1930, three years after the contract was made, he had a conversation

with the brother of plaintiff, which resulted in a contract calling for the delivery by defendant to him of a Paige car to be delivered "on or about July 1, or sooner if possible." Defendant offered to show that he told plaintiff about this contract with his brother and that the Paige car was ready for delivery, but that plaintiff said he could not take that car because he had bought an Elgin car. This evidence was excluded, together with the contract with C. J. Soderborg. Such evidence was inadmissible. The alleged contract for the Paige car was not related to the contract with David Soderborg, and there is no evidence that C. J. Soderborg had any authority to make a contract on behalf of plaintiff.

Furthermore, even if admitted, it would not be a defense, as the contract for the Paige car called for its delivery on or about July 1, 1920, or sooner, and on that date C. J. Soderborg was told by the defendant that he could not deliver the Paige car and could not promise when it would be delivered.

The merits of the controversy are clearly with the plaintiff, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

with the brother of plaintiff, which resulted in a contract call-ing for the delivery by defendant to him of a Dodge car to be delivered "on or about July 1, or sooner if possible." Defendant offered to show that he told plaintiff about this contract with his brother and that the Dodge car was ready for delivery, but the plaintiff said he would not make [illegible] had bought an Elgin car. This evidence was excluded, together with the contract with C. F. [illegible]. Such evidence was inadmissible. The alleged contract for the Dodge car was not related to the contract with [illegible], and there is no evidence that C. F. [illegible] had any authority to make a contract on behalf of plaintiff.

Furthermore, even if admitted, it would not be a defense, as the contract for the Dodge car called for its delivery on or about July 1, 1920, or sooner, and at that time C. F. [illegible] was told by the defendant that he could not deliver the Dodge car and could not promise when it would be delivered.

The merits of the controversy are clearly with the plaintiff, and the judgment is affirmed.

AFFIRMED.

[illegible], P. J., and [illegible], J., concur.

3183a

157 - 29246

ROSEHILL CEMETERY COMPANY,
a corporation,
Appellee,

vs.

ANNA VON BROCK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 24, 1923, on motion of appellee, the bill of exceptions contained in the transcript of the record was ordered stricken. Appellee now moves that the judgment of the Municipal Court of Chicago, entered after verdict on December 11, 1923, against appellant, Anna Von Brock, be affirmed. As none of the alleged errors assigned is based upon the common law record, the motion is granted and the judgment is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

37840

125 - 28777

HAROLD A. HOWARD and JOHN C. HOWARD, Trustees Under the Last Will and Testament of Sarah J. Howard, Deceased, Appellees,

vs.

LEVY SMITH, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 652

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Levy Smith, from a judgment in favor of the plaintiffs, Harold A. Howard and John C. Howard, Trustees for the estate of Sarah J. Howard, deceased, in an action of forcible detainer brought by the plaintiffs against the defendant. The facts are not in dispute. In the year 1920 the plaintiffs leased to Eugene J. Manns for a period of ten years certain property in the City of Chicago. With the knowledge and consent of the plaintiffs Manns sublet part of the premises and retained for himself the second and third floors of a building included in the lease, which floors he used as a rooming house or hotel. Manns entered into a partnership with the defendant for the operation of the rooming house or hotel, and sublet to the defendant for a period of five years, with an option of renewal for five years, a one-half undivided interest in the second and third floors. In April, 1922, Manns entered into a new lease with the plaintiffs for the same premises for a period of ten years. The lease contained a clause providing that the lease should not be assigned without the written consent of the lessors, the plaintiffs. The defendant and Manns continued to operate the rooming house or hotel as before. Later, in October, 1922, the defendant filed a bill in chancery to dissolve the partnership between him and Manns. A receiver was appointed who took possession of the

assets, including the leasehold interest of the defendant and Manns. By order of court the entire assets of the partnership, including the leasehold, were sold to the defendant. While negotiations were pending for the purchase of the assets of the partnership from the receiver, the defendant had a conversation with the plaintiffs in which he told the plaintiffs that he contemplated buying the assets of the partnership, and wanted to know what would be the attitude of the plaintiffs in regard to the leasehold. The plaintiffs told him that he could keep the premises and the leasehold, and that they would not disturb him. After the purchase from the receiver the defendant told the plaintiffs of the purchase, and offered to pay his proportionate share of the rent to the plaintiffs; but the plaintiffs told him to pay the rent to Manns. After he had the conversations with the plaintiffs the defendant made repairs on the premises amounting in cost to $1364. On December 15, 1922, an action of forcible detainer was begun by the plaintiffs against Manns and a judgment of possession was obtained by the plaintiffs. The defendant was not a party to this action. After the judgment against Manns, the defendant attempted to pay rent to the plaintiffs, but they refused to accept the rent.

On May 19, 1923, the plaintiffs began the present action of forcible detainer against the defendant.

The principal grounds on which defendant asks for a reversal of the judgment in the case at bar are, first, that the defendant acquired an assignment of the lease between Manns and the plaintiffs, and that the privity of estate of landlord and tenant was created between the defendant and the plaintiffs; second, that the plaintiffs are estopped from "interfering" with the defendant "in the use and occupation of the premises" by reason of the fact that the plaintiffs told the defendant "to buy the leasehold from the receiver"

assets, including the leasehold interest of the defendant and Hanna. By order of court the entire assets of the partnership, including the leasehold, were sold to the defendant. While negotiations were pending for the purchase of the assets of the partnership from the receiver, the defendant had a conversation with the plaintiffs in which he told the plaintiffs that he contemplated buying the assets of the partnership, and wanted to know what would be the attitude of the plaintiffs in regard to the leasehold. The plaintiffs told him that he could have the premises and the leasehold, and that they would not disturb him. After the purchase from the receiver the defendant told the plaintiffs of the purchase, and offered to pay his proportionate share of the rent to the plaintiffs; but the plaintiffs told him to pay the rent to Hanna. After he had the conversations with the plaintiffs the defendant made repairs on the premises amounting, it is said, to [illegible]. On December 11, [illegible], an action of forcible detainer was begun by the plaintiffs against Hanna and a judgment of possession was obtained by the plaintiffs. The defendant was not a party to this action. After the judgment against Hanna, the defendant attempted to pay rent to the plaintiffs, but they refused to accept the rent.

On May [illegible], [illegible], the plaintiffs began the present action of forcible detainer against the defendant.

The principal grounds on which defendant asks for a reversal of the judgment in the court below are, first, that the defendant acquired an assignment of the lease between Hanna and the plaintiffs, and that the privity of estate of landlord and tenant was created between the defendant and the plaintiffs; second, that the plaintiffs are estopped from "interfering" with the defendant "in the use and occupation of the premises" by reason of the fact that the plaintiffs told the defendant "to buy the leasehold from the receiver"

and "to repair the premises."

In answer to the contention of the defendant that the facts show an assignment of the lease to the defendant, it may be stated that the lease between the defendant and Manns included only part of the property contained in the lease between Manns and the plaintiffs; and the defendant could not claim any right by assignment to any other property than the second and third floors of the building which were operated as a rooming house or hotel. On the authorities cited by counsel for the defendant, in order that the defendant may be entitled to the premises by virtue of facts which operated as an assignment of the lease between Manns and the plaintiffs and created the relation of landlord and tenant between the plaintiffs and the defendant, it would be necessary for the defendant to show that he had acquired the whole of Manns' interest in the lease between Manns and the plaintiffs. Taylor v. Marshall, 255 Ill., 545; Lyons v. Moore, 261 Ill., 73. The receiver in taking possession of the partnership assets took possession of the leasehold of the partnership which embraced only the second and third floors; and that leasehold is all that the defendant acquired by purchase from the receiver. The remainder of the property included in the lease between Manns and the plaintiffs was not affected.

It is not contended by the defendant that the clause of the lease between Manns and the plaintiffs providing that an assignment of the lease should not be made without written consent, was waived by an acceptance of rent from the defendant by the plaintiffs, as the evidence shows that plaintiffs did not accept any rent from the defendant. Since the lease between Manns and the plaintiffs has been forfeited, and since the defendant is a sub-lessee of Manns as to the second and third floors, which were part of the property so contained in Manns' lease from the plaintiffs, the defendant, the sub tenant, may be evicted by the plaintiffs by the action of forcible detainer. Fatchell & Turner v. Johnston, 64 Ill., 305.

and "to repair the premises."

In answer to the contention of the defendant that the facts show an assignment of the lease to the defendant, it may be stated that the lease between the defendant and Green included only part of the property contained in the lease between Green and the plaintiffs, and the defendant would not claim any right by the assignment to any other property than the second and third floors of the building which were operated as a rooming-house or hotel. In the authorities cited by counsel for the defendant, in order that the defendant may be entitled to the premises by virtue of facts which operated as an assignment of the lease between Green and the plaintiffs and against the question of landlord and tenant between the plaintiffs and the defendant, it would be necessary for the defendant to show that he had acquired the whole of Green's interest in the lease between Green and the plaintiffs. [illegible] v. [illegible], [illegible] Ill., [illegible]; [illegible] v. [illegible], [illegible] Ill., [illegible]. The purchaser in taking possession of the partnership assets took possession, of the leasehold of the partnership which embraced only the second and third floors; and that leasehold is all that the defendant acquired by purchase from the receiver. The remainder of the property included in the lease between Green and the plaintiffs was not affected.

It is not contended by the defendant that the clause of the lease between Green and the plaintiffs providing that no assignment of the lease should not be made without written consent, was waived by an acceptance of rent from the defendant by the plaintiffs, as the evidence shows that plaintiffs did not accept any rent from the defendant. While the lease between Green and the plaintiffs has been forfeited, and since the defendant is a sub-lessee of Green as to the second and third floors, which were part of the property so contained in Green's lease from the plaintiffs, the defendant, the sub-tenant, may be evicted by the plaintiffs by the action of forcible detainer. [illegible] v. [illegible], [illegible] Ill., [illegible].

In regard to the question of estoppel urged by the defendant, we are of the opinion that the contention is without merit. The position of the defendant was not altered or changed in any way to his prejudice as the result of the conversations he had with the plaintiffs. He was the sub-lessee of Mamms before the conversations and he remained the sub-lessee of Mamms after the conversations. The only manner in which the defendant was affected by his purchase from the receiver of the leasehold in the second and third floors was that, instead of having a one-half undivided interest as he had had before the purchase, he acquired by the purchase the whole interest. He still remained, however, the tenant of Mamms. Furthermore, if the defendant acquired any rights by reason of the conversations he had with the plaintiffs, the rights were of an equitable nature, and could not be set up in an action of forcible detainer. St. Louis Stock Yards v. Wiggins Ferry Co., 102 Ill. 514, 520; O'Brien v. O'Brien, 196 Ill. App., 346, 347; Illinois Central R. R. Co. v. B. & O. & C. R. R. Co., 23 Ill. App., 531, 550.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

23 - 28373

FRANK I. BROWN,
Appellee,

v.

HUMMER GARAGE & SERVICE CO., a corp.,
Appellant.

CITY COURT OF CHICAGO HEIGHTS.

233 I.A. 653

Opinion filed Apr. 30, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in the City Court of Chicago Heights for the sum of $1,997.71, entered by the court, without a jury, in favor of the plaintiff, Frank I. Brown, and against the defendant, Hummer Garage & Service Co., for labor and services alleged to have been rendered by the plaintiff to the defendant pursuant to a resolution passed by the defendant corporation on October 15, 1920.

The pleadings consisted of the common counts, with an affidavit of claim, and a bill of particulars, and a plea of the general issue, affidavit of merits and a plea of set-off.

The defendant was a corporation (hereinafter called the Company) with a capital stock of the par value of $10,000.00; of which $7,000.00 was subscribed for leaving $3,000.00 of treasury stock. To begin business it purchased the stock on the shelves of the L. Motor Service Company

for $8900.00. The stockholders of the defendant in the fall of 1920, were Strong, Brown (the plaintiff), Schmidt and Rambow. Strong was president, and held a majority of the stock. The four stockholders constituted the board of directors. The plaintiff was secretary, wrote the minutes of the meetings, made and assisted in making sales, pumped gasoline, checked in boarders, washed floors, made certain records, working generally in the garage. He worked for the defendant from October 15, 1920, to May 15, 1922.

On October 15, 1920, there was a meeting of the board of directors, at which all four-representing all the outstanding stock - were present. At that meeting the following resolution was passed, "Motioned and seconded that salaries be in amounts as follows: Salary: J. O. Strong, $3,000; F. L. Brown, $2500; F. F. Schmidt, $2500; C. R. Rambow, $2000. Motion carried." Also, the following, "Moved and seconded that we, the present stockholders, all agree to leave in the corporation all salary possible, so long as needed, and that when one draws on their salary each shall draw pro-ratio of the amount based on their salary. Motion carried."

The plaintiff received in salary from October 15, 1920, to May 15, 1922, when he left, the sum of $2,581.00, and in addition, $79.60, which latter amount was admitted to be a just set-off. The total amount due him from October 15, 1920, to May 15, 1922, at $2500.00 a year, was $3,964.13, so that, having received $2,581.00, and being liable for the extra charge of $79.60, there was due him, according to his claim, $1,304.52. The court entered judgment for $1,397.71, an amount slightly less. The difference, however, is so small we shall consider it as negligible.

for $[illegible]. The stockholders of the defendant in the fall of 1922, were Harvey, Brown (the plaintiff), [illegible] and [illegible]. [illegible] was president, and held a majority of the stock. The four stockholders constituted the board of directors. The plaintiff was secretary, kept the minutes of the meetings, was employed in making sales, prepared samples, checked in merchandise, visited clients, made certain records, working generally in the office. He worked for the defendant from October 15, 1922, to May 15, 1923.

On October 15, 1922, there was a meeting of the board of directors, at which all four—representing all the outstanding stock — were present. At that meeting the following resolution was passed, "Moved and seconded that salaries be as follows: ... Motion carried." Also, the following, "Moved and seconded that we, the present stockholders, all agree to leave in the corporation all salary possible, as long as needed, and that when and ... their salary. Motion carried."

The plaintiff received in salary from October 15, 1922, to May 15, 1923, when he left, the sum of $[illegible], and in addition, $75.00, which latter amount was admitted to be a just set-off. The total amount due him from October 15, 1922, to May 15, 1923, at $[illegible] a year, was $[illegible], so that, having received $[illegible], and being liable for the set-off charge of $75.00, there was due him, according to his claim, $[illegible]. The court entered judgment for $[illegible], an amount slightly less. The difference, however, is so small we shall consider it as negligible.

On behalf of the company a number of claims are made why the judgment should not stand. It is contended that the resolution of October 15, 1920, did not ripen into a binding unqualified obligation of the defendant company, although it is stated in the reply brief that it "does not deny the legality of the minutes of October 15, 1920." The first part of the resolution, which fixed the salary of the defendant at $2500.00, was in the nature of a unilateral contract, being made up of a promise on the part of the defendant and services to be rendered on the part of the plaintiff. Until the plaintiff rendered his services under the contract it remained executory, but as services were rendered from time to time, the contract then became executed, and the plaintiff entitled to his money, unless prevented by reason of the qualifications set out in the second part of the minutes of the meeting of October 15, 1920. It was claimed that the minutes are too indefinite to show just what was the obligation of the defendant. We do not agree with that. The amount promised was expressly fixed. Nor do we think the plaintiff's rights to his salary were affected by the precatory words, "All agree to leave in the corporation all salary possible, so long as needed." Those words did not bind the plaintiff unless he saw fit voluntarily to indulge the defendant; and that, apparently, by quitting and bringing suit he did not see fit to do. The latter part of the minutes contains the following: "When one draws on their salary each shall draw pro-ratio of the amount based on their salary." If we consider the minutes without those words, there would seem to be no doubt that the plaintiff was entitled

In behalf of the company a number of claims are made why the judgment should not stand. It is contended that the resolution of October 15, 1880, did not ripen into a binding unconditional obligation of the defendant company; although it is stated in the reply brief that it "does not deny the legality of the minutes of October 15, 1880." The first part of the resolution, which fixed the salary of the defendant at $1500.00, was in the nature of a unilateral contract, being made up of a promise on the part of the defendant and services to be rendered on the part of the plaintiff. Until the plaintiff rendered his services under the contract it remained executory, but as services were rendered from time to time, the contract then became executed, and the plaintiff entitled to his money, unless prevented by reason of the qualifications set out in the second part of the minutes of the meeting of October 15, 1880. It was claimed that the minutes are too indefinite to show just what was the obligation of the defendant. We do not agree with that. The amount promised was expressly fixed. Nor do we think the plaintiff's rights to his salary were affected by the promising words, "All agree to leave in the corporation all salary possible, as long as needed." These words did not bind the plaintiff unless he saw fit voluntarily to indulge the defendant; and that, apparently, by omitting and enforcing suit he did not see fit to do. The latter part of the minutes contains the following: "When one draws on their salary each shall draw pro-rata of the amount based on their salary." If we consider the minutes without these words, there would seem to be no doubt that the plaintiff was entitled

to recover. There was an express promise to pay the plaintiff $2500.00 a year for his services, and theservices during the time in question were actually rendered. The trial judge was evidently of the opinion that the resolution of October 15, 1930, became a binding, unqualified promise. The record shows that he struck out the evidence as to the financial condition of the Company as it existed after October 15, 1930, and said, "I think the question of the finances of the Company should go out, but if the plaintiff entered into an enforceable contract * * * the plaintiff should recover. If it is an agreement which is not enforceable, he should not." From the present state of the record, it is difficult to determine, actually, just what evidence the trial judge left in, although it is certain that he based his final judgment on the ground that the resolution of October 15, 1930, together with the proof of the plaintiff's services, constituted a binding contract, without any qualifications, at $2500 a year.

In our judgment, the minutes of the meeting of October 15, 1930, show a definite agreement on the part of all, that when any one of the four was paid any salary, each of the others should be entitled to draw a similar proportionate part of his own salary. That meaning is somewhat supported by the conduct of the parties themselves. When the Company was organized it bought out the L. Motor Service Company, and was not strong financially. At the end of the first week, the Directors, who were doing the work of the Company, began to draw salaries, Rambow, $30.00; Brown, $25.00; and Strong, $30.00 per week. That went on until April, 1931, when, at the suggestion of Strong, Presi-

dent and Manager, his actual drawing was increased to $40.00 per week, and the others proportionately. He testified that Brown, Schmidt and Rambow said that that was satisfactory to them. He also testified that they were keeping the salaries paid proportionately, as mentioned in the minutes of October 15, 1920, and that in the latter part of December, 1921, he told them they would have to cut the salaries back to $30.00 and $35.00, because they had some bills to pay. The evidense shows that the checks were signed either by the plaintiff or by one Schmidt. The plaintiff testified that between October 15, 1920, and May 15, 1922, he drew $50.00 a week, nine or ten times. Schmidt, the Treasurer, testified that there was a meeting on May 1, 1922, at which the plaintiff was present, and that Strong said, "How would it do to waive our salaries and make our financial condition better?" that the plaintiff said he would not do it; that about February, 1922, the question of salary came up, and Strong told the plaintiff that if he did not take what he could get along with, he would have to quit; that the plaintiff said he could not draw enough to make a living. He further testified that he told the plaintiff he did not see how they could get along unless they cut out the overhead; that they started to do so, and that the plaintiff, to save a night man, began to work nights himself; that the plaintiff said he would work from seven at night till seven in the morning, and the night man was laid off. Schmidt further testified that Rambow only remained with the Company about four months, and that when he was about to leave, the question came up in regard to back pay; that Rambow was offered a note for

[illegible] and bonuses, his actual drawing was increased to $40.00 per week, and the others proportionately. He testified that Byrne, Schmidt and Kanter said that that was satisfactory to them. He also testified that they were keeping the salaries paid proportionately, as computed in the minutes of October 18, 1930, and that in the latter part of December, 1931, he told them they would have to cut the salaries down to $30.00 and $25.00, because they had more bills to pay. The evidence shows that the checks were signed either by the plaintiff or by Mr Schmidt. The plaintiff testified that between October 18, 1930, and May 15, 1932, he drew $30.00 a week, nine or ten times. Schmidt, the Treasurer, testified that there was a meeting on May 1, 1932, at which the plaintiff was present, and that Byrne said, "How would it be to waive our salaries and make our financial condition better?" that the plaintiff said he would not do it; that about February, 1932, the question of salary came up, and Byrne told the plaintiff that if he did not take what he could get along with, he would have to quit; that the plaintiff said he [illegible] make a living. He further testified that he told the plaintiff he did not see how they could get along unless they cut the overhead; that they started to do so, and that the plaintiff, to save a night man, began to work nights himself; that the plaintiff would be there from seven at night till seven in the morning, and the night man was laid off. Schmidt further testified that Kanter only remained with the company about four months, and that when he was about to leave, the question came up in regard to back pay; that Kanter was offered a note for

$500.00 for his stock, but his salary the Company could not pay; that the plaintiff said "He hasn't got any more right to draw his salary than I have to draw mine." The minutes of a directors meeting held on May 1, 1932, at which Strong, Schmidt and Brown were present, show a motion by Schmidt "that the unpaid back salary of the members of the board as set forth in minutes of October 15, 1930, and shown undrawn on books in closing entry of December 15, 1931, be stricken from liability account and thrown into loss, etc. account," that the motion was carried, Schmidt and Strong voting in the affirmative, and the plaintiff not voting. An audit of December 15, 1931, was offered in evidence, in which the plaintiff's salary was carried as a liability by the defendant, but, apparently, it was subsequently stricken out. Strong testified that after May 1, 1932, he did not consider the back salaries of the plaintiff, Schmidt and himself as liabilities of the corporation; that, although they were set forth by the auditor in the audit of December 15, 1931, as liabilities, they were stricken off as such on the filing of their Income Tax; that that was done by authority of the Board of Directors; that when the bank requested a statement, he furnished it, and back salaries did not appear therein; that the first action taken to have the back salaries eliminated, according to the auditor's report, was on May 1, 1932; that at that time there were only three directors; that he and Schmidt voted for it, and the plaintiff did not vote. He further testified that when considering the Income Tax Report he told the plaintiff that they ought to turn the back salary into the Profit and Loss Account; that otherwise they would have to pay an income tax on it; that at that time he did not consider it

$500.00 for his stock, but his salary the Company could not pay; that the plaintiff said "He hasn't got any more right to draw his salary than I have to draw mine." The minutes of a directors meeting held on May 1, 1923, at which Strong, Schmidt and Brown were present, show a motion by Schmidt "that the unpaid back salary of the members of the board as set forth in minutes of October 15, 1920, and shown entered on books in closing entry of December 31, 1921, be stricken from liability account and thrown into Loss, etc. account," that the motion was carried, Schmidt and Strong voting in the affirmative, and the plaintiff not voting. An audit of December 31, 1921, was offered in evidence, in which the plaintiff's salary was carried as a liability by the defendant, but, apparently, it was subsequently stricken out. Strong testified that after May 1, 1923, he did not consider the back salaries of the plaintiff, Schmidt and himself as liabilities of the corporation; that, although they were set forth by the auditor in the audit of December 31, 1921, as liabilities, they were stricken off as such on the filing of their income Tax; that that was done by authority of the board of directors; that when the bank demanded a statement, he furnished it, and back salaries did not appear therein; that the first action taken to have the back salaries eliminated, according to the auditor's record, was on May 1, 1923; that at that time there were only three directors; that he and Schmidt voted for it, and the plaintiff did not vote. He further testified that when considering the Income Tax Report he told the plaintiff that they ought to turn the back salary into the profit and loss account; that otherwise they would have to pay an income tax on it; that at that time he did not consider it

accrued and owing by the corporation. He further testified that prior to December 15, 1921, when one Adams had charge of the books, the back salaries were not carried as a liability on the books of the defendant; that they were not carried as a liability until one Miss Jansen showed them as such on December 15, 1921. At the close of the evidence, in discussing the competency of certain conversations between Brown, Strong and Schmidt, and that of the evidence as to the finances of the Company, and the introduction of the audit, the trial judge said: "The fact that they have not got the money is not a defense as I make out," and then when counsel for the defendant suggested that if the financial circumstances could not be shown, the audit also ought to go out, the trial judge said, "Yes, that's right. Let them all go out, as, if the plaintiff entered into an enforceable contract or into an agreement, or whatever term you wish to call it, the plaintiff should recover. If it is an agreement which is not enforceable, then he should not." In our judgment, the trial judge erred in failing to consider that the parties had agreed with each other and with the defendant that they were only to draw salary in equal proportions based upon the amounts mentioned in the resolution of October 15, 1920, and that, even though the plaintiff rendered services pursuant to the terms of the resolution, up to May, 1923, he was not entitled to recover without showing either that the defendant was at the time able to pay all of them in full, or without showing what proportionate part of all the salaries the defendant at that time was able to pay.

Judgment is reversed and cause remanded for a new trial. REVERSED AND REMANDED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

107 - 28383

DR. O. W. REST, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
HARRY MOSKOW, Appellant.	)	OF CHICAGO.

233 I.A. 653

Opinion filed Apr. 30, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On May 20, 1921, the plaintiff Dr. O. W. Rest, filed a statement of claim in the Municipal Court of Chicago against the defendant Harry Moskow. It recited that the plaintiff's claim is "for damages to his automobile while he was driving the same with due care and caution for its safety on or about the 18th day of February, 1921, at or near the intersection of Marquette Boulevard and Cottage Grove avenue, both public highways in the City of Chicago, County and State aforesaid, by reason of the careless, negligent and unlawful operation of a certain other automobile operated and controlled by the defendant herein, and by reason thereof the said automobile of this defendant ran into and collided with the automobile of the plaintiff, to the damage of the plaintiff in the sum of Three Hundred ($300.00) Dollars."

On June 9, 1921, the defendant filed an affidavit of merits in which he denied that he drove his automobile in a careless, negligent, or unlawful manner, as charged; denied that the plaintiff's automobile was damaged in the sum of $300; and alleged that the plaintiff was guilty of

negligence in the operation of his automobile, which caused, or contributed to cause, the said collision.

On November 18, 1923, there was a trial by jury, and a verdict for the plaintiff in the sum of $235.81. Judgment was entered on that verdict and this appeal taken therefrom.

No brief has been filed in this court on the part of the plaintiff.

The evidence of the plaintiff is substantially as follows: That he is a physician and surgeon, and had driven an automobile since 1914; that on February 13, 1920, at about 9:15 or 9:30 in the evening, he was driving an electric automobile east upon the south side of Marquette Boulevard in Chicago; that his electric lights were lighted; that just as he was going into Cottage Grove avenue, which runs north and south, he saw the automobile driven by the defendant, about fifty feet south of Marquette Boulevard; that he was driving his own automobile between ten and fifteen miles an hour; that the defendant was driving his automobile at about twenty-five miles an hour; that the two automobiles collided on the east side of Cottage Grove avenue, a little north of the center line of Marquette Boulevard; that as a result of the collision, the right front cowl of his automobile and the left front of the defendant's automobile came together; that immediately after the collision, the defendant said to him, the plaintiff, "I forgot it was a boulevard; it is my fault, and I will take care of your car;" that he subsequently had his automobile repaired by the Schuett Motor Car Company, and paid for the repairs. He further testified that the neighborhood

of the intersection was built up with business and residence buildings.

The witness Catherine Strahan, testified that at the time in question she was walking north on the east side of Cottage Grove avenue towards Marquette Boulevard, and saw the collision; that the defendant's automobile was going twenty-five miles an hour; that as the defendant's automobile swerved around the corner at Marquette Boulevard, going east, it collided with the plaintiff's automobile. On cross-examination she testified that when the automobile of the plaintiff had crossed the west crosswalk going into Cottage Grove avenue, the automobile of the defendant was about 25 feet south of the intersection; that the defendant's automobile was going from 20 to 25 miles an hour; that the defendant's automobile was "going at a rate of speed unusual on approaching a boulevard;" that it appeared to her that there would be a collision "unless somebody stopped;" that there were red lights on Marquette Boulevard and Cottage Grove avenue. It was admitted in the record that Marquette Road is a boulevard.

There was offered in evidence Section 1 of an ordinance of the City of Chicago, which is as follows:

> "It shall be unlawful for any person, firm or corporation operating any vehicle propelled by animal or other power, upon any public street in the city of Chicago to drive or cause the same to be driven upon any boulevard in said city without first bringing such vehicle to a full and complete stop."

Also Section 49 of the Municipal Court Code of the South Park Commissioners, which is as follows:

"No person, firm or corporation driving or operating any vehicle propelled by animal or other power, shall drive or cause the same to be driven into or upon any boulevard intersecting any driveway or section of two boulevards under the control of the South Park Commissioners without first bringing such vehicle to a full and complete stop before reaching the sidewalk line."

As to the damages to and cost of repairs of the plaintiff's automobile, one Schuett, President of the Schuett Repair Company, testified that he examined the plaintiff's automobile after the collision and found that the cowl of the body had a large cave-in; that the door would not close; that the posts and door jamb were knocked out of place; that one of the wheels was broken, and the fender and running board were smashed; that the principal part of the repair work was done in his place, and then it was taken to a paint shop where the painting was done under his supervision. He further testified that he was familiar with the reasonable cost of repairs to such an automobile in the year 1931; and familiar with the cost of painting such automobiles; that the automobile in question was put back in the same condition it was when it was bought, which was about three days before the collision; that the reasonable and customary cost of the repairs to the automobile at that time was $330.30. On cross-examination he stated that most of the repairing was done in his shop, although he let out part of it to another firm under a contract which called for $156.00 which he agreed to pay; that the $156.00 was the reasonable and customary cost for repainting and fixing the upholstering and taking the dent out of the car in 1931.

It is contended on behalf of the defendant that the plaintiff was guilty of contributory negligence; that

"The purpose, [illegible] painting or [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
before [illegible]."

As to the damages to and cost of repairs of the plaintiff's automobile, one [illegible], president of the [illegible] Repair company, testified that he examined the plaintiff's automobile after the collision and found that the rear of the body had a large cave-in; that the door would not close; that the seats had been knocked out of place; that one of the wheels was broken, and the fender and running board were smashed; that the principal part of the repair work was done in his place, and then it was taken to a paint shop where the painting was done under his supervision. He further testified that he was familiar with the reasonable cost of repairs to such an automobile in the year 1931, and familiar with the cost of painting such automobiles; that the automobile in question was put back in the same condition it was when it was bought, which was about three days before the collision; that the reasonable and customary cost of the repairs to the automobile at that time was $[illegible]. On cross-examination he stated that most of the repairing was done in his shop, although he let out part of it to another firm under a contract which called for $[illegible] which he agreed to pay; that the $[illegible] was the reasonable and customary cost for repainting and fixing the upholstering and taking the dents (?) out of the car in 1931.

It is contended on behalf of the defendant that the plaintiff was guilty of contributory negligence that

the ordinance of the City of Chicago providing that "it shall be unlawful for any person to drive any vehicle upon any boulevard in said City without first bringing said vehicle to a full and complete stop," is in conflict with the Motor Vehicle Law, and, therefore, void.

Section 33, of the Motor Vehicle Law of January 1, 1920, is as follows:

> "All vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left; Provided * * * that incorporated cities, having a population of more than 10,000 inhabitants may designate certain streets or boulevards as preferential traffic streets, and prescribe rules regulating traffic upon, crossing over, or turning into such streets or boulevards."

It will be observed that it is there provided that Chicago, "having a population of more than 10,000 inhabitants may designate certain streets or boulevards as preferential traffic streets, and prescribe rules regulating traffic upon, crossing over, or turning into such streets or boulevards." It follows, therefore, that the ordinance was valid, and that the defendant was guilty of a violation of the ordinance in driving into Marquette Boulevard without first stopping his automobile. The case of Kleis v. Adams Ex. Co., 300 Ill. 340, is not in point, as it was based on Section 12 of the Motor Vehicle Law of 1915.

As the evidence shows that when the plaintiff was actually driving into the intersection at a speed of from ten to fifteen miles an hour, and at that time the defendant was twenty-five to fifty feet south of the intersection and driv-

ing from twenty to twenty-five miles an hour, it is only reasonable to assume that if the defendant had complied with the ordinance and stopped his automobile at the south side of the intersection before driving into it, the collision would not have taken place. The defendant violated the ordinance by not stopping, and violated the State law, - section 22 - by excessive speed; whereas, the plaintiff, arriving first at the intersection, and assuming, as he was entitled to assume, that the defendant would obey the law, did only what he was entitled to do and was not guilty of contributory negligence. Of course, the State law does not mean that the driver of a vehcile is never entitled to drive into an intersection if he sees at any distance a vehicle approaching from the right. Salmon v. Wilson, 227 Ill. App. 286; Partridge v. Eberstein, 225 Ill. App. 203.

It is claimed that damages to the amount of the judgment were not proven. Schuett testified that his company repaired the automobile, that all of it was done under his supervision, and that the reasonable and customary cost of the repairs was $230.50. That, being uncontradicted, was ample.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

135 - 28411

S. R. HARRIS,
Appellee,

v.

ALEXANDER G. STAVROU,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

233 I.A. 653

Opinion filed Apr. 30, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in the Municipal Court, entered on October 13, 1922, for $350.00 and costs on the verdict of a jury in favor of the plaintiff, S. R. Harris, against the defendant, Alexander G. Stravrou.

On April 15, 1921, the plaintiff sued the defendant in an action of the fourth class, alleging that the latter employed him to obtain a loan, in the sum of $7,000.00, on certain real estate, for which he promised to pay the plaintiff a commission of five per cent; that the plaintiff offered fulfillment which was refused, and that the defendant as a result owed him $350.00.

On April 30, 1921, the defendant filed an affidavit of merits in which he admitted that he applied for the loan, but he therein alleges that the plaintiff failed to furnish the loan, and that he, the defendant, consequently, was obliged to secure a loan elsewhere; and denied that the plaintiff arranged for any loan, but that he, the defendant, was waiting

128 - 39655

A. L. HARRIS,
Appellee,

v.

ALEXANDER A. DEARBORN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

293 I.A. 653

Opinion filed Apr. 20, 1938.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the Court.

This is an appeal from a judgment in the Municipal Court, entered on October 13, 1937, for $365.00 and costs on the verdict of a jury in favor of the plaintiff, A. L. Harris, against the defendant, Alexander A. Dearborn.

On April 15, 1937, the plaintiff sued the defendant in an action of the fourth class, alleging that the latter employed him to obtain a loan, in the sum of $7,000.00, on certain real estate, for which he promised to pay the plaintiff a commission of five per cent; that the plaintiff offered fulfillment which was refused, and that the defendant thus really owes him $350.00.

On April 29, 1937, the defendant filed an affidavit of merits in which he admitted that he applied for the loan, but he therein alleges that the plaintiff failed to furnish the loan, and that he, the defendant, consequently, was obliged to secure a loan elsewhere; and denied that the plaintiff arranged for any loan, but that he, the defendant, was seeking

for the plaintiff and repeatedly requesting him for a loan, and finally was compelled to secure a loan elsewhere, and notified the plaintiff to that effect.

The evidence for the plaintiff consisted of the testimony of Morris M. Herriman and the plaintiff himself, and certain exhibits; and the evidence for the defendant consisted of his testimony alone. The evidence of Herriman is to the effect that he sold a farm to a certain party; that the latter sold it to another, and that he sold it to the defendant, Stavrou; that when he sold it there was $11,000.00 due him, on theprice he sold it for, that became due November 1, 1920; that he asked the defendant whether he was going to pay at the end of the month and the defendant said he had not succeeded in making a loan; that he asked the defendant whether he had seen the plaintiff about a loan, that he, the witness had borrowed money from the plaintiff on the same property; that the defendant said he would be very glad to see the plaintiff; that he, the witness, then took the defendant over to the plaintiff; that at the interview with the plaintiff the latter and the defendant did all the talking. On cross-examination, he said he had a talk with the defendant over the telephone sometime in December.

The evidence of the plaintiff is to the following effect; that he has been in the real estate, loan and insurance business in Chicago for 50 years and is a member of the Cook County Real Estate Board; that he first met the defendant on October 15, 1920; that he made out an application for a loan of $7,000.00 by S. H. Harris & Com-

fer the plaintiff had repeatedly requesting him for a loan, and finally was compelled to secure a loan elsewhere, and notified the plaintiff to that effect.

The evidence for the plaintiff consisted of the testimony of Morris H. Heartman and the plaintiff himself, and certain exhibits; and the evidence for the defendant consisted of his testimony alone. The evidence of Heartman is to the effect that he sold a farm to a certain party; that the latter sold it to another, and then he sold it to the defendant, [illegible]; that when he sold it there was $11,000.00 due him, on property he sold it for, that became due November 1, 1926; that he asked the defendant whether he was going to pay at the end of the month and the defendant said he had not succeeded in making a loan; that he asked the defendant whether he had seen the plaintiff about a loan, that is, the witness had borrowed money from the plaintiff on the same property; that the defendant said he would be very glad to see the plaintiff; that he, the witness, then took the defendant over to the plaintiff; that at the interview with the plaintiff the latter and the defendant did all the talking. On cross-examination, he said he had a suit with the defendant over the following [illegible].

The evidence of the plaintiff is to the following effect; that he has been in the real estate, loan and insurance business in Chicago for 25 years and is a member of the Cook County Real Estate Board; that he first met the defendant on October 15, 1926; that he made out an application for a loan of $7,000.00 by S. J. Harris & Sons-

pany to the defendant on the latter's real estate, to run at seven per cent, with five per cent to be paid as commission for negotiating or procuring the loan; that it provided that in consideration of S. R. Harris & Company undertaking to investigate the value of the security offered for the loan, the defendant agreed that the option to accept said application should continue and be irrevocable for 10 days from its date; that acceptance might be by mail; that after the defendant signed the application, the plaintiff told him that the loan was accepted and he, the plaintiff, would have the papers ready for him by November 1; that the papers, a trust deed by the defendant to Squire Rush Harris as Trustee, securing a note for $7,000.00 at 7 per cent, and a note for $7,000.00, payable three years after date at 7 per cent, with coupon notes, all payable to the order of the maker, were drawn up on October 25, but not signed by the defendant; that the defendant did not go to the plaintiff's office after those papers were prepared; that on or after November 1, 1920, the plaintiff called up the defendant on the telephone and the latter said he would be right over, but did not come; that almost daily thereafter he had a talk, apparently over the telephone, with the defendant; that the latter kept promising that he would call, but that he had been busy; that he, the plaintiff, on the following day, got the defendant on the telephone and he said he had been out of town but would be over; that he never came afterwards except when the "papers" were paid off; that he had at least a dozen or twenty talks with the defendant between then and the first of December; that the

pany to the defendant on the latter's real estate, to run at seven per cent, with five per cent to be paid as commission for negotiating or procuring the loan; that it provided that in consideration of W. H. Harris & Company undertaking to investigate the value of the security offered for the loan, the defendant agreed that the option to accept said application should continue and be irrevocable for 10 days from its date; that such investigation might be made; that after the defendant signed the application, the plaintiff told him that the loan was accepted and he, the plaintiff, would have the papers ready for him by November 1; that the papers, a trust deed by the defendant to Howard Bank Little as Trustee, securing a note for $7,000.00 at 7 per cent, and a note for $1,000.00, payable three years after date at 7 per cent, with coupon notes, all payable to the order of the maker, were drawn up on October 22, but not signed by the defendant; that the defendant did not go to the plaintiff's office after these papers were prepared; that on or after November 1, 1923, the plaintiff called up the defendant on the telephone and the latter said he would be right over, but did not come; that almost daily thereafter he had a talk, apparently over the telephone, with the defendant; that the latter kept promising that he would call, but that he had been busy; that he, the plaintiff, on the following day, got the defendant on the telephone and he said he had been out of town and would be there; that he never came afterwards except when the "papers" were paid off; that he had at least a dozen or twenty talks with the defendant between then and the first of December; that the

defendant never said anything about increasing the size of the loan.

On cross-examination the plaintiff testified that Herriman held a $11,000.00 mortgage on the property; that he, the plaintiff, had loaned Herriman $7,000.00 on his $11,000.00 mortgage, and that in loaning the defendant $7,000.00, he was going to use the loan to Herriman in paying off that much of the $11,000.00 incumbrance; that he had made arrangements to that effect; that he never at any time offered the money to the defendant; that he could not offer it to him because he was not there; that he told him over the telephone he had the cash to loan; that on the same day he said to the defendant, "Mr. Stavrou, why don't you come and sign the papers so I can have the guarantee policy brought down and pay you out your money;" that he, the plaintiff told the defendant he was ready to close out the loan the minute the papers were signed and the guarantee policy issued; that he could not have the policy issued until the papers were duly signed and recorded; that he met the defendant on the street in the latter part of December, and the defendant said, "I will give you fifty dollars commission if you will let me off and I will get a bigger loan." On re-cross-examination he testified that he asked the defendant why he had not been to his, the plaintiff's office, as he had promised, and the defendant said he could not get along with that amount of money and would give the plaintiff $50.00 if he would let him off; that he refused and told the defendant he would not accept less than $350.00; that he had previously sent the defendant

defendant never said anything about increasing the size of the loan.

On cross-examination the plaintiff testified that Sherman held a $11,000.00 mortgage on the property that he, the plaintiff, had loaned Sherman $7,000.00 on his $11,000.00 mortgage, but that in lending the defendant $7,000.00, he was going to use the loan to Sherman in wip-ing out that much of the $11,000.00 indebtedness; that he had made arrangements to that effect; that he never at any time offered the money to the defendant; that he could not offer it to him because he had not the money; that he told him over the telephone he had the cash to loan; that on the same day he said to the defendant, "Mr. [illegible], why don't you come and sign the papers so I can have the guarantee policy brought down and pay you out your money;" that he, the plaintiff told the defendant he was ready to close out the loan the minute the papers were signed and the guarantee policy issued; that he could not have the policy issued until the papers were duly signed and recorded; that he met the defendant on the street in the latter part of December, and the defendant said, "I will give you fifty dollars commission if you will let me off and I will get a bigger loan." On re-cross-examination he testified that he asked the defendant why he had not been to his, the plaintiff's office, as he had promised, and the defendant said he could not get along with that amount of money and would give the plaintiff $50.00 if he would let him off; that he refused and told the defendant he could not accept less than $350.00; that he had previously sent the defendant

a bill for that amount.

The testimony of the defendant consists almost entirely of a categorical denial of nearly all the essential facts testified to by the plaintiff, with the exception of an admission that he did apply for a loan of $7,000.00 and signed a blank application therefor.

1. It is claimed for the defendant that there was a variance; that the plaintiff sued as a licensed broker on a contract to procure a loan for a commission of five per cent, and that although he arranged for the loan, the defendant refused it; whereas, the evidence shows a contract, not with S. R. Harris, the plaintiff, but with S. R. Harris & Company, without any explanation as to who constituted the company. There was no obligation on the plaintiff to explain the difference, if any, between the two titles. With few exceptions, there is no law preventing anyone from assuming any title he desires to use. In re Carpenter, 109 Fed. 958; Robinson v. Magarity, 28 Ill. 423; Brennan, Adm'r. v. Partridge, 67 Mich. 449. In our judgment there was no variance.

2. It is claimed that a tender was not shown. The defendant signed the application, and the plaintiff, according to his testimony, then did all those things necessary and that could be done in consummation of the loan, before it became necessary for the defendant to further act, and then called upon the defendant to act, and he refused. That was sufficient. As the court said in Osgood v. Skinner, 211 Ill. 229, "If a contract calls for successive acts, first by one party and then by the other, there is no breach by one if

a bill for that amount.

The testimony of the defendant consists almost entirely of a categorical denial of nearly all the essential facts testified to by the plaintiff, with the exception of an admission that he did apply for a loan of $7,000.00 and signed a blank application therefor.

1. It is claimed for the defendant that there was a variance; that the plaintiff sued as a licensed broker on a contract to procure a loan for a commission of five per cent, and that although he arranged for the loan, the defendant refused. [illegible], the evidence shows a contract, not with R. A. Harris, the plaintiff, but with R. A. Harris & Company, without any explanation as to who constituted the company. There was no obligation on the plaintiff to explain the difference, if any, between the two titles. With the exceptions, there is in the [illegible] any title to [illegible] to them. [illegible], 219 Ill. 508; [illegible] v. [illegible], 26 Ill. 479; [illegible] v. [illegible], 87 Ill. 448. In our judgment there was no variance.

2. It is claimed that a tender was not shown. The defendant signed the application, and the plaintiff, according to his testimony, then did all those things necessary and that could be done in consummation of the loan, before it became necessary for the defendant to further act, and then called upon the defendant to act, and he refused. That was sufficient. As the court said in [illegible] v. [illegible], 711 Ill. [illegible], "If a contract calls for concurrent acts, first by one party and then by the other, there is no breach by one if

the precedent act has not been performed by the other."

3. It is claimed that the proof showed that the plaintiff was intending to loan his own money, and to charge seven per cent, and a commission of five per cent, and that such a contract was usurious. But as no money was actually paid over, and as the trust deed that was made out showed the plaintiff to be named as trustee, and as no charge of usury was set up in the affidavit of merits, the claim is not established.

4. It is claimedthat the court erred in regard to certain oral instructions. But when an exception was taken by counsel for the defendant, it recited that it was to each and every instruction given on behalf of the plaintiff, and to the refusal of each and every instruction refused that was requested by the defendant, and that is insufficient. The attention of the trial judge should be called to the particular matters which counsel consider erroneous.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

143 - 38481

ARTHUR J. DE VAL,

Appellee,

v.

CHRISTINA HANSEN, also known as Christine G. Hansen and known as Tina C. Hansen,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 658

Opinion filed Apr. 30, 1934.

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment entered in the Municipal Court, without a jury, in the sum of $1,000.00 in favor of the plaintiff, Arthur J. De Val, against the defendant, Christina Hansen, for commissions on the sale of a piece of real estate.

On April 13, 1931, the plaintiff filed a statement of claim in which he alleged that he was a duly licensed real estate broker; that the defendant listed for sale with him her property at the southwest corner of Irving Park Boulevard and Narragansett avenue, Chicago, and employed him to find a purchaser at the price of $40,000.00 and agreed to pay him the usual real estate commission in the event that he found such a purchaser; that the plaintiff, thereafter, produced Joseph Kasicki and Jane Kasicki, purchasers, at the price of $45,000.00, as a result of which, the usual real estate board commission of three per cent on said amount became due to the plaintiff,

On May 3, 1921, the defendant filed an affidavit of merits in which she denied that she listed her property with the plaintiff; denied that she employed the plaintiff to find a purchaser at a price of $45,000.00; denied that she agreed to pay the plaintiff the usual real estate board commission; denied that the plaintiff submitted the premises to Bianchi and Radini; denied that they agreed to and did purchase the premises at a price of $45,000.00; and denied that she was indebted to the plaintiff in any sum whatever.

In support of the plaintiff's claim, the plaintiff, himself, testified and, also, two witnesses Bianchi and Bedell, and the defendant, who was called under the statute. For the defendant one Kolacek, and the defendant herself, testified.

The evidence of the plaintiff is to thefollowing effect: He was in the real estate business at 3932 Narragansett avenue, and had been in that business for twelve years. From 1920 to 1921 he had been a duly licensed real estate dealer. He had known the defendant for ten or twelve years. The first time he had business dealings with her was in the winter of 1920 - 1921, in January or February. About that time she spoke to him about selling the property in question. Around the first of the year 1921, she sent for him and he saw and spoke to her in her office, in the rear of the building. She said she wanted to sell her property. He asked her what she wanted for it and she said $45,000.00 and that she wanted him to work on it and sell it, and he said, "All right." She asked him what the commission would be in case he sold it, and he told her, the regular real estate commission. That was all she told him then, and he told her, he would work on it.

On May 5, 1931, the defendant filed an affidavit of merits in which she denied that she listed her property with the plaintiff; denied that she employed the plaintiff to find a purchaser at a price of $45,000.00; denied that she agreed to pay the plaintiff the usual real estate board commission; denied that the plaintiff submitted the premises to [illegible] and [illegible]; denied that they agreed to [illegible] the purchase the premises at a price of $45,000.00; and denied that she was indebted to the plaintiff in any sum whatever.

In support of the plaintiff's claim, the plaintiff, himself, testified and, also, two witnesses [illegible] and [illegible], and the defendant, who was called under the statute. For the defendant one [illegible], and the defendant's counsel, testified.

The evidence of the plaintiff is to the following effect: He was in the real estate business at [illegible] avenue, and had been in that business for twelve years. From 1920 to 1932 he had been a duly licensed real estate dealer. He had known the defendant for ten or twelve years. The first time he had business dealings with her was in the winter of 1930 - 1931, in January or February. About that time she spoke to him about selling the property in question. Around the first of the year 1931, she sent for him and he met and spoke to her in her office, in the rear of the building. She said she wanted to sell her property. He asked her what she wanted for it and she said $45,000.00 and that she wanted him to work on it and sell it, and he said, "All right." She asked him what the commission would be in case he sold it, and he told her, the regular real estate commission. That was all she told him then, and he told her, he would work on it.

He saw her next about two or three weeks later, and one Bianchi came in to see him and he took him and his partner Radini over and they went around the building. He asked them to go with him inside and talk to the defendant. She was in front of the building and they walked inside the door on 64th street, and she came back there and he introduced Bianchi and Radini to her, and they all talked there for about half an hour about theprice. When he introduced them to her, he said, "this is Mr. Bianchi and Mr. Radini to look at your building", and she shook hands with both of them.

He told the defendant that Bianchi and Radini would give her, her price of $46,000.00, and they talked it over with her, Mrs. Bianchi also being present. After the others left, the defendant asked him what her commission would be in case it was sold andhe told her, the regular real estate commission. He then worked on it, and they came back and forth several times. He was there twice after that, while Bianchi and his wife, and Radini were looking at the building. He gave the price as $46,000.00 to Bianchi and Radini, and told the defendant that that was always done, and they could then come down. Before he took Bianchi and Radini over there, he already had had a talk with the defendant, about asking more than $45,000.00. He called Bianchi and Radini up at six o'clock and gave them the price of $45,000.00. When she had said she wanted to sell the property for $45,000.00, he told her he would ask $46,000.00 and she said, all right, and they then worked on that basis right straight through. That conversation occurred in theback of defendant's building around the latter part of January or the first of Febru-

He saw her next about two or three weeks later, and one Bianchi came in to see him and he took him and his partner Radini over and they went around the building. He asked them to go with him inside and talk to the defendant. She was in front of the building and they walked inside the door on 64th street, and she came back there and he introduced Bianchi and Radini to her, and they all talked there for about half an hour about theprice. When he introduced them to her, he said, "This is Mr. Bianchi and Mr. Radini to look at your building", and she shook hands with both of them.

He told the defendant that Bianchi and Radini would give her, her price of $46,000.00, and they talked it over with her, Mrs. Bianchi also being present. After the others left, the defendant asked him what her commission would be in case it was sold andhe told her, the regular real estate commission. He then worked on it, and they came back and forth several times. He was there twice after that, while Bianchi and his wife, and Radini were looking at the building. He gave the price as $48,000.00 to Bianchi and Radini, and told the defendant that that was always done, and they could then come down. Before he took Bianchi and Radiniover there, he already had had a talk with the defendant, about asking more than $46,000.00. He called Bianchi and Radini up at six o'clock and gave them the price of $48,000.00. When she had said she wanted to sell the property for $46,000.00, he told her he would ask $48,000.00 and she said, all right, and they then worked on that basis right straight through. That conversation occurred in theback of defendant's building around the latter part of January or the first of Febru-

ary. The last time he saw the defendant was when he wanted to see her about making arrangements for the commission, and she then said he would have to see her lawyer. He was not present when the deal was consummated in Wise's office, but afterwards saw Bianchi and Radini in possession. His evidence on cross-examination is that the first talk he had with the defendant was about the first of January, 1931; that he took Bianchi and Radini there about three weeks afterwards; that he and they were in there twice after that; that he was there when Bianchi and Radini called to look over the property; that he brought Bianchi and Radini in there about the first of February, 1931, and submitted the property to them at a price of $46,000.00 and then in the evening called them up where they lived at Milwaukee, on the long distance telephone, and told them that $45,000.00 would be the least they could buy it for; that nothing was said as to how the money was to be paid as the terms had not been decided upon.

The evidence of the plaintiff is substantially corroborated by the witness Bianchi, who was one of the purchasers. Bianchi is evidently of foreign extraction and did not speak good English, so that at times his answers are not altogether clear. He testified that he and his partner were looking around for some property, and they had a talk with the plaintiff and asked him to see how much was asked for the corner of 64th and Irving Park Boulevard; that neither he nor his partner Radini had ever met the defendant until the plaintiff introduced them to her in the early part of 1931; that that occurred in the dining room of the building in question; that they shook hands with her and he, Bianchi, asked her how much she wanted for the property, and she

ary. The last time he saw the defendant was when he wanted to see her about making arrangements for the commission, and she then said he would have to see her lawyer. He was not present when the deal was consummated in Vise's office, but afterwards saw Bianchi and Radini in possession. His evidence on cross-examination is that the first talk he had with the defendant was about the first of January, 1921; that he took Bianchi and Radini there about three weeks afterwards; that he and they were in there twice after that; that he was there when Bianchi and Radini called to look over the property; that he brought Bianchi and Radini in there about the first of February, 1921, and submitted the property to them at a price of $45,000.00 and then in the evening called them up where they lived at Milwaukee, on the long distance telephone, and told them that $45,000.00 would be the least they could buy it for; that nothing was said as to how the money was to be paid as the terms had not been decided upon.

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said $45,000.00; that he asked her how much for the rent of the whole building and she said $400.00; that he told her he thought it was pretty high, but he would think it over; that he never saw her after that or was in the place afterwards before he bought it. He, further, testified that he and his partner thought it over and then he saw his real estate man one Kolacek, and he sent him over there to see if he could get it a little cheaper; that afterwards he saw Kolacek and the latter said the price was $45,000.00; that he, the witness, then said he would let it go for a couple of days or months, and after that he signed the contract; that he then refused to buy until it was arranged that he could trade in a building he owned, for $30,000.00; that he then bought and got the title; that the deal was closed about the first of March; that after he said he would buy he went over there and was shown the rooms; that before he signed the contract, he told the defendant she would have to fix up the commission with the plaintiff because he was the man who introduced him; that after she said she would take care of it, he signed the contract; that she said, don't worry about it; that the deal was closed in Wise's office. On cross-examination, he testified that he had known Kolacek for four or five years; that Kolacek never showed him the property in September or October, 1930; that he did show him some property in the neighborhood; that he told Kolacek, he wanted to buy some property; that Kolacek never showed him the property in question and never spoke to him about it, before the first time the plaintiff took him to see it; that when he was on the property with the plaintiff and Badini and saw the defendant it was some time in January or

February; that nothing was then said about the terms; that the price was $45,000.00. When asked, "You didn't figure you were going to buy it?", he answered, "I don't figure I going to buy, because -". He further testified that afterwards, he went to Kolacek and told him to look up that property for him; and then sometime after that Kolacek brought him a contract and it was signed; that Kolacek conducted the negotiations about a change in the contract, because he, the witness, did not have enough money; that it was arranged that the defendant should take another piece of property as part payment, and he finally bought the property in March; that he paid Kolacek $150.00 as commissions on the price of the property the defendant took in part payment.

On redirect, he testified that, all told, he saw the plaintiff about four or five times in reference to the property; that the plaintiff called him upon the telephone about the $45,000.00 and he the witness said he could not buy because he did not have money enough.

From the foregoing it will be seen that the plaintiff made out a prima facie case. His evidence, and that of Bianchi, by itself sufficiently proves that the plaintiff was employed by the defendant and that as a result of that employment the defendant sold her property. But it is earnestly contended on behalf of the defendant that she never employed the plaintiff. She says that she never had any conversation with the plaintiff in reference to the sale of the property. She admits that the plaintiff called on her with Mr. and Mrs. Bianchi and Radini in the latter

part of January, to see the premises, and that the plaintiff introduced them. But she says she said nothing about the property because they had already bought it. Her testimony is difficult to understand. She says that before the contract was signed Kolacek did not come into her place with Bianchi and Radini and that she never talked with him, Kolacek, about the property before the contract was signed; that she never talked with the plaintiff at any time about selling her property. She then says that when Bianchi and Radini and the plaintiff were in the place she told the plaintiff the others had already signed the contract, and that when the plaintiff said, "What about me," she said, "I don't know anything about you, you will have to see my attorney." And yet she had already testified that at that conversation nothing was said by the plaintiff, save that he introduced Bianchi and Radini. She says that the first person she talked to about the sale of her property was Kolacek; that she told him it could be bought for $45,000.00, and discussed the terms with him. A close examination of her conversation with the plaintiff discloses, however, that she stated, finally, that the plaintiff said he was entitled to a commission as long as he brought them there and introduced them, and that she said if you have anybody to see, you have my attorney, the property is sold; that that occurred on the 18th or 19th of January, 1921, and the contract was signed on January 17.

She further testified that there were further negotiations after January 17; that they said that they could not get that much money and wanted her to take another building

part of January, to see the premises, and that the plaintiff introduced them. But she says she said nothing about the property because they had already bought it. Her testimony is difficult to understand. She says that before the contract was signed Kolacek did not come into her place with Hiznaki and Radini and that she never talked with him, Kolacek, about the property before the contract was signed; that she never talked with the plaintiff at any time about selling her property. She then says that when Hiznaki and Radini and the plaintiff were in the place she told the plaintiff the others had already signed the contract; and that when the plaintiff said, "What about me," she said, "I don't know anything about you, you will have to see my attorney." And yet she had already testified that at that conversation nothing was said by the plaintiff, save that he introduced Hiznaki and Radini. She says that the first person she talked to about the sale of her property was Kolacek; that she told him it could be bought for $45,000.00, and discussed the terms with him. A close examination of her conversation with the plaintiff discloses, however, that she stated, finally, that the plaintiff said he was entitled to a commission as long as he brought them there and introduced them, and that she said if you have anybody to see, you have my attorney, the property is sold; that that occurred on the 13th or 15th of January, 1921, and the contract was signed on January 17.

She further testified that there were further negotiations after January 17; that they said that they could not get that much money and wanted her to take another building

in part payment which she did, and that she had negotiations with Kolacek, and that a modifying agreement was finally made and signed on March 5, at Wise's office; and that she paid Kolacek a commission of $1,000.00.

On cross-examination she stated that she saw the plaintiff twice on the same day and at no other time; that Kolacek tried to buy the property for Bianchi and Radini; that he first came to her in October; that she had been a tenant for 28 years; that in November she herself got an option for the property and Kolacek called four or five times after that; that she got title in December; that the contract with Bianchi and Radini was signed on January 17, and about a month later, she got the title; that about two weeks later she was informed that they would not carry out the contract and if the modifying agreement had not been made, the sale would not have gone through.

The testimony of Kolacek, a real estate dealer, corroborates in part, that of the defendant. He says that in the early part of October, Bianchi came to his office and asked him if he could find out what the value of the property in question was, and, also, that on the northwast corner, and that he went over and, for the first time spoke to the defendant, and asked her if the property could be bought and that she told him the price was $45,000.00, and the next day he reported that to Bianchi when the latter called at his office and Bianchi asked him to work on it. He further testified that terms were first discussed in December, and he then learned how much Bianchi

in part payment which she did, and that she had negotiations with Holacek, and that a modifying agreement was finally made and signed on March 5, at Niele's office; and that she paid Holacek a commission of $1,000.00.

On cross-examination she stated that she saw the plaintiff twice on the same day and at no other time; that Holacek tried to buy the property for Bianchi and Bedini; that he first came to her in October; that she had been a tenant for 22 years; that in November she herself got an option for the property and Holacek called four or five times after that; that she got title in December; that the contract with Bianchi and Bedini was signed on January 17, and about a month later, she got the title; that about two weeks later she was informed that they would not carry out the contract and if the modifying agreement had not been made, the sale would not have gone through.

The testimony of Holacek, a real estate dealer, corroborates in part, that of the defendant. He says that in the early part of October, Bianchi came to his office and asked him if he could find out what the value of the property in question was, and, also, that on the northeast corner, and that he went over and, for the first time spoke to the defendant, and asked her if the property could be bought and that she told him the price was $15,500.00, and the next day he reported that to Bianchi when the latter called at his office and Bianchi asked him to work on it. He further testified that terms were first discussed in December, and he then learned how much Bianchi

had paid down; that he got in touch with Radini and he raised the sum of $5,000.00; and then they got together and the contract was signed January 17, 1931; that after that Bianchi and Radini came to his office and said that they did not have enough money and they would have to back out; that he took the matter up with the defendant over the telephone, and, also, with them, and finally they came to an agreement suggested by Bianchi, that they would furnish a piece of property as part payment; that then a supplemental contract was prepared in Wise's office. He testified that the plaintiff's name was never mentioned until the deal was closed and deeds passed; and that then the plaintiff came to his, the witness's office and introduced himself and wanted to know if he was not going to split commissions with him; that he told the plaintiff he did not know him and had no commissions to split; that he, the witness, had sold the property and was entitled to what he got; that the plaintiff left saying he was going to sue him. Kolacek then denied the testimony of Bianchi, that he, Bianchi first saw the property through, and was taken there by the plaintiff. He testified, further, that he did not take Bianchi over to see the property because it is shown on the map and Bianchi said he knew the location; that after the deal, Bianchi said, you know I went to the plaintiff. On cross-examination, he testified that he never took Bianchi over to see the defendant; that he told her who his customer was before she signed the contract and explained it to her in October, November and December; that he used the name Bianchi; that the defendant never mentioned the name of

had paid them; that he got in touch with Radini and he raised the sum of $1,000.00; and then they got together and the contract was signed January 17, 1951; that after that Bianchi and Radini came to his office and said that they did not have enough money and they would have to back out; that he took the matter up with the defendant over the telephone, and, also, with Vine, and finally they came to an agreement suggested by Bianchi, that they would furnish a piece of property to make payment; that then a supplemental contract was prepared in Vine's office. He testified that the plaintiff's name was never mentioned until the deal was closed and deeds passed; and that then the plaintiff came to him, the witness's office and introduced himself and wanted to know if he was not going to split commissions with him; that he told the plaintiff he did not have him and had no commission to split; that he, the witness, had sold the property and was entitled to what he got; that the plaintiff left saying he was going to sue him. Walcott then denied the testimony of Bianchi, that he, Bianchi first saw the property through, and was taken there by the plaintiff. He testified, further, that he did not take Bianchi over to see the property because it is shown on the map and Bianchi said he knew the location; that after the deal, Bianchi said, you know I sold to the plaintiff. On cross-examination, he testified that he never told Bianchi [illegible] the defendant; that he told her who his customer was before she signed the contract and explained it to her in October, November and December; that he used the name Bianchi; that the defendant never mentioned the name of

the plaintiff to him; that Radini came into the matter after the change in the contract.

The witness Bianchi, was recalled and stated that the first conversation he had with Kolacek was in January, before the property was sold; that before Radini and he signed they went to Kolacek and he, Bianchi, told Kolacek that the plaintiff was the first man who introduced him and that he told him to get a cheaper price than $45,000.00; that Kolacek said, "Well, I will fix up with the plaintiff." Kolacek was recalled, and denied that testimony of Bianchi, and stated that he must have seen the defendant at least four or five times at her place of business, and that he believed it was the second time that he called on her that he mentioned Bianchi.

One Bedell testified for the plaintiff that either in the latter part of December or first of January, he saw the defendant at her place and she asked him to tell the plaintiff to come over as she wanted to see him, and that when he saw the plaintiff he told him and the plaintiff went over; that he was at the defendant's place continually in December and January and saw Mr. and Mrs. Bianchi there several times. Bianchi, recalled, stated that it was from fifteen days to a month before the contract was signed that the plaintiff took him over to the defendant; that the defendant did not say to the plaintiff that the contract was already signed; that, as amatter of fact, it was not signed at that time; that the plaintiff took him there before he spoke to Kolacek; that when he spoke to Kolacek, he told him about the plaintiff, and said to Kolacek, when I buy you have to fix up the plain-

the plaintiff to him; that Radini came into the matter after the change in the contract.

The witness Bianchi, was recalled and stated that the first conversation he had with Kolacek was in January, before the property was sold; that before Radini and he signed they went to Kolacek and he, Bianchi, told Kolacek that the plaintiff was the first man who introduced him and that he told him to get a cheaper price than $40,000.00; that Kolacek said, "Well, I will fix up with the plaintiff." Kolacek was recalled, and denied that testimony of Bianchi, and stated that he must have seen the defendant at least four or five times at her place of business, and that he believed it was the second time that he called on her that he mentioned Bianchi.

Geo Rodell testified for the plaintiff that either in the latter part of December or first of January, he saw the defendant at her place and she asked him to tell the plaintiff to come over as she wanted to see him, and that when he saw the plaintiff he told him and the plaintiff went over; that he was at the defendant's place continually in December and January and saw Mr. and Mrs. Bianchi there several times. Bianchi, recalled, stated that it was from fifteen days to a month before the contract was signed that the plaintiff took him over to the defendant; that the defendant did not say to the plaintiff that the contract was already signed; that, as a matter of fact, it was not signed at that time; that the plaintiff took him there before he spoke to Kolacek; that when he spoke to Kolacek, he told him about the plaintiff, and said to Kolacek, when I buy you have to fix up the plain-

tiff, because he is the man who introduced him first to the defendant; that Kolacek said, he would fix up with the plaintiff; that he told Kolacek the reason he wanted him to go and see the defendant was to see if he could get the property cheaper than $45,000.00; that prior to that time Kolacek never spoke to him about the property.

It will be seen from the foregoing, that the evidence for the plaintiff is in many ways contradicted by that for the defendant. As said before, taking the plaintiff's and Bianchi's testimony by itself the defendant was liable. The trial judge found for the plaintiff. The question then arises does the record here before us, upon careful scrutiny and consideration, lead to the conclusion that the judgment is clearly against the weight of the evidence. In re Simon, 366 Ill. 304; Jones v. Jones, 186 Ill. App. 106. Having already recited the substance of the evidence, it would now be a work of supererogation, to discuss it in detail and undertake to point out just why the mind refuses to reach the conclusion urged for the defendant. Where there is a categorical conflict, as here, and in reasoning over the matter in order to arrive at a just judgment, the subject of credibility is found to be paramount, we are bound, not having the witnesses before us, to recognize the very superior position of the trial judge; and when, in such a case, his judgment shows confidence in one set of witnesses and disbelief in the other, it is entitled to considerable respect. Here, the judgment shows, the trial judge believed neither the defendant nor Kolacek. The story

tiff, because he is the man who introduced him first to the defendant; that Kolacek said, he would fix up with the plaintiff; that he told Kolacek the reason he wanted him to go and see the defendant was to see if he could get the property cheaper than $45,000.00; that prior to that time Kolacek never spoke to him about the property.

It will be seen from the foregoing that the evidence for the plaintiff is in many ways contradicted by that for the defendant. It must be conceded, taking the plaintiff's and Wisnoski's testimony by itself the defendant was liable. The trial judge found for the plaintiff. The question then arises does the record there before us, upon careful scrutiny and consideration, lead to the conclusion that the judgment is clearly against the weight of the evidence. In re Nixon, 258 Ill. 504; Jones v. Jones, 188 Ill. App. 105. Having already recited the substance of the evidence, it would now be a work of supererogation, to discuss it in detail and undertake to point out just why the mind refuses to reach the conclusion urged for the defendant. Where there is a categorical conflict, as here, and in reasoning over the matter in order to arrive at a just judgment, the subject of credibility is found to be paramount; we are bound, not having the witnesses before us, to recognize the very superior position of the trial judge; and when, in such a case, his judgment shows confidence in one set of witnesses and disbelief in the other, it is entitled to considerable respect. Here, the judgment shows, the trial judge believed neither the defendant nor Kolacek. The story

of the plaintiff as to his employment and the agreement as to his commissions, the defendant denied. She denied the testimony of both the plaintiff and Bianchi, as to what took place when she met the plaintiff and Bianchi and Radini in January, and, also, stated that at that time the contract had already been signed. On that subject, in addition to being contradicted by both the plaintiff and Bianchi, her testimony, even as it appears in the record, seems somewhat dubious; so much so, in fact, that it would certainly not be reasonable for us to say that, as to what actually took place, it would be against the weight of the evidence to believe them and not her. As to Kolacek, and assuming the truth of the testimony of the plaintiff and Bianchi, he was employed by Bianchi, after the plaintiff was employed by the defendant. That is somewhat supported by the fact that he was paid $150.00 commissions by Bianchi, for his services in getting the defendant to take Bianchi's Armitage avenue property as part payment of the $45,000.00. Further, Kolacek admits that he never took Bianchi to the defendant before the contract was signed. Of course, close analysis discloses discrepancies here and there, but, apparently, there are more in the evidence for the defendant than in that for the plaintiff.

We have examined the matter very carefully, and do not feel that we are at all justified in overriding the determination of the trial judge.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

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We have examined the matter very carefully, and do not feel that we are at all justified in overruling the determination of the trial judge.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, J., AND [illegible], J., CONCUR.

157 - 28433

LE LOUVRE, a corp., Appellee, v. WEST END CLEANERS & DYERS, a corp., Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

233 I.A. 653

Opinion filed Apr. 30, 1924.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant, West End Cleaners & Dyers, from a judgment in the Municipal Court for $90.00 in favor of the plaintiff, Le Louvre.

The statement of claim recites that "it is for money had and received by the defendant which said defendant failed and refused to turn over to plaintiff: Twenty-five dollars due from R. R. Street to said plaintiff and paid by said Street to defendant. The further claim of plaintiff is for the sum of Sixty-five dollars paid by said plaintiff to the Illinois Bell Telephone Company on account of three months' telephone charges, which defendant was liable for and failed and refused to pay."

The affidavit of claim states "that the said cause is a suit upon a contract for the payment of money; that the nature of plaintiff's demand is as stated and that there is due to plaintiff from the defendant after allowing to the defendant all its just credits, deductions

and set-off's the sum of ninety dollars and no cents ($90.00)."

Summons was issued on January 3, 1923, commanding the bailiff to summon the defendant, if it shall be found in the First District of the City of Chicago, personally to be and appear, etc. The return on the summons was as follows: "Served this writ on the within named West End Cleaners Corporation, by delivering a copy thereof and affidavit attached thereto to R. Feleongut, agent of said corporation and at the same time informing him of the contents thereof in the City of Chicago this 4th day of January, 1923. The president, clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor or any other agent of said corporation not found in the City of Chicago. Dennis J. Egan, bailiff; by Pat Dawley, deputy."

On January 15, 1923, the record recites that the court heard evidence, and found the issues against the defendant, and assessed the plaintiff's damages at $90.00, and that judgment was entered on the finding. It is claimed that the statement of claim does not state a cause of action, sufficient to support the judgment. It was a claim of the fourth class, and we have held that it is sufficient in such a case, if it informs the defendant of the nature of the plaintiff's claim. McClunn v. Gillespie, 237 Ill. App. 400.

As there is no bill of exceptions, and the common law record recites that evidence was heard, we are bound to assume that theevidence supports the judgment. For aught we know, the evidence may have shown that the defendant for a consideration had made a binding promise to pay the plain-

and asbeofis the sum of ninety dollars and no cents ($90.00)."

Summons was issued on January 3, 1923, commanding the bailiff to summon the defendant, if it shall be found in the First District of the City of Chicago, personally to be and appear, etc. The return on the summons was as follows: "Served this writ on the within named Clemens Corporation, by delivering a copy thereof and affidavit attached thereto to R. Pelzenger, agent of said corporation and at the same time informing him of the contents thereof in the City of Chicago this 4th day of January, 1923. The president, clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor or any other agent of said corporation not found in the City of Chicago. Dennis J. Egan, Bailiff; by Pat Hanley, Deputy."

On January 15, 1923, the record recites that the court heard evidence, and found the issues against the defendant, and assessed the plaintiff's damages at $90.00, and that judgment was entered on the finding. It is claimed that the statement of claim does not state a cause of action sufficient to support the judgment. It was a claim of the fourth class, and we have held that it is sufficient in such a case, if it informs the defendant of the nature of the plaintiff's claim. Hoffman v. Gillespie, 207 Ill. App. 430.

As there is no bill of exceptions, and the common law record recites that evidence was heard, we are bound to assume that the evidence supports the judgment. For aught we know, the evidence may have shown that the defendant for a consideration had made a binding promise to pay the plain-

tiff each of the amounts set out in the statement of claim. And such being the case, no question arises as to the application of Section 18 of the Practice Act. It is contended that "it does not appear on the face of the record that the summons was served within the First District of said court as it therein commanded; nor is it shown that the defendant had its principal office in said First District, as contemplated and required by Section 39 of the Municipal Court Act; nor does it appear that the defendant was a domestic corporation". The contention is untenable. The court was entitled to assume from the contents of the return that there had been proper service. It was not necessary that the return recite that the defendant's principal office was in the City of Chicago and in the First District of the court. If the defendant had seasonably and by proper proceedings challenged the service, the court would have considered it. The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

3631

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 654

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7283 Agenda 50

Rutland Farmers' Grain
& Supply Company,

appellant,

vs.

William Thies,

appellee,

Appeal from the Circuit Court of La Salle County

233 I.A. 6??

Jett, J.

This is an action originally commenced by Rutland Farmers' Grain & Supply Company, the appellant, to recover of William Thies, the appellee, the sum of $220.60 which appellant claims is due from appellee on an account between them. The cause was tried before a Justice of the Peace and a judgment was rendered in favor of the appellee and against the appellant for the sum of $36.13. An appeal was taken to the Circuit Court and a trial was had before the Court with a jury and the finding was in favor of the defendant, appellee here. A motion for a new trial was made, overruled, and judgment entered on the verdict of the jury and against the appellant for costs, from which judgment appellant prosecutes this appeal.

The appellant owns and operates a grain elevator at Rutland, Illinois. L. E. Ingram was the manager of the appellant company and one Matthias Krischel was an employee about the elevator and in the absence of the manager he purchased grain. The company kept a ledger in which they kept the accounts with their customers, a scale book in which the weight of the load and tare were entered when the grain was hauled, and a reference book. In this reference book entries of grain purchased for future delivery and the terms of sale would be entered. Krischel made no entries of grain purchased, when purchases were made by him, but made a memorandum on a sheet of paper taken from a pad kept for that purpose, and such memorandum was placed on a hook, and when the manager returned he would take the slip from the hook and make the proper entries in the reference book. On July 31, 1920, appellee went with one Irvin Davis, to the office

7583 Agenda 50

Rutland Farmers' Grain
& Supply Company,
Appellant,

vs. Appeal from the Circuit Court
of La Salle County

William Thies,
Appellee.

233 I.A. 654

Jett, J.

This is an action originally commenced by Rutland Farmers' Grain & Supply Company, the appellant, to recover of William Thies, the appellee, the sum of $220.60 which appellant claims is due from appellee on an account between them. The cause was tried before a Justice of the Peace and a judgment was rendered in favor of the appellee and against the appellant for the sum of $35.13. An appeal was taken to the Circuit Court and a trial was had before the Court with a jury and the finding was in favor of the defendant, appellee here. A motion for a new trial was made, overruled, and judgment entered on the verdict of the jury and against the appellant for costs, from which judgment appellant prosecutes this appeal.

The appellant owns and operates a grain elevator at Rutland, Illinois. L. E. Ingram was the manager of the appellant company and one Matthias Krischel was an employee about the elevator and in the absence of the manager he purchased grain. The company kept a ledger in which they kept the accounts with their customers, a scale book in which the weight of the load and tare were entered when the grain was hauled, and a reference book. In this reference book entries of grain purchased for future delivery and the terms of sale would be entered. Krischel made no entries of grain purchased, when purchases were made by him, but made a memorandum on a sheet of paper taken from a pad kept for that purpose, and such memorandum was placed on a hook, and when the manager returned he would take the slip from the hook and make the proper entries in the reference book. On July 21, 1920, appellee went with one Irvin Davis, to the office

of the appellant company. Ingram the manager was absent and Krischel was working at the elevator.

Appellee called and Krischel hearing him came to the office. Appellee inquired of Krischel the price of oats and Krischel said he would call Mrs. Ingram and reported to appellee that oats were worth seventy-five cents. Up to this time there does not appear to be much if any conflict in the testimony. The contention of appellee is he sold a thousand bushels of oats at seventy-five cents and that he so informed Krischel and that Krischel picked up a pad of scratch paper and made a memorandum but just what he made or placed on the paper appellee does not know. It is the contention of appellant that appellee informed Krischel that he would sell five hundred bushels of oats at seventy-five cents and that he made a memorandum to that effect.

The case as stated by appellant is, "We contend that we did not purchase one thousand bushels but supposed we were purchasing five hundred and were willing to pay seventy five cents per bushel for that number of bushels. As stated this is the only question in the case. If we purchased one thousand bushels the judgment should be affirmed; if we did not it should be reversed. This we think will be admitted by appellee." That a contract was entered into cannot be denied. The question at issue is how many oats were sold? Was it a thousand bushels or was it five hundred bushels? The question as to how many bushels were sold was purely a question of fact for the jury. Appellee and Davis testified that a thousand bushels were sold. The man in charge of the elevator testified only five hundred bushels were sold; he had no distinct recollection of the transaction other than what was indicated on a certain slip of paper on which he made a memorandum. Appellant relied upon the books it kept in the transaction of its business, and they were introduced in evidence.

A question was raised during the trial with reference to an entry relative to this transaction that appeared in one of the books offered in evidence by appellant company. Appellee insists the entry shows one thousand bushels had been entered and that it had been changed to five

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A question was raised during the trial with reference to an entry relative to this transaction that appeared in one of the books offered in evidence by appellant company. Appellee insists the entry shows one thousand bushels had been entered and that it had been changed to five

hundred. The book and all of the facts and circumstances in connection therewith were exhibited to the jury. The jury observed the same and heard the testimony of the respective parties with reference thereto. The jury having made a finding on the questions of fact involved in this cause, we are not inclined to interfere with the verdict unless there is something in the record to show that the rights of appellant were unduly prejudiced, or that the finding is manifestly contrary to the weight of the evidence.

Complaint is made of instruction number nine given on the part of appellee. This instruction is with reference to any witness testifying falsely and from it is omitted the words, "wilfully and knowingly." The instruction as given has been condemned in many instances and it was error to give it, but in view of the facts in this case and of the instructions given on the part of appellant we are of the opinion, that although the instruction was erroneous the rights and interests of appellant were not unduly prejudiced thereby. Other complaints relative to instructions are made but after a careful consideration of the record in this proceeding we are not prepared to say that reversible error was committed, nor that the verdict is manifestly against the weight of the evidence.

The judgment of the court below will be affirmed.

Judgment affirmed.

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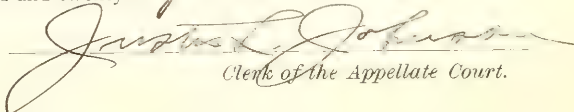
Other complaints relative to instructions are made but after a careful consideration of the record in this proceeding we are not prepared to say that reversible error was committed, nor that the verdict is manifestly against the weight of the evidence.

The judgment of the court below will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Mar., in the year of our Lord one thousand nine hundred and twenty-four



Clerk of the Appellate Court.

R. H. D[illegible]

265 2

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 654

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7298 Agenda 56.

Samuel P. Hall,
Appellee,
vs
W. O. Bellamy,
Appellant.

Error to the Circuit Court of La Salle County.

Jett, J.

233 I.A. 654

This suit was begun by Samuel P. Hall, appellee, against W. O. Bellamy, appellant, before a Justice of the Peace in La Salle County, A judgment was obtained in the Justice of the Peace court in favor of appellee and against appellant for the sum of $240.00. Appellant prosectued an appeal to the Circuit Court of La Salle County where a jury trial was had and at the close of the evidence the court directed a verdict in favor of appellee and against appellant for $265.00. Appellant prosecuted a further appeal to this court. Hall, the appellee, is the owner of certain buildings located at 609 Columbus Street and 608 Court Street in the City of Ottawa, the two buildings together extended through the block. The west half was a three story brick building and the east half a one story frame structure. The premises in question were held and occupied by appellant under a written lease which provided for monthly payments of rent at the rate of $75.00 per month and which said lease ran from February I, 1917 to January 31, 1920.

During the latter part of the term the buildings began to leak and by reason thereof it is claimed by appellant that he was damaged in materials, and hindered in the performance of his labors and injured in the use of the premises because of such leaking.

Appellant had sub-let the second story, of the three story building, the upper story was vacant, About September I of the last years tenancy appellant purchased a building and it is claimed by him that on or about December I, 1919, he surrendered possession of the leased premises and that such surrender was accepted by appellee. The evidence upon the question of the surrendering of the possession is conflicting. After hearing the evidence a

7292 Agenda 56.

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Appellee,

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233 I.A. 654

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verdict was directed by the court for the amount of the rent claimed by appellee to be due and unpaid for the months of December 1919, January and February 1920 and for attorneys fees.

Upon the trial of the cause appellant sought by way of recoupment to show damages against the claim for rent by appellee. It was insisted by appellant that he was entitled to damages resulting from the leaking of the roof, and from other leakage occasioned by certain work that was done upon the premises by appellee.

By the terms of the lease under which appellant was occupying the premises it was the duty of appellant to make repairs. Appellant did not make the repairs and he failed to object to appellee making them. From the evidence ti would appear that the leaking complained of after the repairs were made was no worse than it was before the making of them. We are of the opinion from the evidence, the appellant moved out of the premises in question for the reason that he preffered to occupy his own building. Even if he attempted to surrender possession as he claims he did his attempt was unavailing, because he kept possession of the second story of the building through his sub-tenant until after the expiration of the lease. After an examination of the record, and of the facts disclosed in this proceeding, we are of the opinion the court properly directed a verdict of for the rent.

The only serious question that arises upon the record in this cause is whether or not the court was correct in including in the verdict as directed the sum of $40.00 for attorneys fees. The lease contained the following provision, "And it is further covenanted and agreed by and between the parties that the party of the second part shall pay and discharge all costs and attorneys fees and expenses that shall arise from enforcing the covenants of this indenture by the party of the first part"

Upon the trial it appears appellee offered evidence to the effect that the services of the attorney before the Justice of the Peace was worth $15.00, and in the Circuit Court $25.00 making a total of $40.00 for attorneys fees included in the verdict and

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judgment as directed by the court. It is contended by appellee, that appellant did not object to and had acquiesced in the claim for attorneys fees. From what appears in the record appellant objected to the offered proof in which appellee sought to show the value of the legal services, and is in our opinion in a position to urge his objections in this court.

We are of the opinion the court should not have included in the directed verdict the sum of $40.00 claimed by appellee for ~~his~~ attorneys fees and for that reason the verdict and judgment are excessive to the extent of $40.00. The judgment in this cause will be affirmed in favor of appellee and against appellant for the sum of $225.00 if appellee will enter a remittitur of $40.00 within 20 days from the filing of the opinion in this cause. If appellee fails to enter a remittitur within 20 days from the filing of the ~~opinin~~ opinion them the judgment will stand reversed and the cause remanded.

Affirmed upon remittitur being entered, otherwise reversed and remanded.

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We are of the opinion the court should not have included in the directed verdict the sum of $40.00 claimed by appellee for his attorneys fees and for that reason the verdict and judgment are excessive to the extent of $40.00. The judgment in this cause will be affirmed in favor of appellee and against appellant for the sum of $225.00 if appellee will enter a remittitur of $40.00 within 20 days from the filing of the opinion in this cause. If appellee fails to enter a remittitur within 20 days from the filing of the opinion then the judgment will stand reversed and the cause remanded.

Affirmed upon remittitur being entered, otherwise reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

3633

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

233 I.A. 654

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GENERAL NUMBER 7066 Agenda Number 12

SYLVESTER THOMAS KEEFE
by JOHN ROSSI, his next
friend and JOHN LAURIN
KEEFE, appellees

APPEAL FROM GRUNDY

vs.

MYSTIC WORKERS OF THE WORLD
appellant

233 I.A. 554

Jones J:

The appellees recovered a judgment of One Thousand Dollars and interest against appellant in the circuit court of Grundy County on a beneficiary certificate issued by the appellant on the life of Alice Keefe Rossi, mother of Sylvester Thomas Keefe and John Laurin Keefe.

The declaration contained three counts, The first set out the certificate <u>in haec verba,</u> the second set out its legal effect and the third consisted of the common counts. Appellant filed a plea of the general issue. It also filed three special pleas all alike in substance. Each averred that in the application for the certificate Alice Keefe Rossi made false answers to various questions which were asked her concerning her physical condition at the time of the application the condition of her health previous to that time and concerning an operation which had been performed upon her and that her answers were made warranties. To these special pleas the appellees filed a general replication, in which they averred that Alice Keefe Rossi did not make the answers to the questions therein set out. Appellant joined issue upon the replications.

At the trial, appellees offered the policy in evidence and proved the death of Alice Keefe Rossi and payment of all premiums. A motion to direct a verdict in favor of appellant was denied. ~~Appellant-was-denied~~ Appellant then offered evidence tending to show that the answers of assured to questions contained in her application concerning her condition of health at the time of and previous to the making of the application and especially those with reference to an

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233I.A. 654

Jones J:

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operation which had been performed upon her, were untrue. In rebuttal over the objection of the appellant the appellees offered evidence tending to show that at the time the application was taken the assured disclosed to the medical examiner all of the facts with respect to her physical condition at that time and prior thereto and disclosed to him the facts concerning the operation which had been performed upon her and that the medical examiner entered improper answers to the questions after such disclosure had been made to him.

Appellant contends that under the pleadings this evidence in rebuttal was not competent and that objections thereto should have been sustained. We are of the opinion that appellant's position is correct; that the general replication filed by the appellee to the special pleas of appellant simply denied that she made the statements and answers averred in the special pleas, and did not aver that she made true answers to the medical examiner and that he entered incorrect answers in the application which she afterwards signed. When a plaintiff wishes to rely on new matter, he must reply specially, unless a reply is dispensed with by the Statute. The new matter pleaded must confess the facts alleged in the plea and avoid their effect. (Allen vs. Scott 13 Ill. 80; Sefton vs Mitchell 120 Ill. App. 256). We are of opinion that the evidence in question could only have been made competent by the filing of a special replication averring that the assured made full disclosure to the medical examiner and that he made the incorrect answers contained in the application, notwithstanding the fact that such disclosure had beem made to him.

But it is urged upon the part of the appellee that by introducing evidence to rebut that offered by appellee the appellant waived the error. We cannot agree with this contention. The appellant made clear and specific objections to the evidence complained of at the time it was offered by the appellee. The Supreme Court said in the case of Teter vs. Spooner, 279 Ill. 39, "Indeed this court after a review of the authorities in other jurisdictions has held that after the court has overruled defendant's objections to a certain class of evidence the defendant may introduce evidence of the same class to meet that of the plaintiff without waiving his right to

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claim his exceptions on appeal. (Chicago City Railway Co. vs. Uhter 212 Ill. 174 and cases there cited.)"

The court committed a reversible error in admitting the evidence in question.

Appellant also assigns error in the giving of instructions 1 to 5 inclusive on behalf of the appellees. These instructions are based upon the incompetent evidence above referred to. The giving of them was therefore error.

The appellant also complains of error in the giving of certain instructions because they told the jury that the appellees were only required to prove fraud on the part of the medical examiner by a preponderance of the evidence. Whereas, the rule is that since the statute makes it a crime for the medical examiner to write answers in the application for insurance not given by the insured, the incorrectness of the answers must be proven beyond a reasonable doubt. This view of the law is correct.

In People vs. Sullivan 218 Ill. 419, it is said, "The rule in Illinois, except as modified by statute in actions of slander or libel, is that when a criminal offense is charged in the pleadings and must be established either to sustain the cause of action or maintain the defense, the presumption of innocence arises, and the crime charged must be proven by evidence which removes every reasonable doubt of guilt."

The appellant, however, tendered instruction number 10 upon the question of fraud on the part of the medical examiner, which told the jury that, "The burden is on the plaintiffs to prove such alleged fraud if any, by a preponderance of the evidence." Appellant clearly waived the error, by tendering a similar instruction. (McIntuff vs. Insurance Company of North America 248 Ill., 92; Harney vs. Sanitary District of Chicago, 260 Ill. 54).

Other instructions offered by the appellant were refused because embodied in other given instructions. We see no error in this.

Because of the errors above pointed out, however, the cause

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Other instructions offered by the appellant were refused because embodied in other given instructions. We see no error in this.

Because of the errors above pointed out, however, the cause

will have to be reversed and remanded for a new trial.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of Mar. in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

3634

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 654

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AGENDA NUMBER 6 GENERAL NUMBER 7218

SIMON J. SCHLOESSER, ALIAS
SAMUEL J. SCHLOESSER, ALIAS
SAM J. SCHLOESSER, AND FLORENCE
SCHLOESSER, HIS WIFE,
APPELLANTS

VS.

JOHN S. LEES,
APPELLEE

APPEAL FROM LASALLE.

233 I.A. 654

Jones J:

This is an appeal from the circuit court of LaSalle County dismissing a bill filed by the appellant for the specific performance of a contract to sell and deliver a certain moving picture business including machines, screen, theatre seats, ticket booth, fans, wiring, and the assignment of a lease of the building. After the issues were formed the cause was referred to the Master to take the evidence and to report his conclusions of law and fact. The contract sought to be enforced is in the following language:

January 6, 1921.

"Received from Sam J. Schloesser and wife, through Wm. Willmeroth, twenty-five ($25.00) dollars, as part payment on all machines, organ, equipment and all other chattels which go to make up the moving picture show business of the Riviera Theatre, located on the first floor known as 1818 Fourth Street Peru, Ill. Sale price, $4,500.00

JOHN S. LEES.

But the appellants allege in their bill that there was a verbal agreement dehors the written instrument that the agreement should be performed on January 12th, 1921, excepting that the defendant John S. Lees was to have the right to retain the goods and chattels and the premises until January 15th, 1921, at which time he was to make full delivery of possession. A demurrer, both general and special, to the bill of complaint, was overruled and thereupon the appellee answered. The answer in so far as it effects the equities of the case, denies that the contract set forth the correct sale price and alleges that the

AGENDA NUMBER 6 GENERAL NUMBER 7218

SIMON J. SCHLOESSER, ALIAS
SAMUEL J. SCHLOESSER, ALIAS
SAM J. SCHLOESSER AND FLORENCE
SCHLOESSER, HIS WIFE,
APPELLANTS

APPEAL FROM LASALLE.

VS.

JOHN S. LEES,
APPELLEE

233 I.A. 654

Jones J:

This is an appeal from the circuit court of LaSalle County dismissing a bill filed by the appellant for the specific performance of a contract to sell and deliver a certain moving picture business including machines, screen, theatre seats, ticket booth, fans, wiring, and the assignment of a lease of the building. After the issues were formed the cause was referred to the Master to take the evidence and to report his conclusions of law and fact. The contract sought to be enforced is in the following language:

> January 5, 1921.
>
> "Received from Sam J. Schloesser and wife, through
>
> Wm. Willmeroth, twenty-five ($25.00) dollars, as part payment on all machines, organ, equipment and all other chattels which go to make up the moving picture show business of the Riviera Theatre, located on the first floor known as 1818 Fourth Street Peru, Ill. Sale price, $4,500.00
>
> JOHN S. LEES.

But the appellants allege in their bill that there was a verbal agreement dehors the written instrument that the agreement should be performed on January 12th, 1921, excepting that the defendant John S. Lees was to have the right to retain the goods and chattels and the premises until January 15th, 1921, at which time he was to make full delivery of possession. A demurrer, both general and special, to the bill of complaint, was overruled and thereupon the appellee answered. The answer in so far as it effects the equities of the case, denies that the contract set forth the correct sale price and alleges that the

sale price was $5000. It further alleges that there was a verbal agreement by which the appellants agreed to take over certain deposits made by the appellee with film companies for the rental of films, which the appellee could not recover from the companies, but might assign to a purchaser who could use them in paying rentals, and that this was omitted from the agreement. It also alleges that he owns a lease upon the building in which the business is conducted and that the lease is not mentioned in the agreement.

The cause was referred to the Master, who made a report of the evidence and of his findings of fact and of law, which is in substance that on January 6th, 1921, the appellee, Lees, was the owner of goods and chattels making up the moving picture show business at the Riviera Theatre at Peru, Illinois, and on that date made and delivered the written instrument above set forth for the consideration of twenty five ($25.00) Dollars paid at that time by appellants; that he agreed to sell the business to them for $4500; and that no time was provided in said agreement for carrying out the same. The Master further found that it was agreed between the parties that said agreement should be carried out as soon as practicable after its date and that the said appellants should succeed to all the right and interest of said appellee in said business on January 12th, 1921, with the privilege on the part of the appellee to retain the use until January 15th, 1921; that after the execution of such agreement the appellants acquired by purchase the building in which the business was carried on, by deed dated January 11, 1921; that on January 12th, 1921, the parties met and a controversy arose over the terms of the agreement but the appellants were ready to pay the appellee the balance due amounting to $4,475; but that a controversy arose over the deposits, the appellee insisting that the appellants agreed to purchase the deposits and to pay for them, in addition to the sum mentioned in the contract, the appellant insisting that no definite agreement was made as to the disposal of the deposits which were not contracted for.

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The Master further found that the evidence was so conflicting that is was impossible to consider parol agreements, if any, outside the contract; that the parties are experienced moving picture show operators and familiar with the business; that they entered into the agreement and that it is a legal obligation without without any uncertainty as to its object or extent; that the appellants have always been ready and willing and offered to pay Lees the balance of $4,475 upon his complying with the Bulk Sales Act and making and delivering to appellant a good and sufficient bill of sale said goods and chattels and delivering possession of said premises; but that the appellee has wholly refused to comply with his agreement and with the Bulk Sales Act; and that the appellants have deposited with the Clerk of the Circuit Court the sum of $4,475 to be paid to the appellee upon his complying with the agreement. The Master also found that the equities are with the appellants and that they are entitled to the relief prayed for in the bill.

The appellee filed objections, to practically all of the findings of the Master as to the law and facts. The Master overruled the objections and they were made exceptions in the circuit court to his report. After a full hearing upon the bill, answer, the Master's report, and the exceptions thereto, the Court entered a decree sustaining the appellee's exceptions to the report of the Master and dismissed the bill for want of equity.

It is stated by the appellants in their argument that the question before the Court is whether or not a court of equity will decree specific performance of a contract for the sale of personal property when a portion of the property is composed of fixtures in the nature of chattels real and are made for a particular building, installed therein and adapted to a particualr business. On the other hand, it is urged upon the part of the appellee that the contract in this case is so uncertain that it will not be enforced specifically; that it is lacking in mutuality, the appellants not being so bound by its terms that they could be compelled to perform; that a contract

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for the sale of personal property will not be enforced specifically; that the appellants have a full and complete remedy at law and that the agreement does not contain the entire agreement of the parties.

The general rule is that a Court of equity will not decree the specific performance of a contract, unless its terms are clear and certain and clearly established. (Barrett v. Geisinger I48 Ill. 98, IIO; Folsom vs. Harr 2I8id. 369.)

It is also well established that as a general rule a court of equity will not decree the specific performance of a contract for the sale of personal property. (Cohn vs. Mitchell II5 Ill. I24; Pierce vs. Plumb 74 id. 326; Barton vs. DeWolf I08 id. I95; Anderson vs. Olsen I88 id. 502.)

The chief exceptions to this rule are cases wherein the property has some sentimental value, where it is such that it cannot be purchased upon the open market, where fraud has entered into the making of a contract, where the goods have been specially manufactured for the particular purpose and cannot be purchased in the open market or where a trust is involved. It will be found that thetrue test in all these cases is whether the complainant is without an adequate remedy at law. (See Pierce vs. Plumb Supra; Barton vs. DeWolf, Supra; Cohn vs. Mitchell Supra; and Anderson vs. Olsen, Supra.) Whether the court will decree specific performance of a contract either relating to real estate only or personal property or to both joined in the same contract, rests in the sound discretion of the court, (Barrett vs. Geisinger I79 Ill. 240; Miller vs. Clark 30I id. 273; Stephens vs. Clark 305 id. 408.) except in cases where the complainants bring themselves wholly within the well recognized equity rules permitting specific performance when such relief becomes a matter of right. (Anderson vs. Anderson 25I Ill. 4I5; Corrigan vs. Ralph 265id. 57I; Woodrow vs. Quaid 292 id. 27; Allen vs. Hayes, decided by the Supreme Court at the October Term I923). A court of equity will indulge great latitude in hearing evidence whether in equity and good conscience it ought to decree specific performance of a contract.

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(Kilcoin vs. Ortell, 302 Ill. 531.)

The evidence in this case is extremely conflicting and discloses that before and after the signing of the agreement set forth, the parties discussed and considered other matters relating to the transfer of the business. They differ about the conclusions they reached. It is strongly insisted by the appellee that the appellants agreed to take over and pay for the deposits above mentioned, amounting to more than $1400 in addition to the consideration mentioned in the contract; that there is a custom in the moving picture show business that when a business is sold the purchaser takes over the deposits paying for them the amount actually on deposit at the time of transfer; that the sale price of the business was $5000. The appellants admit such to have been the sale price, but say that they were not to pay the additional $500. They claim that the owner of the building who deeded it to the appellants on January 11, 1921, agreed to pay said sum of $500 and was ready and willing to pay the same. The appellants claim that they had no agreement to take over the deposits and that there is no custom for purchasers to take deposits. They also insist that the lease held by the appellee upon the premises was included within the terms of the agreement as personal property. There is a conflict on other points relating to the transfer of the business. What we have set forth is sufficient to show the state of the evidence.

An examination of the bill of complaint discloses that the appellants did not aver and set forth in their bill facts and circumstances sufficient to show that they had no remedy at law. General allegations are not sufficient, but facts upon which the allegations are founded must appear. (Pierce vs. Plumb, Supra.)

We are of the opinion that the bill failed to show, on its face, sufficient grounds to entitle the appellants to equitable relief, there being no charge of fraud. We think the case comes within the general rule that equity will not decree specific performance of contracts relating to personal property. But whether that is correct

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or not, we are of the opinion after careful examination of all the facts and circumstances relied upon on the part of the appellants that they were not entitled to the elief prayed for.

It is urged upon the part of appellants that Section "68" of Chapter I2Ia of the Statute provides, that "Where the seller has broken a contract, to deliver, specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages."

We are of the opinion that the statute in question does no more than declare the common law with respect to the sale of goods. The provision that the court "may, if it thinks fit" clearly indicates that the legislature did not intend, by that section to make the remedy of specific performance a matter of right but purely one to be granted in the discretion of the court. Viewing the statute as we do we are forced to the conclusion that the trial court was bound by the rules of the common law in the exercise of its discretion; and that the court has not abused that discretion.

The decree of the chancellor dismissing the bill for want of equity was right and will be affirmed.

Decree Affirmed.

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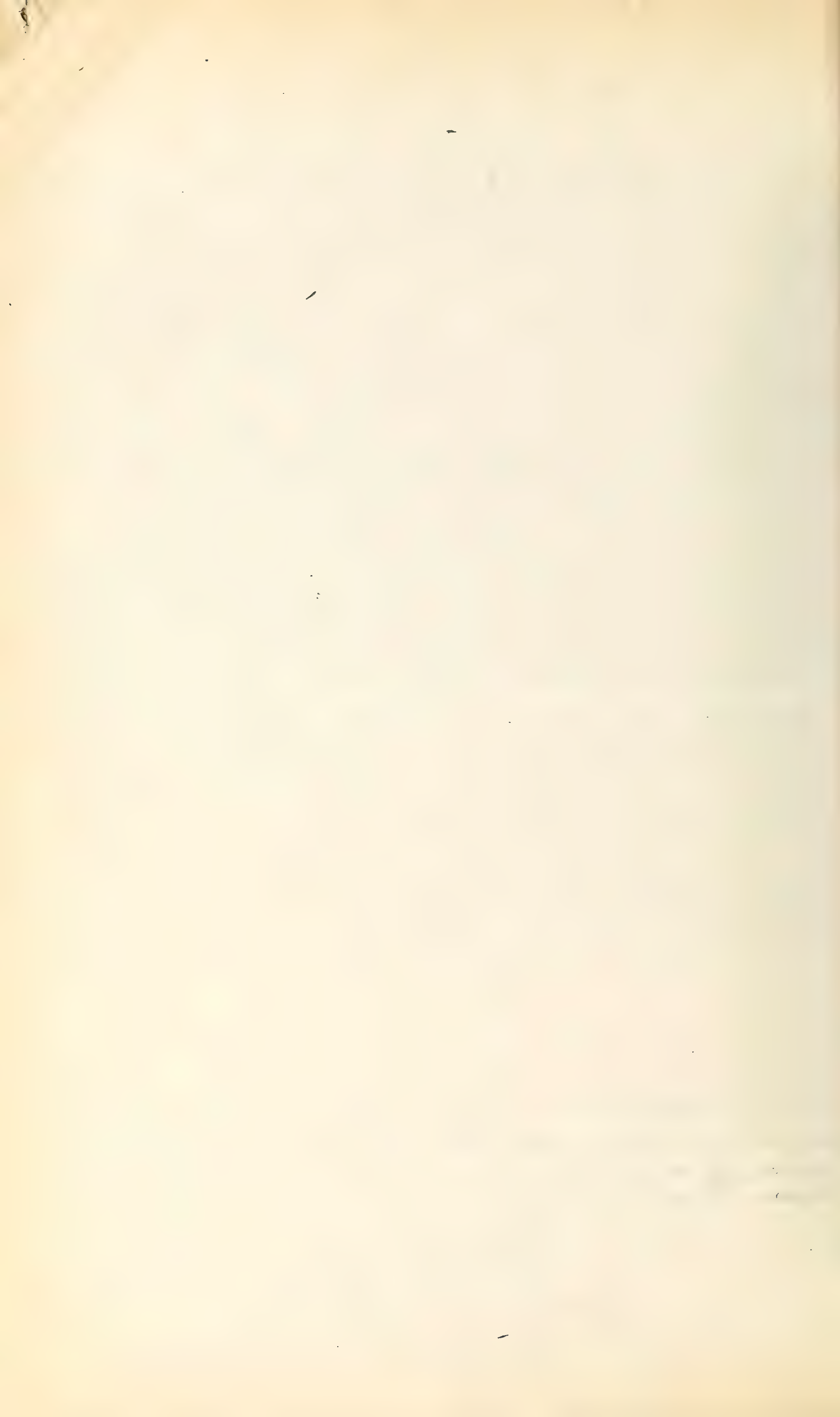
Decree Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of Mar. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson

Clerk of the Appellate Court.



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

233 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On FEB 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7233 Agenda Number 39

Mabel Vogel, Appellee

vs.

Viola Sebring, et al

(Union Bank of Chicago

Appellant)

Appeal from Iroquois.

233 I.A. 655

Jones J:

The appellee Mabel Vogel, filed a suit in the circuit of Iroquois County for the partition of Lots Six (6) and Seven (7) of Block Three (3) of the original town, of Cissna Park, Iroquois County, Illinois. The bill alleged that her father O. W. Sebring was the owner of an undivided one fourth part of each of said lots; and that he died intestate owning said property on the 31st day of November 1921; leaving his widow and children his only heirs at law; that Luther Stabus, Ray Stabus and the heirs at law of one Peter Bowers, deceased were the owners respectively of a one-fourth interest in said Lot Six (6); that Luther Stabus is the owner of an undivided one-half and Ray Stabus the owner of an undivided one fourth of said Lot Seven (7).

The bill further alleged that the entire interest of said Lot Six (6) was subject to two mortgages in the aggregate sum of $736.30, first and second liens respectively thereon; and that Lot Seven (7) was subject to a mortgage in the sum of $1699.00, which was a first lien thereon; that the interest of O. W. Sebring in said premises was subject to the following liens Judgment of J. F. Kurfees Paint Company, rendered June 22, 1921, in the sum of $140.78, judgment of the Union Bank of Chicago rendered June 28, 1921 in the sum of $498.90, judgment of Tanner & Company rendered December 26, 1921, in the sum of $166.50, judgment of W. D. Allen Manufacturing Company recovered October 15, 1921, in the sum of $126.87.

A decree of sale was rendered ordering the Master in Chancery to sell said premises free and clear of the mortgages and judgments. The Union Bank of Chicago, a judgment creditor, was represented in the partition proceedings by Benjamin & Pallisard, attorneys. On the day before the sale, Benjamin & Pallisard, sent a telegram to the Union Bank as follows: "Sebring lots being sold

General Number 7235 Agenda Number 39

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to-morrow, Two o'clock. Do you authorize bid?" In reply to this telegram, the president of the bank wired, "To avoid unfair sale, bid enough to cover mortgages and the two liens dividing bid between two properties according to your best judgment." At the sale Benjamin bid $4535.34. on both lots when offered together. This was as near as could be figured, two-thirds of their value as shown by the report of the appraisers filed in said cause. The Union Bank refused to recognize this bid. The Master in Chancery reported the sale and the failure of the Bank to comply with the terms of the sale, whereupon the complainant moved for an order upon the Union Bank to comply with the terms of of the sale, and in default thereof, that the premises be resold. The Court entered a rule upon the bank to show cause why it should not be required to comply with the bid. In response to said rule, the Union Bank filed affidavits setting up that Pallisard & Benjamin had no other authority than that contained in the telegram above set forth, and further alleged that the bid, as made, was unauthorized. Upon the hearing, the Court ordered a resale of the premises upon the same terms and conditions as the first sale except that it did not require the premises to be sold for at least two-thirds of the appraised value. The decree further provided that the Union Bank of Chicago should pay the loss, if any, which might result from the sale of the premises at a less sum than the first sale.

The premises were again sold by the Master in Chancery to Simon Goldstein, Lot Six (6) for the sum of $1025, and Lot Seven (7) for the sum of $1825, neither lot selling for two thirds of its appraised value. The Master reported the sale to the Court. The Union Bank of Chicago filed objections to the report. The Court overruled the objections and entered an order confirming the sale and directing the Union Bank of Chicago to pay to the Master for the benefit of the parties interested, $1757.99. This is the difference between the bid made by Benjamin in the name of the Bank and the amount realized by the Master on the resale. The Union Bank of Chicago has perfected an appeal from this decree.

The first question for determination is whether the bid of Benjamin on the first sale was within the authority conferred upon

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him. His retainer, as an attorney, would not authorize him to bid upon the lots in the bank's name. Perkins vs. Webb 67 Ill. App. 474. His authority, if any was derived from the telegram. A special agent is defined to be one invested with limited specified powers, which he is authorized to exercise only for a particular purpose. His power is measured by the express directions given by the principal. (Gregg vs. Wooliscroft & Co. 52 Ill. App. 214) The telegram merely authorized Benjamin to bid the amount due on the three mortgages, plus the amount due on the two judgments, one for $140.78 and one for $498.90, a total of $3065.20. He was thus a special agent. He did not comply with the authority conferred upon him, but bid two-thirds of the appraised value, which was $1434.80 more than he was authorized to bid. He was also directed to bid in the two pieces separately and he bid them in when offered together for a lump sum. We are of the opinion and so hold, that the bid of Benjamin was not within the authority conferred upon him by the Union Bank; that he had no authority to make the bid, which he did make, and for this reason, the Court was in error in holding that the Union Bank is liable for the difference between the amount of his bid and the amount for which the property was resold.

It is next complained that the priority of the judgments is not determined in the decree. The decree of partition gives the dates and amounts of each mortgage and the amount due on each and the dates and amounts of the judgments. From this data the priority of the judgments can be ascertained, unless some of them were entered in the same court, and at the same term. The court could have determined that fact subsequent to the sale when the time came to distribute the fund among the parties entitled thereto.

The appellant further claims that the two lots should not have been sold free and clear of the lien of the Bank's judgment. The appellant made no objection to the provision of the decree for sale in that respect, but aside from that, under the statute, there can be no doubt of the power of a court of equity to order a sale of the premises free and clear of the liens of judgments thereon when the circumstances warrant such a sale.

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The appellant further claims that the two lots should not have been sold free and clear of the lien of the Bank's judgment. The appellant made no objection to the provision of the decree for sale in that respect, but aside from that, under the statute, there can be no doubt of the power of a court of equity to order a sale of the premises free and clear of the liens of judgments thereon when the circumstances warrant such a sale.

It is next insisted that the court was in error in approving the report of resale by the master. In view of the fact that the bid of the Union Bank was unauthorized we are of the opinion that the subsequent proceedings in the case were irregular and that the Court should have ordered the property resold, under the original decree of sale. If the property did not bring two-thirds of its appraised value, when offered the second time, then the Court should have had the property re-appraised, and re-sold under the new appraisement, As the matter now stands, the property has been sold for about $1500 less than two thirds of its appraised value. Where for any irregularity, in the proceedings, under the decree of partition and sale, the sale is set aside, the property should be resold under the original appraisement. (24 Cyc. 15).

The appellant raises other questions which we do not discuss because they are not material to a correct disposition of the case.

The decree will therefore be reversed and the cause remanded with instructions to the Chancellor to discharge the Union Bank from Liability under its bid, to set aside the approval of the master's report of sale, and order the premises sold under the original decree.

Reversed and Remanded.

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The decree will therefore be reversed and the cause remanded with instructions to the Chancellor to discharge the Union Bank from liability under its bid, to set aside the approval of the master's report of sale, and order the premises sold under the original decree.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 29th day of Mar in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

233 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On MAR 12 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Abe L. Morris,

Appellant,

vs.

Lewis S. Kuhn and Waldo A. Kuhn, partners doing business under the firm name of Kedron Valley Products Company,

Appellees,

Appeal from the Circuit Court of Henry County.

233

Partlow, P.J.

The appellant, Abe L. Morris, began suit in the circuit court of Henry county against appellees, Lewis S. Kuhn and Waldo A. Kuhn to recover damages for personal injuries sustained in an automobile collision. There was a trial by jury, verdict and judgment in favor of appellees, and this appeal was prosecuted.

Appellees are partners engaged in raising onions which they ship in carload lots. In their business they use several large trucks, among them being a two ton Indiana truck. In 1920, Dan Floyd rented about eighteen acres of land from B. M. Kuhn, the father of appellees, located near Annawan, Henry County, Illinois. On this land Floyd raised cabbage, one-half of which belonged to his landlord as rent. When the time came to market the cabbage it was found almost impossible to sell them, and Kuhn gave his share of the crop to Floyd and suggested that he peddle them in the surrounding towns. Floyd had no way of transporting the cabbage except by horses and wagon, and he asked Kuhn to loan him a truck. Kuhn said he did not own a truck but they belonged to his two sons, the appellees, and suggested that Floyd talk to Waldo Kuhn about it. Floyd had a talk with Waldo Kuhn in which he asked for the loan of the truck. Waldo Kuhn testified that Floyd came to him and asked him for the loan of the truck, stating that he thought he would go in an easterly direction to market his cabbage. Floyd said he had a man working for him by the name of Art Larson who could drive a truck. Kuhn replied that he had never seen Larson drive a

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truck and did not care to let the truck go with an inexperienced driver, as it had just been repaired and the onion season was approaching. He testified he knew Floyd did not own a truck or know how to handle one. He told Floyd his foreman could go some day, and if he could, he would let the foreman take the truck and take a load of cabbage for Floyd up east. Within a day or two, Kuhn talked with his foreman, Harry Mackey, who said he could go the following day. Kuhn told Mackey to notify Floyd he could have the truck the next day and to have his cabbage ready. Kuhn testified he did not again see Mackey or Floyd until after the accident. Kuhn on cross-examination testified he wanted a competent man to drive the truck; that Mackey was the most competent man he had and could be trusted; that Kuhn did not intend that Floyd should use any discretion in operating the truck; that he wanted Mackey to drive because of his ability and knowledge; that on a former trial in Peoria Kuhn testified that he wanted to have control during the trip for the protection of himself and his property. Floyd testified he asked Waldo Kuhn for the use of the truck and told him he had a driver. Kuhn said he would not let the truck out that way. Kuhn said that if he let Floyd have the truck that he, Kuhn, would furnish the driver. A day or two after that Floyd received information from Waldo when he could have the truck, and Floyd made arrangements for loading the same.

On the morning of August 17, 1920, Mackey reported to Floyd with the truck. They loaded two tons of cabbage on it, making a total load including the cabbage, truck and men of about 9000 pounds. Floyd and Mackey started east along the Rock Island Railroad. Mackey was driving. Floyd testified he did not know just where his destination would be and never told appellees where he was going, that he directed Mackey which way to drive. They stopped at two or three towns where Floyd sold a couple of hundred pounds of cabbage, for which he received and kept the money. He got gasoline at Wyanet and Floyd paid for it. At Princeton, Illinois, Floyd was informed there was a good prospect for selling cabbage at the village of De Pue, which is on the bank of

truck and did not care to let the truck go with an inexperienced driver, as it had just been repaired and the onion season was approaching. He testified he knew Floyd did not own a truck or know how to handle one. He told Floyd his foreman could go some day, and if he could, he would let the foreman take the truck and take a load of cabbage for Floyd up east. Within a day or two, Kuhn talked with his foreman, Harry Mackey, who said he could go the following day. Kuhn told Mackey to notify Floyd he could have the truck the next day and to have his cabbage ready. Kuhn testified he did not again see Mackey or Floyd until after the accident. Kuhn on cross-examination testified he wanted a competent man to drive the truck; that Mackey was the most competent man he had and could be trusted; that Kuhn did not intend that Floyd should use any discretion in operating the truck; that he wanted Mackey to drive because of his ability and knowledge; that on a former trial in Peoria Kuhn testified that he wanted to have control during the trip for the protection of himself and his property. Floyd testified he asked Waldo Kuhn for the use of the truck and told him he had a driver. Kuhn said he would not let the truck out that way. Kuhn said that if he let Floyd have the truck that he, Kuhn, would furnish the driver. A day or two after that Floyd received information from Waldo when he could have the truck, and Floyd made arrangements for loading the same.

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the Illinois river, and they started to drive to that place. The road from Princeton to De Pue extends down a long steep hill known as the De Pue or Mecum hill. It is about 1600 feet long and has a descent of 178 feet in that distance, with five or six turns or curves some of which are rather sharp. Just before reaching the crest of the hill there was a slight ascent. Mackey testified he put his machine in low to climb this ascent and he left it in low all the way down the hill. This acted as a brake and tended to retard the speed of the truck. He also used both the foot and emergency brake. They were about three-fourths of the way down the hill when they came to a sharp curve. There was an undergrowth of trees and brush on the east side of the hill which obstructed the view of any vehicle coming up the hill. As the truck rounded this curve, Floyd and Mackey saw a Ford roadster coming up the hill between 150 and 200 feet away.

Appellant resided at Louisiana, Missouri, and was a traveling salesman working for himself. On the morning in question he met P.M. Barnes in Peru, Illinois. Barnes was a traveling salesman for the American Tobacco Company and was traveling in a Ford roadster which had been converted into a truck, with a box on the rear. The appellant and Barnes were going to make the same towns and Barnes invited appellant to ride. They went to De Pue and started up this hill. Barnes was on the left side of the car and appellant was on thr right side. This was the car which Floyd and Mackey met on the hill. The left front wheel of the truck struck the left front wheel of the Ford, crushing the left front wheel of the Ford. The right front wheel of the truck swung forward until it came in contact with the left rear wheel of the Ford, and the truck then pushed the Ford in front of it diagonally to a ditch on the east side of the road in close proximity to a red haw tree. Barnes and appellant were fastened under the Ford, and it was with considerable difficulty that they were removed. They were taken to a hospital at La Salle where appellant received some treatment. His injuries consisted of cuts and bruises on different parts of his body and especially on the left leg. The left hip was

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broken. In a day or two he was removed to his home on a cot. He was in bed about seven weeks, and then used crutches and a cane for over eleven months, during which time he was unable to attend to his business. He paid about $1100 for doctor bills and hospital expenses. At the time of the injury he was forty years old, was physically strong and earned $3500 to $5000 per year. He has been able to earn since the accident only about one-half of what he was able to earn prior thereto, and is now permanently crippled. He began suit in the United States District Court at Peoria and after all the evidence was introduced he dismissed his suit. He then began this action in the circuit court of Henry county, Illinois.

The declaration consisted of four counts. The first count alleged that the truck had defective brakes and that the driver was unable to control it on account of the brakes not being in proper repair. The second alleged that the driver failed to seasonably turn to the right on meeting the Ford. The third alleged that appellees owned the truck, and by their agents and servants were transporting their farm products, and did not use reasonable care, caution and skill in operating the truck, and operated it at an excessive rate of speed. The fourth alleged that appellees and their agents were in control of the truck, and ran the same at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the way, and ran into the plaintiff and injured him. The appellees filed the general issue and four special pleas, in which they denied that the truck was at the time of the injury engaged in the business of appellees, denied the ownership of the cabbage being transported, denied that the truck was in charge of any servant or agent of appellees engaged in their business and under their control, and alleged that the appellant's employer and appellees were both operating under the Workmen's Compensation Act, and there could be no recovery.

The first material question is whether Mackey was the servant of appellees, under their power and dominion and engaged in their business, so as to render them liable for any negligence of which he might be

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The first material question is whether Mackey was the servant of appellees, under their power and dominion and engaged in their business, so as to render them liable for any negligence of which he might be

guilty; or whether he was the servant of Floyd and, therefore, not liable for his negligence.

A general servant of one master may be loaned or hired to another master for some special purpose and thereby become the servant of the latter in the particular transaction. The master is the one who has the direction and control of the servant. The test is whether, in the particular service in which the servant is engaged at the time of the injury, he continues to be liable to the direction and control of the master, or becomes liable to and under the direction and control of the person to whom he is loaned or hird. The doctrine of respondeat superior applies only where the the relation of master and servant exists between the wrong doer and the person sought to be charged for the negligence or wrong, at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful act an injury may be traced was, at the time, in the general employment of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time of the injury and who has the right to control and direct the conduct of the servant. Servants who are employed and paid by one person may be the servants of another in a particular transaction and that too, where the general employer is interested in the work.

In Shearman and Redfield on Negligence, 4th edition, 160, 162, the rule is laid down that he is the master who has the choice, control and direction of the servant; that the master remains liable to a stranger for the control of his servants unless he abandons their control. The control of the servants does not exist unless the hirer has the right to discharge them and hire others in their places. The doctrine of respondeat superior is appliable where the person sought to be charged has the right to control the actions of the person committing the injury.

In Pioneer Fireproof Construction Company v. Hansen, 176 Ill. 100, on page 108, it is said, "It follows that the right to control the

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negligent servant is the test by which it is to be determined whether the relation of master and servant exists; and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists."

In Grace & Hyde Company v. Probst, 208 Ill. 147, on page 151, it is said, "The master is the one who has the direction and control of the servant, and the test is whether, in the particular service, the servant continues liable to the direction and control of his master, or becomes subject to the party to whom he is loaned or hired." Citing Consolidated Fire Works Company v. Koehl, 190 Ill. 195.

In P.C.C. & St. L. Ry. Co. v. Bovard, 223 Ill. 176, on page 182, it is said, "Where the servant is temporarily loaned by the master to another for some special service the servant for the time becomes wholly subject to the direction and control of the person to whom loaned and for whom the special service is being performed and is wholly free during such time, from the direction of the master he becomes the servant for the time of the person to whom loaned or hired, and during such time may bear the relation of fellow servant to the other servants of the master to whom he is loaned."

In Harding v. St. Louis Stock Yards Company, 242 Ill. 444, on page 449, it is said, "No absolute or arbitrary rule can be laid down by which it can be plainly seen in every case whether a person is the servant of a general or special master as those terms are used in the decisions. The special facts of each case must be looked to in order to reach the proper conclusion." On page 451, it is said, "The test in such case is whether, in the particular service, the servant continues to be under the direction and control of his master or of the other party. * * * The doctrine of respondeat superior will apply only when the relation of master and servant is shown to exist between the wrong doer and the person sought to be held for the injury. The master is he in whose business the servant is engaged at the time and who has the right to direct and control the servant's conduct."

In Wadsworth Howland Co. v. Foster, 50 Ill. App. 513, Wadsworth

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In Wadsworth Howland Co. v. Foster, 50 Ill. App. 513, Wadsworth

& Co. was a corporation and manufactured paint. Instead of owning teams to haul its goods, it hired the work done by the week by one Smiddie, who owned two wagons and teams. Smiddie drove one of the teams and Gengenback drove the other. Smiddie's name was on the pay-foll of Wadsworth & Co. and he paid the other driver. They both got their orders from the shipping clerk of Wadsworth as to the place to which they were to go, but no directions were given as to the route. Gengenback drove over a child and killed it. The question was whether he was the servant of Wadsworth & Co. or of Smiddie. The appellate court held that Smiddie was an independent contractor and Gengenback was his servant. It was held that the real test by which to determine whether a person is acting as the servant of another, is to ascertain whether, at the time of the injury, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders. The person sought to be charged must at least have the right to direct such servant's conduct and prescribe the manner of doing the work.

In Fisher v. Levy, 182 Ill. App. 393, the plaintiff in error was a corporation engaged in the wholesale newspaper delivery business, and was under contract with the Chicago Journal Company to furnish a horse, wagon and driver to deliver its daily papers at a stipulated price for a stipulated amount of work. The driver received his pay from the plaintiff in error, who received his pay from the Journal Company. Plaintiff in error made nothing out of the driver's wages. The driver each morning went to the place of business of the plaintiff in error, got the horse and wagon and then went to the Journal office. In all matters connected with the business of the Journal Company, the driver was subject to its orders and under them delivered papers to its customers at various stores and news stands and collected money on bills given him by the Journal Company. Both the plaintiff in error and the Journal Company had authority to discharge the driver independent of the other. The driver left his horse unhitched, it ran away and caused the damage in question. It was held that while the Journal

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Company could direct where the driver should deliver the papers, the evidence did not show any control of the Journal Company over the management of the horse; that, in the absence of proof to the contrary, it would be presumed that as to all matters relating to the manner of driving, managing and handling the horse, the original employer had control of the driver and was liable for his negligence.

In Perong v. Eudeikes, 223 Ill. App. 72, the owner of an automobile loaned it and a driver to the Hoyne Auto Livery Co. to be used at a funeral. The only instruction the owner gave the driver was to report to the Hoyne Company. The Hoyne Company paid the owner for the use of the auto and driver. During the trip the auto struck a man and injured him. Suit was brought and there was a recovery. The appellate court reversed the judgment, holding that the driver was the servant of Hoyne & Co. and not the servant of the owner, and on page 75 it was said, "The courts have uniformly held that where a servant is temporarily loaned by the master to another for some special service, and the servant for the time being becomes wholly subject to the direction and control of the person to whom loaned and for whom the special service is being performed, and is wholly free during such period from the direction of his master, he becomes for such period the servant of the person to whom he is loaned", citing P.C.C. & St. L. Ry. Co. v. Bovard, 223 Ill. 176; Grace & Hyde Co. v. Probst, 208 Ill. 147; Wheeler v. Chicago & Western Indiana Co., 267 Ill. 326.

Other authorities might be cited from other jurisdictions, but we do not deem it necessary to review them. From these authorities it is apparent that the law in this state on this question is well settled. The difficulty does not arise from ascertaining what the law is, but arises in the application of the law to the particular facts presented. Any apparent conflict in the decisions may be explained by the difference in the facts. A slight difference in the facts may make an entire change in the liability of the parties. As was said in Harding v. St. Louis Stock Yards, supra, "No absolute or arbitrary rule can be laid down. The special facts in each case must be looked to in order to

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reach the proper conclusion." It is apparent, however, from these cases cited, that the person causing an injury may be a servant of both parties. Where he is loaned by his general employer to another party, in order for the general employer to escape liability, he must surrender all power, control and authority over the servant. If he retains power and authority over the servant, he becomes liable for his negligent acts.

The evidence as to the conditions under which appellees loaned this truck to Floyd is undisputed, and it is a question whether these undisputed facts were sufficient to show that appellees retained such control over the truck as rendered them liable for the negligence of the driver. This question was submitted to the jury as a question of fact, under the eighth instruction given at the request of appellant. When Floyd asked Waldo Kuhn for the loan of the truck, Kuhn was willing to loan him the truck, but was not willing to let him have it if it was to be driven by an inexperienced man. The truck was of considerable value, had just been repaired at large expense and appellees were about to use it in their business. Kuhn refused to let the truck go without furnishing the driver. He furnished a driver whom he considered an expert, and he did so for the purpose of conserving his property and seeing that it was handled in a careful and skillful manner. Under the facts we do not think it can be said that the appellees surrender all of the power and authority which they had over the driver while he was in the service of Floyd. Floyd had the right to direct where the truck should go how far it should be driven, what stops should be made, and all other incidents connected therewith; but he did not have authority to designate the manner in which the truck should be operated, the rate of speed at which it could be run, or any other act in connection with the driving of the same. This control was reserved by appellees and was exercised by them through their servant, Mackey. We are of the opinion that the appellees did not surrender all authority and control over the driver so as to make him the exclusive servant of Floyd.

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We have no way of determining how the jury decided this question of appellees' liability, but even if it be conceded that Mackey was the servant of appellees that fact was not conclusive of this case. The declaration charged certain negligence against appellees and the burden was upon appellant to establish some one of these acts of negligence before he would be entitled to recover. There is no evidence even tending to support the charge that the brakes were defective as alleged in the first count of the declaration. On the contrary the only evidence on that point is that the brakes were in good working order and that Mackey used both the foot and emergency brake from the time he started down the hill until he struck the Ford. It therefore remains to be determined whether the evidence sustains the charge that Mackey failed to seasonably turn to the right, or did not use reasonable care and skill in operating the truck, and operated it at an excessive rate of speed which was greater than was reasonable and proper having regard for the traffic and use of the way as alleged in the other counts of the declaration.

To sustain these charges appellant offered the evidence of himself and three boys, Spute Howard, eighteen years old, who lived at the top of the hill on the west side of the road, and who was picking plums back of the house 150 feet from the road; Calvin O'Brien, thirteen years old, who lived on the east side of the road 100 feet from the accident and who was on his front porch; and William O'Brien, thirteen years old, who was 100 feet above the curve picking grapes. As to the speed of the truck, appellant testified he estimated the speed at thirty to thirty-five miles per hour. Howard testified the truck was making a rumbling noise; that it was a noise like the shifting or stripping of gears and the truck then gained momentum, and in his judgment was going thirty-five miles per hour. Calvin O'Brien testified the truck made a rumbling noise and seemed to be coming rapidly, extremely fast, but he could not say how fast, anywhere from twenty-five to thirty-five miles per hour; that the engine of the truck was not running and the truck was not in gear and there was no noise from the gears; that it made a sort of a rumbling noise like a freight train

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going fast; that he told several people what he thought the speed was and they did not agree with him. William O'Brien testified he heard a rumbling noise but he did not testify to the rate of speed. Mackey testified when he started down the hill he put the truck in low gear and kept it in low gear all the way down; that this had the effect of retarding the speed, and he had both brakes on to the full extent of their power; that at the time of the accident he was going ten to twelve miles per hour, and in this last statement he is corroborated by Floyd. The evidence also shows that when the garage man attempted to pull the truck away from the Ford after the accident they found it in low gear and had to jack up the rear wheels before they could shift the gears. Four garage men who had experience in testing and driving cars and who were familiar with the hill testified that if a truck attempted to go down the hill at a rate of speed in excess of fifteen miles it could not make the turns and would either run into the embankment or be overturned.

There is also a sharp conflict in the evidence as to the sides of the road on which these vehicles were traveling just before and at the time of the collision. Appellant testified the truck was on the left side coming down, and that Barnes pulled over as far to the right side going up as he could. Howard testified the truck seemed to be in the center of the road as it came around the last curve, and ran diagonally off to the left, and that the Ford was as far on the right side as it could go. William O'Brien testified the Ford was on the right side going up, and the truck was in the center at the curve, and later was wobbling and occupied the greater part of the road; that it was on the left side going down hugging the ditch; that he could not state for sure which part of the road the truck was in. Calvin O'Brien testified the Ford seemed to go towards the right side going up, and the truck came around the curve in the center, but below the curve it was hugging the left side going down. Mackey and Floyd testified the truck was on the extreme right side going down, three or four feet from the edge of the road; that the Ford was on the left side going up

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and swerved to the right and then to the left before the collision. The evidence shows that when the wheels of the Ford were crushed, and pushing in front of the truck they scraped a groove or track from the point of the collision to the tree, sixty or seventy feet, so the exact point of the collision was marked in the road. Three disinterested witnesses testified these marks began just to the left of the center going up and led to the tree. Witnesses on both sides testified the Ford traveled more than twice the distance the truck traveled before the collision and after the men saw each other. The appellant testified the Ford was traveling slowly, and Calvin O'Brien testified the Ford was in low gear and that it was impossible for it to travel very fast. Appellant testified he saw the truck coming from the top of the hill, while the evidence shows his view of the top of the hill was so obstructed by trees and underbrush that the top of the hill was not visible from where appellant was.

In this conflicting condition of the evidence on almost every feature of the case, the question is whether this court would be justified in reversing the judgment on the ground that it is not sustained by the evidence. The burden was upon the appellant to prove his charge of negligence as alleged in some count of his declaration by a preponderance of the evidence. Whether he did so prove his case was a question of fact for the jury. After the jury has determined the facts we are not at liberty to set aside the judgment simply because the evidence is in conflict, or because we are of the opinion that a different verdict might have been returned, but before we are justified in so doing, we must be of the opinion that the verdict is manifestly against the weight of the evidence. Illinois Central Railroad Company v. Gillis, 68 Ill. 317; Donelson v. East St. Louis Railway Company, 235 Ill. 625; Marble v. Marble, 304 Ill. 229. While it is true the negligence of Barnes cannot be imputed to appellant, yet if the jury believed from the evidence that the truck was on the right side of the road and was traveling at from ten to twelve miles per hour, and that the Ford was on the wrong side of the road, the jury would be justified in returning a verdict against appellant. After a careful consideration of this

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evidence we cannot say that the verdict is manifestly against the weight of the evidence, and we do not feel justified in reversing the judgment on that ground.

The court admitted in evidence on behalf of appellees a map of De Pue, or Mecum hill. Appellant claims this was error for the reason that the map had marked on it the following language; "central spot of accident", "left from wheel", "hawthorn tree", "cherry tree"; that the map was made two years after the accident; that the engineer who prepared it had no personal knowledge of the location of the "central spot of accident" and fixed the location by what he was told by J. K. Ryan, who was a witness who arrived at the scene of the accident shortly after it occured; that the "central spot of accident" was located on the map on the left hand side of the road going up the hill, which would lead the jury to believe that the driver of the Ford was on the wrong side of the road, and for that reason was guilty of contributory negligence; that the "central spot of accident" was a written statement on the map not proper to go to the jury, and assumed that the collision was an accident; that the map was not explained to the jury. We do not think any of these contentions are sustained by the evidence. The engineer who prepared the map testified it was made from measurements taken by him and was a correct representation of the hill, its grades, elevations, curves, roadways, etc.; that it showed the correct location of the red haw tree against which the cars landed as a result of the collision; that the place on the road where the collision occurred was pointed out to him by Ryan and correctly showed on the map the spot which Ryan pointed out to him as the place where the accident occurred. The testimony of all the witnesses located the cars and the injured men at the red haw tree. There is no controversy that the cars, from the instant of the collision, moved in the direction to the tree. The map indicated all these points. The jury fully understood that the point marked "central spot of accident" only located that as the spot where Ryan thought the accident occurred. In all other respects the map was correct and

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The court admitted in evidence on behalf of appellees a map of De Rue, or Mason hill. Appellant claims this was error for the reason that the map had marked on it the following language; "central spot of accident", "left from wheel", "hawthorn tree", "cherry tree"; that the map was made two years after the accident; that the engineer who prepared it had no personal knowledge of the location of the "central spot of accident" and fixed the location by what he was told by J. K. Ryan, who was a witness who arrived at the scene of the accident shortly after it occured; that the "central spot of accident" was located on the map on the left hand side of the road going up the hill, which would lead the jury to believe that the driver of the Ford was on the wrong side of the road, and for that reason was guilty of contributory negligence; that the "central spot of accident" was a written statement on the map not proper to go to the jury, and assumed that the collision was an accident; that the map was not explained to the jury. We do not think any of these contentions are sustained by the evidence. The engineer who prepared the map testified it was made from measurements taken by him and was a correct representation of the hill, its grades, elevations, curves, roadways, etc.; that it showed the correct location of the red haw tree against which the cars landed as a result of the collision; that the place on the road where the collision occurred was pointed out to him by Ryan and correctly showed on the map the spot which Ryan pointed out to him as the place where the accident occurred. The testimony of all the witnesses located the cars and the injured men at the red haw tree. There is no controversy that the cars, from the instant of the collision, moved in the direction to the tree. The map indicated all these points. The jury fully understood that the point marked "central spot of accident" only located that as the spot where Ryan thought the accident occurred. In all other respects the map was correct and

we do not believe the jury was misled to the prejudice of the appellant.

Appellant insists that the court improperly permitted Ryan to testify that he ran a Chevrolet car, weighing 1500 pounds, down this hill at twenty-five miles per hour. Ryam testified he had been engaged in the garage business; was familiar with the road in question; had tested and operated trucks on the road and was familiar with two ton trucks; that, in his judgment, the truck, if operated down the hill at twenty-five miles per hour, would have landed in the ditch before it readhed the curve. He also testified to the locations of the tracks in the road. No objection was made to this evidence. On cross-examination he testified as to the effect of the rate of speed on the truck on the hill and no objection was made that such evidence was not a proper subject for expert testimony. On re-direct examination he was asked if he had made any experiment as to the effect on a car coming down the hill at any rate of speed and answered that he had with a Chevrolet car. He was then asked what the effect was as to the ability of a car to go around these curves at the speed mentioned. Objection was made by appellant and sustained. Thereupon an offer was made to prove the result of the experiment. Appellant withdrew his objection and the question was answered. This testimony was admitted without objection, and therefore, no error can be assigned upon it.

Complaint is made of the thirteenth instruction given on behalf of the appellees. This instruction told the jury that the court did not intend to intimate to the jury what its opinion was, or should be, as to any fact, or facts in dispute. This instruction has been held proper in Chicago Terminal Transfer Company v. Reddick, 131 Ill. App. 515; 230 Ill. 105.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

Justice Jones, Dissenting.

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Appellant insists that the court improperly permitted Ryan to testify that he ran a Chevrolet car, weighing 1500 pounds, down this hill at twenty-five miles per hour. Ryan testified he had been engaged in the garage business; was familiar with the road in question; had tested and operated trucks on the road and was familiar with two ton trucks; that, in his judgment, the truck, if operated down the hill at twenty-five miles per hour, would have landed in the ditch before it reached the curve. He also testified to the locations of the tracks in the road. No objection was made to this evidence. On cross-examination he testified as to the effect of the rate of speed on the truck on the hill and no objection was made that such evidence was not a proper subject for expert testimony. On re-direct examination he was asked if he had made any experiment as to the effect on a car coming down the hill at any rate of speed and answered that he had with a Chevrolet car. He was then asked what the effect was as to the ability of a car to go around these curves at the speed mentioned. Objection was made by appellant and sustained. Thereupon an offer was made to prove the result of the experiment. Appellant withdrew his objection and the question was answered. This testimony was admitted without objection, and therefore, no error can be assigned upon it.

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We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

Justice Jones dissenting.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

31-7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On MAR 12 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7290 Agenda 53

Oneida State Bank,
appellee,

vs.

C. A. Peterson, et al,
appellants.

Appeal from the Circuit Court of Knox County

233 I.A. 655

Jett, J.

This is the third time this cause has been brought to this court for review. At the conclusion of the first hearing in the trial court, a judgment was rendered in favor of the defendants in bar of the action. This court reversed that judgment because the trial court improperly exercised its judicial discretion in refusing to permit the plaintiff, after the conclusion of the evidence offered on behalf of the defendants, to make certain additional proof, Oneida State Bank v. Peterson, 211 Ill. App. 655. After the cause was redocketed in the Circuit Court a trial was had before a jury, and at the conclusion of all the evidence offered on behalf of the plaintiff a directed verdict was returned in favor of the defendants. The case was again reviewed by this court and the judgment was again reversed and the cause remanded. Oneida State Bank v. Peterson, 266 Ill. App. 381. A full statement of the facts will be found in these opinions and it is unnecessary for us to make an extended statement here. We expressly outlined the procedure which should obtain upon a retrial of the case and the record discloses that the rulings of the trial court closely followed our suggestions. Upon the hearing so conducted the issues were submitted to the jury under proper instructions which resulted in a verdict in favor of appellee for $3323.58 upon which judgment was rendered and the defendants Field and Murdock appealed.

The evidence discloses that on June 22, 1906, a written partnership agreement was entered into between appellants and W. D. Patty, C. A. Peterson and S. J. Metcalf for the purpose of buying and selling Canadian lands; that by this agreement the profits arising therefrom were to be divided so that appellants would receive one half thereof and Patty Peterson and Metcalf the remaining one half and that where lands were purchased or money advanced for options the parties were to be held equally financially responsible.

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This partnership agreement did not provide by what name the partnership should be called and the real controverted issue of fact in the case is as to who constituted the partnership of S. J. Metcalf and Company. Appellee contends that S. J. Metcalf and Company was the name of the partnership created by the partnership agreement of June 22, 1906 and consisted of Patty, Peterson, Metcalf, Field and Murdock, While it is the contention of appellants that S. J. Metcalf and Company was composed of Patty, Peterson and Metcalf and that appellants were in no way connected with it.

In pursuance of this partnership agreement of June22, 1906, several tracts of Canadian lands were bought and sold and beginning on July 17, 1906, and continuing until April 1, 1915 there was an active account in appellee's bank under the name of S. J. Metcalf and Company, During this period money was borrowed and notes of S. J. Metcalf and Company were executed therefor.

On December 8, 1914, a meeting was held at Appellee's bank at which time the indebtedness of S. J. Metcalf and Company was discussed. Some of the officers and directors of the bank were present as were also Patty and Metcalf. The indebtedness at that time, according to the evidence amounted to $8323.58 and was evidenced by four notes. It was agreed that Patty and Metcalf would execute a note for $5000.00 and secure the same by a mortgage upon some lands which they owned and that a partnership note for the balance of $3323,58 would be given. Nothing more was done on that day but subsequently the note of $5000.00 and the mortgage to secure the same were executed and on February 8, 1915, were delivered to the bank and at that time the note for $3323.58 was executed but it was antedated December 8, 1914; S. J. Metcalf signed this note, "S. J. Metcalf and Company" and he and C. A. Peterson each signed it individually. At this time the four notes evidencing the indebtedness to appellee were cancelled and delivered to Metcalf.

Peterson testified that the firm of S. J. Metcalf and Company consisted of Patty, Metcalf, Field, Murdock and himself. Miss Anderson testified to statements made in her presence by Patty to a bank examiner to the same effect. Metcalf in his evidence also referred to S. J. Metcalf and Company as the five-man partnership.

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There was other evidence tending to substantiate plaintiff's contention as to who constituted the partnership and from all of which the jury was fully authorized and warranted in finding for the plaintiff upon this issue.

In our former opinion we held that a note given by surviving members of a partnership after the death of a deceased partner in settlement of a pre-existing and valid debt of said partnership and in pursuance of an agreement made during the lifetime of such deceased partner was a valid obligation of the partnership but appellants strenuously insist that inasmuch as it was not shown that appellants expressly authorized the execution of the note $3525.58 dated December 8, 1914, there can be no recovery thereon. In directing the lower court to overrule the demurrer to the additional counts we said in our former opinion: "While it is true that the additional counts do not aver that authority was expressly given to execute and deliver the note after the dissolution of the partnership, the alleged agreement is so broad and comprehensive in its character that the power to give the note in question after the death of Patty seems undeniable." Oneida State Bank vs Peterson, et al., 226Ill. App. 381 (384). The settlement on December 8, 1914, was within the scope of the partnership business and the acts of Peterson and Metcalf were the acts of and binding upon all the members of the partnership.

Appellants next contend that the trial court erred in admitting the testimony of Miss Anderson hereinbefore referred to. Upon the former hearing of this case we held this evidence competent and for the reasons there stated the ruling of the trail court was proper.

What we have already said disposes of the objections raised by appellants to the instructions which were given and to those instructions which were tendered by appellants and which were refused. There was no change in the issues upon the third trial except the trial court overruled the demurrer to the additional counts and to the replication to the plea of the five year statute of limitations. The evidence produced upon the third trial with the addition of some

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cumulative evidence was substantilly the same as that produced upon the second hearing. The law governing the questions presented was settled by our former opinions. Not only the trial court but this court, upon this appeal, is bound by those decisions. Anderson vs Fletcher 228 Ill. App. 372-377. We believe the judgment rendered upon the verdict of the jury is in accordance with the merits of the case and should not be disturbed. There is no reversible error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

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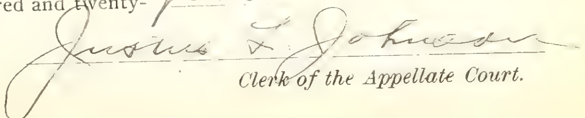
JUDGMENT AFFIRMED.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of April in the year of our Lord one thousand nine hundred and twenty-four



Clerk of the Appellate Court.

(3155 a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

#7275.

Agenda #41

Vulcan Detinning Company,

Appellee

Vs.

J. N. St. Clair,

Appellant.

Appeal from the Circuit Court of LaSalle County.

235 I.A. 655

Jett, J.

On January 11th, 1923, a writ of injunction was issued by the circuit court of LaSalle County, upon the application of appellee, restraining appellant, who was the President of Vulcan Federal Union #15107 and others from doing, among other things any act in furtherance of any conspiracy or combination to obstruct or interfere with appellee in its free and unrestrained control and operation of its business, or from in any way or manner, by use of threats of personal injury, intimidation, suggestion of danger, or threats of violence of any kind, interfering with, hindering, obstructing, or stopping any person engaged in the employ of appellee, and from interfering by violence or threats of violence, intimidation or suggestion of danger, with any person desiring or seeking employment with appellee and from inducing or attempting to induce by threats intimidation, force, or violence, or putting in fear, or by suggestion of danger, any of the employes of appellee, so as to cause them through fear to leave the employ of appellee, or from preventing any person by such means, from entering into the employ of appellee, or from intimidating, threatening or abusing in any manner the employees or prospective employees of appellee, and also from applying opprobrious epithets to any of the employees of appellee, or to any person or persons seeking employment at its factory, and from calling them or either of them scabs or other offensive, scurrilous or opprobrious names.

On February 24, 1923, appellee filed its petition in the Circuit Court of LaSalle County, reciting the issuance and service of said ~~injuncito~~ injunction and alleging among other

47775. Agenda #41

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On February 24, 1925, appellee filed its petition in the Circuit Court of LaSalle County, reciting the issuance and service of said ~~injuncto~~ injunction and alleging among other

things that appellant, together with other officers of said Union, caused the following notice to be printed in the Streator Daily Independent Times and the Streator Free-Press, two newspapers of Streator, Illinois, viz:-

"At their meeting held on February 18, 1923, the members of the Vulcan Federal Union No. 15107, voted unanimously to continue their strike against the Vulcan Detinning Company, until an honorable agreement is reached. Those voted as traitors are ex-members W.H. Thomas, and John Krapljon, now in the Vulcan works, and Charles Hersheway at the Western Glass Works, and Former Union men now at the Vulcan Works, are George Sourby, Andrew Galick, and Gus Samuelson, No redblooded man will steal a real man's job, We are out to win. And will win.

Vulcan Federal Union 15107
By order of the organization.

The petition further alleges that Thomas and Krapljon were former members of the union, and were at that time in the employ of appellee. Further charges were made against appellant with reference to his violating the writ which it will not be necessary for us to notice..

Appellant filed his answer to said petition, admitting the issuance of such injunction, and that he received a copy thereof; but denying that he caused the publication of said notice and avering that it was published by the instruction of his Union.

A hearing was had and from the evidence produced the court found that appellant did wilfully violate the injunction by pub - lishing and causing to be published in the two Streator newspapers the notice herein set forth. The Court further found appellant guilty of contempt of court and fined him $500.00 in default of the payment of which he was ordered committed to jail for six months or until the fine is paid or he is otherwise released by due process of law. From this order appellant has appealed to this court.

The evidence is not conflicting. It is disclosed that the recording secretary was ordered by the vote of the local Union to publish said notice in the two ~~newspaper~~ newspapers of Streator Appellant delivered the notice to the city editor of each of the newspapers and requested the editor of each to publish the same

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and charge the bill therefor to the Union but to send the bill to him. Appellant insists however that in so doing he was simply the agent or messenger of the corresponding secretary; that the corresponding secretary had to go to work early and it was therefore impossible for him to deliver the notices to the newspapers for publication and in order to accommodate the corresponding secretary, appellant did go to the newspaper offices and have the same published. Appellant testified that he did not believe that he was violating the injunction by so doing, and had he thought it was a violation of the order he would not have done it.

It is first insisted by counsel for appellant that the publication of this notice was not a violation of the injunction. In 2 High on Injunctions (4th Ed.) Sec. 1446, it is said "In deciding whether there has been an actual breach of an injunction, it is important to observe the objects for which the relief was granted, as well as the circumstances attending it. And it is to be observed that the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court." The injunction restrained appellant from interfering with appellee's business, and from attempting to induce or compel by intimidation or putting in fear any of the employees of appellee so as to cause them through fear to leave such employment, and also from applying approbrious epithets to any of the employees of appellee. This notice stated that the Union of which appellant was President had stigmatized as traitors two former members of that Union, who were then in the employ of appellee and concluded "No redblooded man will steal a real man's job". No satisfactory reason was advanced for the publication of this article other than that the secretary of the Union testified that the purpose was to keep the Union together. Appellant and his organization were explicitly forbidden from intimidating or abusing any of appellee's employees, and it certainly cannot be seriously contended that the use of this language was not calculated to do that which was clearly prohibited by the injunction. The

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article was scurrilous, offensive, abusive and scandalous, and the publication of this article was clearly violative, not only of the spirit but of the very letter of the writ. Its only purpose was to vilify those persons whose names were therein mentioned, to publicly hold them up to scorn and ridicule, and thereby to intimidate them and cause them to leave appellee's employ or to intimidate others, and thereby prevent them from entering into the employ of appellee.

It is next insisted that if the publication thereof did violate the injunction, then as a matter of law and fact, appellant was not guilty of publishing the same. The facts are not disputed. Appellant is the President of the Union, He was present when the resolution was unanimously adopted. He personally delivered the notice to each of the papers and requested the publication of the same. The Union itself may be primarily responsible for the adoption of the resolution and its publication, but appellant knew of the injunction, and its terms.

He personally caused the publication of an article which the injunction strictly prohibited. He did that which the order of the court had specifically forbidden. He was not acting merely as an innocent messenger. He was not an accessory but a principal.

It is next contended that before appellant can be punished for contempt it was incumbent upon appellee to show that it had been injured in its property rights. This same contention was made in the case of Nusbaum v. Retail Clerks Int. Protective Assn. 227 Ill. App. 206, but was there determined adversely to appellant, and the court speaking through Mr. Justice Morrill said "The argument cannot be sustained for the further reason that the question of injury to complainants is not properly before the court in a collateral proceeding for contempt in violating the injunction. Franklin Union v. People 220 Ill. 355; Flannery v. People, 225 Ill. 62; Lyon & Healy v. Piano Worker's Union, 289 Ill. 176. Injury and damage

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will be inferred in such a case. Loven v. People 158 Ill. 159. The cases cited by appellant are not in point. The facts in the case of Rothschild v. Boston Store 219 Ill. App. 419, were that the defendant had been restrained from using advertisements in such manner as to induce the belief that the defendant was selling merchandise which was formerly the property of the complainant. The evidence disclosed that the defendant had purchased the stock of Louis J. Rothschild of St. Paul and the advertisements so plainly stated. The Court held that the defendant, having bought the stock of Louis J. Rothschild of St. Paul, did not by its placards or advertisements deceive any one, and that the complainant therefore had no interest in the transaction and therefore had suffered no injury. Another case relied upon by appellant, People v. Deidrich, 141 Ill. 665, is commented upon in the case of Loven v. The People Supra. the rule is there stated as follows, viz:

> "It is shown that the same interests which were in litigation in the principal suit, and which are protected by the injunction, are being violated, and from these facts, as it seems to us, injury and legal damage will be inferred. There is no suggestion that the complainant has parted with the rights which were the subject of litigation, in the principal suit, or has in any way lost its interest therein. The authorities cited by the defendant in support of his position in this respect seem to be cases where the complainant had no interest in the property affected by the acts sought to be charged as a contempt, or had parted with his interest in the subject of the litigation.

It is finally insisted that the punishment is excessive, although counself for appellant recognize that this is a matter largely discretionary with the trial court. Appellant is an intelligent man, and one who had held many offices of trust and confidence. For eight years he had served as Clerk of the Probate Court of La Salle County. He was deputy sheriff for nine months. For twenty-one years he was a member of and an officer in the National Guard, during thirteen of these years he was Captain and retired with rank of Major. For a number of years he was the Chief of Police of Streator, and at the time of the hearing and for several years prior thereto he was justice of the peace. There was no excuse offered for his flagrant and wilful disobedience to the spirit

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> "It is shown that the same interests which were in litigation in the principal suit, and which are protected by the injunction, are being violated, and from these facts, as it seems to us, injury and legal damage will be inferred. There is no suggestion that the complainant has parted with the rights which were the subject of litigation, in the principal suit, or has in any way lost its interest therein. The authorities cited by the defendant in support of his position in this respect seem to be cases where the complainant had no interest in the [illegible] affected by the acts sought to be charged as a contempt, or had parted with his interest in the subject of the litigation.

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and letter of the writ, and we are not inclined to say that the amount or character of the penalty imposed is excessive, or out of proportion to the gravity of appellant's offense. We cannot say the discretion reposed in the trial court was abused. The order and judgment appealed from is affirmed.

Judgment Affirmed.

and letter of the writ, and we are not inclined to say that the amount or character of the penalty imposed is excessive, or out of proportion to the gravity of appellant's offense. We cannot say the discretion reposed in the trial court was abused. The order and judgment appealed from is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

(3756a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233I.A. 655

BE IT REMEMBERED, that afterwards, to-wit: On APR 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 7301 Agenda 59

Kempton Farmers Elevator,
Company, a corporation,
appellee,
vs.
James E. Bennett trading and
doing business under the name
of James E. Bennett & Co.,
appellant,

Appeal from the Circuit Court
of Kankakee County

233 I.A. 655

Jett, J.

This is a suit in assumpsit brought in the Circuit Court of Kankakee County, by Kempton Farmers Elevator Company, appellee, against James E. Bennett, trading and doing business under the name of James E. Bennett & Company, appellant.

The declaration consists of the common counts which were limited by an amended bill of particulars filed by appellee. Appellant pleaded the general issue and the statute of limitations. The claim of appellee as set forth in its amended bill of particulars is "For grain sold and delivered to defendant and money had and received by defendant to and for the use of the plaintiff from sale of grain belonging to plaintiff". Also for "moneys received by defendant upon checks sent defendant by A. J. Hartquest without authority of plaintiff, drawn upon the State Bank of Kempton, Kempton, Illinois, and other charges drawn upon the Farmers State Bank of Cabery, Illinois, signed Kempton Farmers Elevator Company, per A.J. Hartquest, General Manager." Also for "interest on above sums of money $3000.00". The bill of particulars included a list of a number of items showing the date, the car number and the value of each of the cars of grain, together with a list of items from February 21, 1916, to August 16, 1920.

A trial was had and on March 30, 1923, the court rendered judgment in favor of appellee for $20,296.04, on a verdict directed by the court on the motion of appellee at the close of all the evidence in the case. Appellant prosecutes this appeal.

No. 7301 Agenda 58

Kempton Farmers Elevator Company, a corporation, appellee,

vs.

James E. Bennett trading and doing business under the name of James E. Bennett & Co., appellant.

Appeal from the Circuit Court of Kankakee County

233 I.A. 655

Jett, J.

This is a suit in assumpsit brought in the Circuit Court of Kankakee County, by Kempton Farmers Elevator Company, appellee, against James E. Bennett, trading and doing business under the name of James E. Bennett & Company, appellant.

The declaration consists of the common counts which were limited by an amended bill of particulars filed by appellee. Appellant pleaded the general issue and the statute of limitations. The claim of appellee as set forth in its amended bill of particulars is "For grain sold and delivered to defendant and money had and received by defendant to and for the use of the plaintiff from sale of grain belonging to plaintiff". Also for "moneys received by defendant upon checks sent defendant by A. J. Hartquest without authority of plaintiff, drawn upon the State Bank of Kempton, Kempton, Illinois, and other charges drawn upon the Farmers State Bank of Cabery, Illinois, signed Kempton Farmers Elevator Company, per A.J. Hartquest, General Manager." Also for "interest on above sums of money $3000.00". The bill of particulars included a list of a number of items showing the date, the car number and the value of each of the cars of grain, together with a list of items from February 21, 1916, to August 16, 1920.

A trial was had and on March 30, 1923, the court rendered judgment in favor of appellee for $20,285.04, on a verdict directed by the court on the motion of appellee at the close of all the evidence in the case. Appellant prosecutes this appeal.

It is conceded by appellee that the controlling facts and questions of law in this case are substantially the same as in Kempton Farmers Elevator Co. v. Lowitz & Co., No. 7237, in this court.

In the instant case there are several transactions in cotton futures, pork and corporation stocks as well as grain, while in the Lowitz case the transactions were all in grain.

The questions raised on this record are the same as in the Lowitz case, 7237, and the conclusions reached in that case are decisive of the questions presented in this proceeding. The judgment in the Lowitz case xxxx was reversed for the reason that the court directed a verdict in favor of the appellee, it being held in that case that the questions of fact involved should have been submitted to the jury.

The question of the liability of appellant in this case under the evidence was a question of fact for the jury and the court improperly directed a verdict for the appellee and for that reason the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

It is conceded by appellee that the controlling facts and questions of law in this case are substantially the same as in Kempton Farmers Elevator Co. v. Lowitz & Co., No. 7237, in this court.

In the instant case there are several transactions in cotton futures, pork and corporation stocks as well as grain, while in the Lowitz case the transactions were all in grain.

The questions raised on this record are the same as in the Lowitz case, 7237, and the conclusions reached in that case are decisive of the questions presented in this proceeding. The judgment in the Lowitz case xxxx was reversed for the reason that the court directed a verdict in favor of the appellee, it being held in that case that the questions of fact involved should have been submitted to the jury.

The question of the liability of appellant in this case under the evidence was a question of fact for the jury and the court improperly directed a verdict for the appellee and for that reason the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

(3757a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 656

BE IT REMEMBERED, that afterwards, to-wit: On APR 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7252 Agenda Number 24

Thomas H. Runyan and Robert Kucharski
Defendants in Error

vs.

Federal Paving Company,
A Corporation,
Plaintiff in Error

Error to Circuit Court of Stephenson County.

233 I.A. 656

Jones J:

On December 21, 1922, Thomas H. Runyan, one of the defendants in error, filed a suit in the circuit court of Stephenson County, for the purpose of enforcing by virtue of Section 23, Chapter 82 of the Revised Statutes, an alleged lien, on moneys owing by the State of of Illinois, to the Federal Paving Company, plaintiff in error, for work performed under a contract for a public improvement. The bill alleged that the Federal Paving Company had entered into a contract with the State of Illinois through the Department of Public Works and Buildings, Division of Highways, for the construction of a cement road in Sections 19 and 23 of Route 5, in Stephenson County; that the Federal Paving Company had entered into a contract with Robert Kucharski, one of the defendants in error, subletting to him certain grading work in those sections; and that Kucharski had entered into a contract with the complainant Runyan subletting to him certain of the grading work so contracted to Kucharski. Runyan was to be paid thirty-five cents per yard for all dirt removed by him. There was personal service upon the plaintiff in error but not on Kucharski, the latter being served by publication.

The plaintiff in error and Kucharski were defaulted and a decree was entered finding that Kucharski was indebted to defendant in error, and granting the relief prayed. The plaintiff in error complains that the decree is not supported by the allegations of the bill and therefore the Court could not enter a decree against the plaintiff in error.

General Number [illegible]   Agenda Number [illegible]

Thomas E. Runyan and Robert Kucharski
Defendants in Error

vs.

Federal Paving Company,
A Corporation,
Plaintiff in Error

Error to Circuit
Court of Stephenson County.

2331.A.656

Jones, J.:

On December 21, 1932, Thomas E. Runyan, one of the defendants in error, filed a suit in the circuit court of Stephenson County, for the purpose of enforcing by virtue of Section 23, Chapter 82 of the Revised Statutes, alleged lien, on moneys owing by the State of Illinois, to the Federal Paving Company, plaintiff in error, for work performed under a contract for a public improvement. The bill alleged that the Federal Paving Company had entered into a contract with the State of Illinois through the Department of Public Works and Buildings, Division of Highways, for the construction of a cement road in Sections 19 and 20 of Route 5, in Stephenson County; that the Federal Paving Company had entered into a contract with Robert Kucharski, one of the defendants in error, subletting to him certain grading work in these sections; and that Kucharski had entered into a contract with the complainant Runyan subletting to him certain of the grading work so contracted to Kucharski. Runyan was to be paid thirty-five cents per yard for all dirt removed by him. There was personal service upon the plaintiff in error but not on Kucharski, the latter being served by publication.

The plaintiff in error and Kucharski were defaulted and a decree was entered finding that Kucharski was indebted to defendant in error, and granting the relief prayed. The plaintiff in error complains that the decree is not supported by the allegations of the bill and therefore the court could not enter a decree against the plaintiff in error.

" A defendant against whom a default has been entered may contest the sufficiency of the bill upon a writ of error. Only allegations well pleaded are confessed." (Monarch Brewing Co. vs. Wolford 179 Ill. 252; Langlois vs. People 212 Ill. 75; Stearns vs. Glos, 235 Ill. 290; Rice Co. vs. McJohn 244 Ill. 264.)

The only point to be decided in this case is whether the bill is sufficient to support the decree. It is first urged against the bill that it does not allege on what date the sworn statement of claim was filed with the proper state official and therefore that it does not allege that the bill was filed within thirty days after the filing of the sworn statement; second, that the bill merely alleges that the sworn statement was mailed ant that mailing did not constitute a filing; and third, it is not alleged that the sworn statement of the claims was filed with the state official whose duty it was to pay the plaintiff in error.

The allegations of the bill are that the complainant filed a statement under oath with the Department of Public Works and Buildings, Division of Highways claiming the amount of money due him, which affidavit was dated the 25th day of November 1922, and immediately mailed to the Department office at Dixon, Illinois. The bill was filed on the 21st day of December 1922. It thus appears that the statement of claim being filed subsequent to its date, it must have been filed within thirty days previous to the filing of the bill, because thirty days had not yet elapsed when the bill was filed.

The bill avers that the statement was filed with the Division of Highways, notwithstanding the allegation that it was mailed. It may have been both mailed and filed. It cannot be said that an instrument cannot be filed in an office by mailing it to the proper officer for filing, and that where this is done and the officer files the instrument that there was not a proper filing. It is the common practise everywhere to transmit documents, to officials for filing by mail.

Plaintiff in error practically concedes in its reply brief

" a defendant against whom a default has been entered may contest the sufficiency of the bill upon a writ of error. Only allegations well pleaded are confessed." (Monarch Brewing Co. vs. Wolford 179 Ill. 252; Langlois vs. People 212 Ill. 75; Stearns vs. Glos, 235 Ill. 290; Rice Co. vs. McJohn 244 Ill. 264.)

The only point to be decided in this case is whether the bill is sufficient to support the decree. It is first urged against the bill that it does not allege on what date the sworn statement of claim was filed with the proper state official and therefore that it does not allege that the bill was filed within thirty days after the filing of the sworn statement; second, that the bill merely alleges that the sworn statement was mailed and that mailing did not constitute a filing; and third, it is not alleged that the sworn statement of the claims was filed with the state official whose duty it was to pay the plaintiff in error.

The allegations of the bill are that the complainant filed a statement under oath with the Department of Public Works and Buildings, Division of Highways claiming the amount of money due him, which affidavit was dated the 25th day of November 1922, and immediately mailed to the Department office at Dixon, Illinois. The bill was filed on the 21st day of December 1922. It thus appears that the statement of claim being filed subsequent to its date, it must have been filed within thirty days previous to the filing of the bill, because thirty days had not yet elapsed when the bill was filed.

The bill avers that the statement was filed with the Division of Highways, notwithstanding the allegation that it was mailed. It may have been both mailed and filed. It cannot be said that an instrument cannot be filed in an office by mailing it to the proper officer for filing, and that where this is done and the officer files the instrument that there was not a proper filing. It is the common practice everywhere to transmit documents, to officials for filing by mail.

Plaintiff in error practically concedes in its reply brief

that if the sworn statement of claim was delivered to the Department of Public Works and Buildings, Division of Highways, being the department which would in the end be called upon to make the payment that the statement was filed with the proper state officials. The bill alleges it was filed with the Department of Public Works and Buildings, Division of Highways.

We are of the opinion that the bill sufficiently alleged the facts to support the decree entered by the court, and the decree will, therefore, be affirmed.

Decree Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct 8, 1924

3757

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 656

BE IT REMEMBERED, that afterwards, to-wit: On APR 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7255 Agenda Number 27

Charles C. Shrimplin, Administrator of the estate of Hannibal W. Shrimplin, deceased, Appellant,

VS.

Cleveland, Cincinnati, Chicago and St. Louis, Railway Company, Appellee

Appeal from Iroquois.

233

Jones J:

Appellant's intestate, Hannibal W. Shrimplin, was killed by a train operated by the agents of the appellee on November XX 17, 1920. Suit was commenced in the Circuit Court of Iroquois County on June 8, 1921, and a declaration consisting of one count was filed. This declaration did not give the date the death occurred, and for that reason, did not state a good cause of action. On November 17, 1921, being the first anniversary of the accident appellant filed an amended declaration which gave the date of the accident and death.

To this amended declaration, a demurrer was filed on the ground that the declaration was not filed within one year from the death of appellant's intestate as provided by the statute. The court sustained the demurrer and appellants elected to stand by the demurrer. Judgment was entered in bar of the action and for costs against the appellant.

It is conceded that the declaration filed June 8th 1921, stated no cause of action and that the suit was commenced with the filing of the amended declaration on November 17, 1921. (See Hartray vs. Chicago City Railway Co. 290 Ill. 85.)

The only question to be decided is whether or not the amended declaration was filed within a year as provided by the statute. The right of action for death caused by the wrongful act, neglect or default of the defendant is created by the statute, and exists only by virtue of the statute. Section 2 of the statute provides in part, "Every

such action shall be commenced within one year after the death of such person." In this case plaintiff's right of action began to run immediately upon the death of plaintiff's intestate, which was November 17, 1920. The right of action continued ~~ix~~ for a period of one year, and suit must be filed within that time. The period would therefore expire at midnight on November 16, 1921. It is provided in Section 1 of Chapter 131 of the statute that, "The word month shall mean a calendar month and the ~~x~~ word year shall mean a calendar year, unless otherwise expressed." The general rule is that the calendar year ends on the corresponding day of the following year less one day. A year beginning January 2nd expires at midnight of January 1st following. The statute further provides, "The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last". Under this statute it has frequently been held that the correct method of computing time, where an act is to be done within a particular time, after a specified day, is to exclude the specified day and include that upon which the act is to be performed. (Ewing vs. Bailie 4 Scam. 420; Waterman vs Jones 28 Ill. 54; Roan vs, Rohrer 72 id. 582; Gordon vs. People 154 Ill. 664.) But where the act is not to be done within a particular time after a specified day, but ~~ix~~ is to be done, within a particular period of time beginning with a specified day, the specified day is included and the anniversary day excluded.

In the case of People vs. Coffin 279 Ill. 401 the petitioner was appointed to office by the Civil Service Commission of Chicago on November 13, 1914. The rules of the Commission provided "for an appointment upon probation for a period of six months". Section 10 of the Act to regulate the Civil Service of Cities provides in part that, "At or before the expiration of the ~~period~~ period of probation, the head of the department ~~ox~~ or office in which a candidate is employed may, by and with the consent of said commission, discharge him,

such action shall be commenced within one year after the death of such person." In this case plaintiff's right of action began to run immediately upon the death of plaintiff's intestate, which was November 17, 1920. The right of action continued for a period of one year, and suit must be filed within that time. The period would therefore expire at midnight on November 16, 1921. It is provided in Section 1 of Chapter 131 of the statute that, "The word month shall mean a calendar month and the word year shall mean a calendar year, unless otherwise expressed." The general rule is that the calendar year ends on the corresponding day of the following year less one day. A year beginning January 2nd expires at midnight of January 1st following. The statute further provides, "The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last". Under this statute it has frequently been held that the correct method of computing time, where an act is to be done within a particular time, after a specified day, is to exclude the specified day and include that upon which the act is to be performed. (Ewing vs. Bailie 4 Scam. 420; Waterman vs Jones 28 Ill. 54; Roan vs. Rohrer 72 id. 582; Gordon vs. People 154 Ill. 664.) But where the act is not to be done within a particular time after a specified day, but is to be done, within a particular period of time beginning with a specified day, the specified day is included and the anniversary day excluded.

In the case of People vs. Coffin 279 Ill. 401 the petitioner was appointed to office by the Civil Service Commission of Chicago on November 15, 1916. The rules of the Commission provided "for an appointment upon probation for a period of six months". Section 10 of the Act to regulate the Civil Service of Cities provides in part that, "At or before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of said commission, discharge him,

upon assigning in writing ~~xxx~~ his reason therefor to said commission. If he is not then discharged, his appointment shall be deemed complete". The petitioner was discharged on May 13, 1915, and the Court was called upon to determinewhether the period of probation ended upon May 12th or May 13th. The Court said, "The Act is not to be done within a particular time after a specified day, but is to be done within a particular period of time, beginning with a specified day. 'At or before the expiration of the period of probation' refers to the duration of such period, and the discharge was authorized only during that ~~xx~~ time. The plaintiffs in error assume that the six months period of probation is a period of time excluding the day of appointment. No reason is suggested for such construction. The appointment was complete on November 13, 1914. The petitioner became Superintendent of the Bureau of Social Surveys on that day--- The same stature already referred to prescribes the meaning of the word 'month' to be a calendar month and the calendar month ends on the corresponding day in the month succeeding its beginning less one day. The time within which a probationer may be discharged is not within six months from and after his appointment but at or before the expiration of the period of six months beginning with the day of his appointment. That period ends six months after his appointment on the corresponding day of the month less one".

In the case of Krug vs. Outhouse 8 Ill. App. 304 a trespass was committed on the 21st day of June 1873. Suit was begun on the 21st day of June 1878. The statute in force at that time provided that "the action shall be commenced within five years next after the cause of action accrued". The court said, "The statute then and now in force, required that the action should be brought in five years, from the time ~~xxx~~ of the commission of the trespass and the statute began to run from the time the right of action accrued. The right of action accrued on the 21st day of June 1873. The 21st day of of June 1878 was one day more than five

upon complaint in writing and the reasons therefor to said commission. If it is not thus discharged, his appointment shall be deemed complete". The petitioner was discharged on May 1[illegible], 19[illegible], and the Court was called upon to determine whether the period of probation ended upon May 1[illegible]th or May 1[illegible]th. The Court said, "The Act is not to be done within a particular time after a specified day, but is to be done within a particular period of time, beginning with a specified day. 'At or before the expiration of the period of probation' refers to the duration of such period, and the discharge was authorized only during that time. The plaintiffs in error assume that the six months period of probation is a period of time excluding the day of appointment. No reason is suggested for such construction. The appointment was complete on November 1[illegible], 19[illegible]. The petitioner became [illegible] Superintendent of the Bureau of Social Surveys on that day--- The same statute already referred to prescribes the meaning of the word 'month' to be a calendar month and the calendar month ends on the corresponding day in the month succeeding the beginning less one day. The time within which a probationer may be discharged is not within six months from and after his appointment but at or before the expiration of the period of six months beginning with the day of his appointment. That period ends six months after his appointment on the corresponding day of the month less one".

In the case of Krug vs. Outhouse 8 Ill. App. 3[illegible] a trespass was committed on the 21st day of June 1873. Suit was begun on the 21st day of June 1878. The statute in force at that time provided that "the action shall be commenced within five years next after the cause of action accrued". The court said, "The statute then and now in force, required that the action should be brought in five years, from the time of the commission of the trespass and the statute began to run from the time the right of action accrued. The right of action accrued on the 21st day of June 1873. The 21st day of June 1878 was the day when the five

years; and the right to prosecute this suit was barred."

In the case of Irving vs. Irving 209 Ill. App. 318, the complainant filed a suit to have his marriage with the defendant declared void upon the ground that the defendant had been previously married, obtained a divorce and married him in violation of the statute providing, "that in every case in which a divorce has been granted - - - neither party shall marry again within one year from the time the decree was granted." The decree of divorce was granted on the 27th day of June 1913. The second marriage occurred on the 27th day of June 1914. The court held that the statutory provision for "excluding the first day and including the last" is for computation when "the time within which any act provided by law is to be done", did not apply to the statute on divorce, but that the year began to run with the date of the decree and ended on the corresponding day of the succeeding year less one day. We can see no distinction in the wording of the Divorce Statute referred to and the Statute of Limitations in this case.

We are aware that the Appellate Court, in the case of Kahlo vs, Kahlo 204 Ill. App. 409, held contrary to the decision in this case but in view of the decisions quoted above, we are unable to follow that decision.

We are of the opinion and so hold that the cause of action in this cause was barred at the time of the filing the declaration on November 17, 1921, and that the court ruled correctly in sustaining the demurrer and dismissing plaintiff's suit. The judgment of the lower court will therefore be affirmed.

Judgment affirmed.

years, and the right to prosecute this suit was barred."

In the case of Irving vs. Irving 203 Ill. App. 316, the complainant filed a suit to have his marriage with the defendant declared void upon the ground that the defendant had been previously married, obtained a divorce and married him in violation of the statute providing, "that in every case in which a divorce has been granted - - - neither party shall marry again within one year from the time the decree was granted." The decree of divorce was granted on the 27th day of June 1913. The second marriage occurred on the 27th day of June 1914. The court held that the statutory provision for "excluding the first day and including the last" is for computation when "the time within which any act provided by law is to be done", did not apply to the statute on divorce, but that the year began to run with the date of the decree and ended on the corresponding day of the same succeeding year less one day. We can see no distinction in the wording of the Divorce Statute referred to and the Statute of Limitations in this case.

We are aware that the Appellate Court, in the case of Kehlo vs. Kehlo 204 Ill. App. 408, held contrary to the decision in this case but in view of the decisions quoted above, we are unable to follow that decision.

We are of the opinion and so hold that the cause of action in this cause was barred at the time of the filing the declaration on November 17, 1921, and that the court ruled correctly in sustaining the demurrer and dismissing plaintiff's suit. The judgment of the lower court will therefore be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct, in the year of our Lord one thousand nine hundred and ~~twenty~~-Four

Justus L. Johnson
Clerk of the Appellate Court.

(37562)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

233 I.A. 656

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7258 Agenda Number 30

Eva May Ketterer, by her
next friend, Charles Ketterer
Appellant

vs.

St. Louis, Springfield and
Peoria Railroad,
Appellee.

Appeal from circuit
court of Peoria.

233 I.A. 656

Jones J:

This was a suit instituted in the circuit court of Peoria County by Eva May Ketterer, by her next friend, Charles Ketterer, to recover damages for personal injuries alleged to have been caused by the negligence of the servants of the defendant in the operation of one of its interrurban cars, in the city of Peoria. Upon the trial of the case, the jury returned a verdict finding the defendant guilty and fixing plaintiff's damages at $1.00. Plaintiff charges that while she was riding with said Charles Ketterer, in a Ford car, across the tracks of the defendant in the city of Peoria, the defendnt, without giving any warning or notice ran its car and struck the automobile in which the plaintiff was riding and injured plaintiff. The court entered judgment on the verdict. The plaintiff appeals and insists that the case should be reversed and remanded for a new trial for three reasons.

First, that the jury found the defendant guilty and failed to assess substantial damages.

Second, that the court erred in refusing to permit plaintiff to show, by evidence her personal physical appearance prior to the injury and so show damages by way of marring her personal appearance.

Third, that there was reversible error in two instructions in which the personal pronoun, "his" was used instead of "her" thus confusing the ~~plant~~ plaintiff with her next friend Charles Ketterer.

We have examined the entire record in this case with great care and fail to find sufficient evidence on which to base a finding that the defendant was negligent, nor do we find any competent proof of recoverable damages sustained by the plaintiff. There is no evidence of pecuniary loss by way of moneys paid out and expended by the plaintiff

General Number 7258 Agenda Number 30

Eva May Ketterer, by her
next friend, Charles Ketterer
Appellant

vs.

St. Louis, Springfield and
Peoria Railroad,
Appellee.

Appeal from circuit
court of Peoria.

233 I.A. 656

Jones J:

This was a suit instituted in the circuit court of Peoria County by Eva May Ketterer, by her next friend, Charles Ketterer, to recover damages for personal injuries alleged to have been caused by the negligence of the servants of the defendant in the operation of one of its interurban cars, in the city of Peoria. Upon the trial of the case, the jury returned a verdict finding the defendant guilty and fixing plaintiff's damages at $1.00. Plaintiff charges that while she was riding with said Charles Ketterer, in a Ford car, across the tracks of the defendant in the city of Peoria, the defendant, without giving any warning or notice ran its car and struck the automobile in which the plaintiff was riding and injured plaintiff. The court entered judgment on the verdict. The plaintiff appeals and insists that the case should be reversed and remanded for a new trial for three reasons.

First, that the jury found the defendant guilty and failed to assess substantial damages.

Second, that the court erred in refusing to permit plaintiff to show, by evidence her personal physical appearance prior to the injury and so show damages by way of marring her personal appearance.

Third, that there was reversible error in two instructions in which the personal pronoun, "his" was used instead of "her" thus confusing the plaintiff with her next friend Charles Ketterer.

We have examined the entire record in this case with great care and fail to find sufficient evidence on which to base a finding that the defendant was negligent, nor do we find any competent proof of recoverable damages sustained by the plaintiff. There is no evidence of pecuniary loss by way of moneys paid out and expended by the plaintiff

for her recovery, and while there is some evidence of physical injury, it is of such a character that the jury may well have found that the plaintiff had not sustained substantial damages by reason thereof. We are not disposed to disturb the verdict upon the ground that substantial damages were not assessed.

It is most strenuously urged that the court erred in refusing to permit the plaintiff to show her physical appearance before the injury and after, so that the marring of her personal appearance might be taken as an element of damage to be considered by the jury. To support this contention, the plaintiff relies upon the case of I.C. R.R. Co. vs. Cole 165 Ill. 334, in which case the jury was instructed that it might consider "to what extent, if any, he (the plaintiff) has been injured or marred in his personal appearance." It will be observed that the objection was not to the instructions but to the remarks of counsel made in arguing the case to the jury and the court did not consider the specific point now urged. Indeed the Supreme Court afterwards, in the case of Chicago City Railway Company vs. Hagenback 228 Ill. 290, said of the instructions in the Cole case, "There was no question in that case whether the instruction was a correct statement of the law, and the court said that it was not seriously urged that the instructions were errorneous nor that they did not in all respects state correct propositions of law, but rather that they were misunderstood by the jury on account of improper remarks of counsel. As the court stated that no objection was made to the instruction, in question, what the court said about it did not conclusively establish its correctness."

In the case of Chicago & Milwaukee Electric Ry. Co. vs. Krempel 103 Ill. App. 1 decided by this court, objection was made to an instruction which told the jury that they might consider to what extent plaintiff had been injured or marred, in her personal appearance in determining the amount of damages to be assessed. This court, relying upon the case of I.C. R.R. Co. vs. Cole Supra, held the instruction to be good. That decision was rendered prior to the case of Chicago City Ry. Co. vs. Hagenback, Supra, and is therefore not to be taken as an authority on that point.

for her recovery, and while there is some evidence of physical injury, it is of such a character that the jury may well have found that the plaintiff had not sustained substantial damages by reason thereof. We are not disposed to disturb the verdict upon the ground that substantial damages were not assessed.

It is most strenuously urged that the court erred in refusing to permit the plaintiff to show her physical appearance before the injury and after, so that the marring of her personal appearance might be taken as an element of damage to be considered by the jury. To support this contention, the plaintiff relies upon the case of I.C. R.R. Co. vs. Cole 165 Ill. 334, in which case the jury was instructed that it might consider "to what extent, if any, he (the plaintiff) has been injured or marred in his personal appearance." It will be observed that the objection was not to the instructions but to the remarks of counsel made in arguing the case to the jury and the court did not consider the specific point now urged. Indeed the Supreme Court afterwards, in the case of Chicago City Railway Company vs. Hagenbeck 228 Ill. 290, said of the instructions in the Cole case, "There was no question in that case whether the instruction was a correct statement of the law, and the court said that it was not seriously urged that the instructions were erroneous nor that they did not in all respects state correct propositions of law, but rather that they were misunderstood by the jury on account of improper remarks of counsel. As the court stated that no objection was made to the instruction, in question, what the court said about it did not conclusively establish its correctness."

In the case of Chicago & Milwaukee Electric Ry. Co. vs. Krempel 103 Ill. App. 1 decided by this court, objection was made to an instruction which told the jury that they might consider to what extent plaintiff had been injured or marred, in her personal appearance in determining the amount of damages to be assessed. This court, relying upon the case of I.C. R.R. Co. vs. Cole Supra, held the instruction to be good. That decision was rendered prior to the case of Chicago City Ry. Co. vs. Hagenbeck, Supra, and is therefore not to be taken as an authority on that point.

In the case of Cullen vs. Higgins, 216 Ill. 78, the Supreme Court said "The first instruction given on behalf of appellee informed the jury that in estimating her damages if they found in her favor, they might take into consideration whether or not she had been 'marred physically.' The jury we think would understand the word 'marred' as used in the instruction, to mean the same as the word 'disfigured', and that the instruction, in the form in which it was framed, should not have been given to the jury." This later case has been followed by the Appellate Court in the cases of Taylor vs. Peoria B. & C. Traction Co. 184 Ill. App. 188; Souleyret vs. O'Gara Coal Co. 161 Ill. App. 60; Weinberg vs. City of Chicago 172 Ill. App. 77. It is apparent that the court did not err in refusing to permit the plaintiff to show whether or not she was disfigured before the accident.

We have examined the instructions in which the masculine pronoun was used instead of the feminine pronoun, while the feminine pronoun would have been proper, still we are of the opinion that the jury could not have ~~been~~ misunderstood who was the beneficial plaintiff and entitled to the judgment to be recovered, if any. We do not think the plaintiff was injured in this respect.

As stated before our examination of the evidence convinces us that there is not sufficient evidence upon which to base a finding that the defendant was negligent as charged in the declaration but since the defendant does not assign cross errors, and substantial justice will be done by affirming the judgment of the lower court, it will be affirmed.

Judgment Affirmed.

In the case of Cullen vs. Higgins, 216 Ill. 78, the Supreme Court said "The first instruction given on behalf of appellee informed the jury that in estimating her damages if they found in her favor, they might take into consideration whether or not she had been 'marred physically.' The jury we think would understand the word 'marred' as used in the that instruction, to mean the same as the work 'disfigured', and the instruct-ion, in the form in which it was framed, should not have been given to the jury." This later case has been followed by the Appellate Court in the cases of Taylor vs. Peoria B. & C. Traction Co. 184 Ill. App. 188; Souleyret vs. O'Gara Coal Co. 161 Ill. App. 60; Weinberg vs. City of Chicago 172 Ill. App. 77. It is apparent that the court did not err in refusing to permit the plaintiff to show whether or not she was disfigured before the accident.

We have examined the instructions in which the masculine pronoun was used instead of the feminine pronoun, While the feminine pronoun would have been proper, still we are of the opinion that the jury could not have been misunderstood who was the beneficial plaintiff and en-titled to the judgment to be recovered, if any. We do not think the plaintiff was injured in this respect.

As stated before our examination of the evidence convinces us that there is not sufficient evidence upon which to base a finding that the defendant was negligent as charged in the declaration but since the defendant does not assign cross errors, and substantial justice will be done by affirming the judgment of the lower court, it will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

3 8

(31592)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 656

BE IT REMEMBERED, that afterwards, to-wit: On MAY 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7263 Agenda Number 33

Charles Herbert Leavitt, appellee

vs.

Rockford City Traction Co. Appellant

Appeal from Winnebago County.

Jones J:

233 I.A. [illegible]

The appellee filed this suit to the October term 1921 of the Circuit Court of Winnebago County against the appellant, the Rockford City Traction Co. to recover damages for injuries sustained by him in a collision between the automobile in which he was riding and a street car operated by the appellant. The declaration charges that while appellee in the exercise of due care for his own safety, was riding in a truck driven by George Leavitt, the agent of the appellant so negligently controlled and operated one of its cars, that it collided with the truck in which appellee was and injured him. The specific charge of negligence is that it was night time and there was no head light burning on appellant's car. To the declaration, the defendant pleaded the general issue. Upon a trial in the circuit court, the jury returned a verdict finding the issues in favor of the appellee and assessing his damages at $450. The court, after overruling a motion for a new trial, entered a judgment on the verdict from which appellant prosecutes this appeal.

There is no error urged upon the rulings of the court with respect to the admission or exclusion of evidence or instructions to the jury. It is shown that the plaintiff was in the hospital for 17 days following the injury. From this, it will be seen that the amount of the verdict clearly indicates that there was no passion or prejudice in the minds of the jury during the trial and in returning the verdict. The appellant asks this court to reverse the case upon a question of fact urging that the evidence fails to show that there was negligence upon the part of the appellant and does show that there was contributory negligence on the part of the appellee; that because of this, the court erred first in denying appellant's motion to direct a verdict at the close of the

General Number 7265 Agenda Number 33

Charles Herbert Leavitt, Appellee

vs. Appeal from Winnebago County.

Rockford City Traction Co. Appellant

Jones J. 255 I.A. 457

The appellee filed this suit to the October term 1921 of the Circuit Court of Winnebago County against the appellant, the Rockford City Traction Co. to recover damages for injuries sustained by him in a collision between the automobile in which he was riding and a street car operated by the appellant. The declaration charges that while appellee in the exercise of due care for his own safety, was riding in a truck driven by George Leavitt, the agent of the appellants so negligently controlled and operated one of its cars, that it collided with the truck in which appellee was and injured him. The specific charge of negligence is that it was night time and there was no head light burning on appellant's car. To the declaration, the defendant pleaded the general issue. Upon a trial in the circuit court, the jury returned a verdict finding the issues in favor of the appellee and assessing his damages at $450. The court, after overruling a motion for a new trial, entered a judgment on the verdict from which appellant prosecutes this appeal.

There is no error urged upon the rulings of the court with respect to the admission or exclusion of evidence or instructions to the jury. It is shown that the plaintiff was in the hospital for 17 days following the injury. From this, it will be seen that the amount of the verdict clearly indicates that there was no passion or prejudice in the minds of the jury during the trial and in returning the verdict. The appellant asks this court to reverse the case upon a question of fact urging that the evidence fails to show that there was negligence upon the part of the appellant and does show that there was contributory negligence on the part of the appellee; that because of this, the court erred first in denying appellant's motion to direct a verdict at the close of the

appellee's evidence and in overruling that motion when renewed at the end of all the evidence.

The motion to direct a verdict for the defendant should be denied:- "Where the evidence produced before the jury with all the inferences proper to be drawn therefrom, fairly tended to prove the cause of action, set out in the declaration." Union Bridge Co. vs. Teehan 190 Ill. 374.

"The rule is the same whether the motion is made at the close of plaintiff's evidence or at the close of all the evidence." Libby McNeill & Libby vs. Cook 222 Ill. 206. In the latter opinion a large number of cases are collected, stating the rule in varying language as applied both to allowing and denying the motion, since the opinion was rendered numerous cases have been decided declaring the rule as therein stated. We deem it unnecessary to discuss any of them.

The evidence discloses that about eight o'clock on the evening of March 11th, 1921, the appellee, in company with his uncle, George Leavitt, was travelling west along East State Street in the city of Rockford in a Ford truck driven by appellee's uncle. An agent of the appellant was driving one of its cars eastward on the same street. A collision occurred between the car and the Ford truck. It was a rainy, misty evening. The appellee claims that there was no headlight burning on appellant's car and by reason thereof, he and his uncle were unable to see the street car in time to avoid a collision. It appears from the testimony, that the motorman of appellant's car saw the Ford truck some two or three blocks distant before they came together. There is evidence on the part of appellant tending to show that the head light on the car was burning. The appellee claims that just before meeting appellant's car, the driver of the truck was compelled to turn to the center of the street on to the car track to avoid coming in contact with two automobiles parked next to the curb and to avoid a hole in the street and that he had not been able to drive to the right side of the street again before the collision. Appellee also claims that they were driving at a rate of speed not to exceed six to eight miles per hour, because the rain and mist made it difficult to see other vehicles

appellee's evidence and in overruling that motion when renewed at the end of all the evidence.

The motion to direct a verdict for the defendant should be denied:- "Where the evidence produced before the jury with all the inferences proper to be drawn therefrom, fairly tended to prove the cause of action set out in the declaration." Union Bridge Co. vs. Teehan 190 Ill. 374.

"The rule is the same whether the motion is made at the close of plaintiff's evidence or at the close of all the evidence." Libby McNeill & Libby vs. Cook 222 Ill. 206. In the latter opinion a large number of cases are collected, stating the rule in varying language as applied both in allowing and denying the motion. Since that opinion was rendered numerous cases have been decided declaring the rule as therein stated. We deem it unnecessary to discuss any of them.

The evidence discloses that about eight o'clock on the evening of June 11th, 1921, the appellee, in company with his uncle, George Jaspin, was travelling west along East State Street in the city of Rockford in a Ford truck driven by appellee's uncle. An agent of the appellant was driving one of its cars eastward on the same street. A collision occurred between the car and the Ford truck. It was a rainy, misty evening. The appellee claims that there was no headlight burning on appellant's car and by reason thereof, he and his uncle were unable to see the street car in time to avoid a collision. It appears, from the testimony, that the motorman of appellant's car saw the Ford truck some two or three blocks distant before they came together. There is evidence on the part of appellant tending to show that the head light on the car was burning. The appellee claims that just before meeting appellant's car, the driver of the truck was compelled to turn to the center of the street on to the car track to avoid coming in contact with two automobiles parked next to the curb and to avoid a hole in the street and that he had not been able to drive to the right side of the street again before the collision. Appellee also claims that they were driving at a rate of speed not to exceed six to eight miles per hour, because the rain and mist made it difficult to see other vehicles

There is a decided conflict in the evidence upon the question of the rate of speed at which the street car was moving, whether there was a head light upon the street car, whether the motorman sounded a bell to warn the appellee, and whether or not there were curtains drawn at the front of the street car which would obscure the lights inside the car.

If it were true as contended by appellee that there was no head light burning upon the street car, then it was being negligently operated and if the motorman saw the Ford truck two or three blocks ahead as he testified he did, then he undoubtedly owed some duty to avoid hitting it.

Upon the question of contributory negligence, it is argued that the evidence shows that the appellee and the driver of the Ford truck were both intoxicated and that since they were both intoxicated the appellee was negligent in riding in the truck. There was a conflict in the evidence on this point and it was for the jury to say what the fact was. The rule is that the negligence of the driver will not necessarily be imputed to the plaintiff but that the plaintiff is under a duty to use due care and caution for his own safety. (Swanlund vs. Rockford Ry. Co. 305 Ill. 339 and cases there cited.) The appellee testified that he was looking ahead but that because there was no head light on the street car, he was unable to see it in time to warn the driver of its approach and escape the collision and that neither he nor the driver was intoxicated. Upon a motion to direct a verdict this evidence must be taken as true. (Walldren Express Co. vs. Krug 291 Ill. 472).

All these questions were questions of fact to be determined by the jury. The trial court who saw and heard the witnesses has approved of the finding of the jury no questions of law arise either upon the admission or exclusion of evidence, or the giving of instructions, and the judgment will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

(376)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7269 Agenda No. 36.

Ralph D. Baynard, Appellee	)	
	)	Appeal from the
vs.	)	County Court of
	)	Peoria County.
Illinois Underwriters Corporation, Appellant	)	

Jones J:

233 I.A.

Ralph D. Baynard, Plaintiff below, recovered a Judgment for $450.00 against the Illinois Underwriters Corporation defendant, in the County Court of Peoria County. The suit was based upon a claim for services rendered the defendant by the plaintiff for nine weeks at a salary of fifty dollars per week.

The grounds relied upon for the reversal of the judgment are (1) that the verdict is contrary to the manifest weight of the evidence, (2) that evidence offered by the defendant was improperly excluded by the Court (3) that evidence offered by the plaintiff was improperly admitted by the court and (4) that the Court improperly gave plaintiff's instructions 1 and 2 and refused defendant's instructions 1,3 and 4.

The plaintiff claims that he was employed to solicit insurance for the defendant and was only to devote a few hours a day to the work; that he complied with his contract in every respect; that his employment was not properly changed from that of a salary basis to that of a commission basis on October 22nd, 1921, and that his salary until January 1, 1922, at which time he resigned, was due.

The defendant insists that it employed the plaintiff to solicit insurance for it at a salary of $50.00 a week and that he was to devote his entire time to the business; that he began work in April 1921 and continued until November 1st, 1921; that on October 22nd, his employment was changed from a salary basis to that of a commission basis, the change effective November 1st, 1921; that he continued working for the company from November 1st, to January 1st, 1922 earning $30.32 commissions during that time.

General No. 7369 Agenda No. 36.

Ralph D. Baynard, Appellee

vs.

Illinois Underwriters Corporation, Appellant

Appeal from the County Court of Peoria County.

Jones J:

233 I.A. 657

Ralph D. Baynard, Plaintiff below, recovered a judgment for $400.00 against the Illinois Underwriters Corporation defendant, in the County Court of Peoria County. The suit was based upon a claim for services rendered the defendant by the plaintiff for nine weeks at a salary of fifty dollars per week.

The grounds relied upon for the reversal of the judgment are (1) that the verdict is contrary to the manifest weight of the evidence, (2) that evidence offered by the defendant was improperly excluded by the Court (3) that evidence offered by the plaintiff was improperly admitted by the court and (4) that the Court improperly gave plaintiff's instructions 1 and 2 and refused defendant's instructions 1,3 and 4.

The plaintiff claims that he was employed to solicit insurance for the defendant and was only to devote a few hours a day to the work; that he complied with his contract in every respect; that his employment was not properly changed from that of a salary basis to that of a commission basis on October 22nd, 1931, and that his salary until January 1, 1932, at which time he resigned, was due.

The defendant insists that it employed the plaintiff to solicit insurance for it at a salary of $50.00 a week and that he was to devote his entire time to the business; that he began work in April 1931 and continued until November 1st, 1931; that on October 22nd, his employment was changed from a salary basis to that of a commission basis, the change effective November 1st, 1931; that he continued working for the company from November 1st, to January 1st, 1932 earning $30.33 commissions during that time.

In April 1921 C.K.Gerdes, Lyman Coleman and Edward Lehman were the owners and directors of Gerdes & Company, a corporation. Gerdes was President, Lehman, Vice-President and Coleman was Secretary-Treasurer. Gerdes employed Baynard, who was then elected President, Gerdes became General Manager and the name of the corporation was changed to that of the Illinois Underwriters Corporation. The Plaintiff testified that he continued in the employ of the Company, soliciting insurance and acting as President until January 1, 1922, at which time he resigned.

C.K.Gerdes testified for the defendant that the Board of Directors of the company held a meeting on October 22, 1921 and that on that date he notified the plaintiff that he was discharged from his employment of soliciting insurance on salary but that he might continue in the employ of the company soliciting insurance upon a commission basis. He further testified that the plaintiff did continue on that basis and earned $30.32 between November 1, 1921, and January 1, 1922. Coleman's testimony so far as it is material to the issues is that he was Secretary-Treasurer of the company, knew the duties to be performed by the Plaintiff that the plaintiff failed to give his full time to the business of the defendant and that his services were not of any value to the defendant. He further testified that a certain ledger produced by him contained a true account between the defendant company and the plaintiff and that there was a balance due the defendant of $30.32 for commissions.

Upon the examination he was asked to draw his finger over certain early items of the account. He did so and then testified that the ink did not blur. He was then directed to draw his finger across later items of the account. He did so and then testified that the ink blurred.

It is contended by the defendant that, under the rule stated in Peaslee v. Glass, 61 Ill. 94, the case must be reversed because the verdict is manifestly against the weight of the evidence. In

In April 1921 C.K.Gerdes, Lyman Coleman and Edward Lehman were the owners and directors of Gerdes & Company, a corporation. Gerdes was President, Lehman, Vice-President and Coleman was Secretary-Treasurer. Gerdes employed Baynard, who was then elected President. Gerdes became General Manager and the name of the corporation was changed to that of the Illinois Underwriters Corporation. The Plaintiff testified that he continued in the employ of the Company, soliciting insurance and acting as President until January 1, 1922, at which time he resigned.

C.K.Gerdes testified for the defendant that the Board of Directors of the company held a meeting on October 28, 1921 and that on that date he notified the plaintiff that he was discharged from his employment of soliciting insurance on salary but that he might continue in the employ of the company soliciting insurance upon a commission basis. He further testified that the plaintiff did continue on that basis and earned $30.33 between November 1, 1921, and January 1, 1922. Coleman's testimony so far as it is material to the issues is that he was Secretary-Treasurer of the company, knew the duties to be performed by the Plaintiff that the plaintiff failed to give his full time to the business of the defendant and that his services were not of any value to the defendant. He further testified that a certain ledger produced by him contained a true account between the defendant company and the plaintiff and that there was a balance due the defendant of $30.33 for commissions.

Upon the examination he was asked to draw his finger over certain early items of the account. He did so and then testified that the ink did not blur. He was then directed to draw his finger across later items of the account. He did so and then testified that the ink blurred.

It is contended by the defendant that, under the rule stated in Peaslee v. Glass, 61 Ill. 94, the case must be reversed because the verdict is manifestly against the weight of the evidence. In

that case, the court said, "It belongs to the plaintiff to make out a case. The burden of proof is upon him, and where the issue rests upon the sworn affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached and testifying to a state of facts equally probably, a conscientious jury can only say that the plaintiff has failed to establish his claim. Without saying that this court would set aside a verdict for the plaintiff rendered in such cases on the ground alone that it was not sustained by the evidence, we must set aside one resting alone upon the evidence of the plaintiff when that is contradicted not only by the defendant but also by another witness and there are no elements of probability to turn the scale. Such is the present case." This case has been followed in numerous decisions both by the Supreme Court and by the Appellate Court, but it is to be noted that the rule that the unsupported evidence of the plaintiff will not support a verdict when contradicted not only by the defendant but by other witnesses applies "when there are no elements of probability to turn the scale."

In the case at bar the only witnesses to the making of the contract of employment were the plaintiff and the witness C.K. Gerdes. Gerdes testified that he knew the state of the account between the company and the plaintiff and that he made a tender previous to the commencement of the suit, which was therefore prior to March 29th, 1922. The cause was tried in 1923. Thixxx The evidence tends strongly to show that the account referred to by the witness was made up at the time of the trial. The evidence of Coleman is also impeached by the fact that he is the witness who testified to the accuracy of the account. Clearly here are "elements of probability to turn the scale".

But it is urged that the account was not material to any issue in the case and therefore could not be used for impeachment. To this contention, it is sufficient to say that the defendant claimed a tender of the amount the account,as offered, showed to be due. The account was offered in evidence to support the tender. It was clearly

that case, the court said, "It belongs to the plaintiff to make out a case. The burden of proof is upon him, and where the issue rests upon the sworn affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached and testifying to a state of facts equally probably, a conscientious jury can only say that the plaintiff has failed to establish his claim. Without saying that this court would set aside a verdict for the plaintiff rendered in such cases on the ground alone that it was not sustained by the evidence, we must set aside one resting alone upon the evidence of the plaintiff when that is contradicted not only by the defendant but also by another witness and there are no elements of probability to turn the scale. Such is the present case." This case has been followed in numerous decisions both by the Supreme Court and by the Appellate Court, but it is to be noted that the rule that the unsupported evidence of the plaintiff will not support a verdict when contradicted not only by the defendant but by other witnesses applies "when there are no elements of probability to turn the scale."

In the case at bar the only witnesses to the making of the contract of employment were the plaintiff and the witness C.K. Gerdes. Gerdes testified that he knew the state of the account between the company and the plaintiff and that he made a tender previous to the commencement of the suit, which was therefore prior to March 29th, 1922. The cause was tried in 1925. ~~Thirxx~~ The evidence tends strongly to show that the account referred to by the witness was made up at the time of the trial. The evidence of Coleman is also impeached by the fact that he is the witness who testified to the accuracy of the account. Clearly here are "elements of probability to turn the scale".

But it is urged that the account was not material to any issue in the case and therefore could not be used for impeachment. To this contention, it is sufficient to say that the defendant claimed a tender of the amount the account, as offered, showed to be due. The account was offered in evidence to support the tender. It was clearly

material to the issues in the case.

In the case of Hollenbeck v. Cook, 180 Ill. 65, the court, referring to the case of Shevalier v. Seager, 121 Ill. 564, said, "There, as here, the evidence was conflicting and after careful consideration of the case we held that a verdict will not be set aside where there is a contrariety of evidence and the facts and circumstances by a fair and reasonable intendment will authorize the verdict returned, notwithstanding it may appear to be against the strength and weight of the evidence nor when the evidence of the successful party, when considered by itself is clearly sufficient to sustain the finding." This latter case is cited with approval in Carney v. Sheedy, 295 Ill. 78. "Where an Appellate Court is unable to say that the verdict of the jury is contrary to the manifest weight of the evidence the verdict will not be disturbed." (Lewis v. Chicago & Northwestern Railway Company, 199 Ill. App. 438).

The appellant complains that the court excluded secondary evidence of the contents of the minute book showing the actions of the Board of Directors of the defendant company on October 22, 1921. The evidence of Gerdes is that the minute book was kept in a safe in the office of the company and that he, Coleman, Lehman, Baynard and the stenographer all had access to the safe. Gerdes testified that he had made a search for the book but was unable to find it. Coleman was allowed to testify that he was unable to find the book as did Baynard upon being recalled. The defendant did not call the stenographer or Lehman to show their knowledge of the whereabouts of the book, if it was still in existence. We are of the opinion that the foundation laid for the introduction of secondary evidence was insufficient and that the court properly excluded it from evidence. (Mullanphy Savings Bank v. Schott, 135 Ill. 655; Hedenberg v. Nash, 144 Ill. App. 352). The book may have been either in the possession of Lehman or the stenographer.

While the rule stated in Peaslee v. Glass, supra, is clearly the law, there is the further rule stated in Brown v. Berry, 47 Ill. 175, as follows: "It is also urged that the evidence does not support the verdict. It is conflicting and in such cases it is for the jury to

adhering to the decisions of the Court.

In the case of Schreiber v. Cady, 280 Ill. 48, the court, referring to the case of Hamilton v. Burger, 116 Ill. 104, said: "There, as here, the evidence was conflicting and after careful consideration of the case we held that a verdict will not be set aside where there is a contrariety of evidence and the facts and circumstances by a fair and reasonable intendment will authorize the verdict returned, notwithstanding it may appear to be against the strength and weight of the evidence when the evidence of the successful party, when considered by itself is clearly sufficient to sustain the finding." This latter case is cited with approval in Carney v. Sheedy, 295 Ill. 78. "Where an Appellate Court is unable to say that the verdict of the jury is contrary to the manifest weight of the evidence the verdict will not be disturbed." (Lewis v. Chicago & Northwestern Railway Company, 279 Ill. App. 438).

The appellant complains that the court excluded secondary evidence of the contents of the minute book showing the actions of the Board of Directors of the defendant company on October 22, 1921. The evidence of Gerdes is that the minute book was kept in a safe in the office of the company and that he, Coleman, Lehman, Hayward and the stenographer all had access to the safe. Gerdes testified that he had made a search for the book but was unable to find it. Coleman was allowed to testify that he was unable to find the book as did Hayward upon being recalled. The defendant did not call the stenographer or Lehman to show their knowledge of the whereabouts of the book, if it was still in existence. We are of the opinion that the foundation laid for the introduction of secondary evidence was insufficient and that the court properly excluded it from evidence. (Mullanphy Savings Bank v. Schott, 135 Ill. 655; Hedenberg v. Nash, 144 Ill. App. 552). The book may have been either in the possession of Lehman or the stenographer.

While the rule stated in Finch v. Kinsey, supra, is clearly the law, there is the further rule stated in Ladd v. Shapp, 47 Ill. 170, as follows: "It is also urged that the evidence does not support the verdict. It is conflicting and in such cases it is for the jury to

weigh and to give to every part its due weight. If irreconcilable then they must give proper weight to such as they believe and reject such portions as they think unworthy of belief. This they had better facilities of doing than other persons as they see the witnesses and hear them testify. If they had regarded the evidence for plaintiff in error alone they would no doubt have found for him but believing that on the part of the defendant in error, they were warranted in finding for him. In such a conflict, we could not reverse, because the weight of evidence may be slightly against the finding of the jury." It is also said in Crain v. Wright, 46 Ill. 107, "and unless it is clear that the jury have mistaken the weight of the evidence and their verdict is manifestly against it, this court will not interpose to set aside the verdict, and reverse the judgment rendered upon it."

It is objected that the court improperly admitted the charter of the corporation in evidence on behalf of the plaintiff. While the existence of the corporation was not in question and the evidence neither tended to prove nor disprove any of the issues involved in the case, nevertheless, we are unable to see how it could have effected the verdict of the jury, and for that reason we are of the opinion that its admission does not constitute reversible error.

The defendant complains that the court erroneously gave plaintiff's instructions numbered 1 and 2. Instruction number 1 reads as follows: "The court instructs the jury that if you believe from a preponderance or greater weight of all the evidence in this case that plaintiff acted as President of the defendant company and performed all the services he was required to perform, under his agreement, with said defendant company as shown by a preponderance or greater weight of the evidence and you further believe that plaintiff was to receive the sum of fifty dollars per week for acting as President and the performance of said services and has not been paid, then in that state of proof, it will be your duty to find the issues for the plaintiff."

The defendant contends that the words "as shown by a preponderance

weigh and to give to every part its due weight. If irreconcilable then they must give proper weight to such as they believe and reject such portions as they think unworthy of belief. This they had better facilities of doing than other persons as they see the witnesses and hear them testify. If they had regarded the evidence for plaintiff in error alone they would no doubt have found for him but believing that on the part of the defendant in error, they were warranted in finding for him. In such a conflict, we could not reverse, because the weight of evidence may be slightly against the finding of the jury." It is also said in Crain v. Wright, 14 Ill. 377, "and unless it is clear that the jury have mistaken the weight of the evidence and their verdict is manifestly against it, this court will not interpose to set aside the verdict, and reverse the judgment rendered upon it."

It is objected that the court improperly admitted the charter of the corporation in evidence on behalf of the plaintiff. While the existence of the corporation was not in question and the evidence neither tended to prove nor disprove any of the issues involved in the case, nevertheless, we are unable to see how it could have affected the verdict of the jury, and for that reason we are of the opinion that its admission does not constitute reversible error.

The defendant complains that the court erroneously gave plaintiff's instructions numbered 1 and 2. Instruction number 1 reads as follows: "The court instructs the jury that if you believe from a preponderance or greater weight of all the evidence in this case that plaintiff acted as President of the defendant company and performed all the services he was required to perform, under his agreement, with said defendant company as shown by a preponderance or greater weight of the evidence and you further believe that plaintiff was to receive the sum of fifty dollars per week for acting as President and the performance of said services and has not been paid, then in that state of proof, it will be your duty to find the issues for the plaintiff."

The defendant contends that the words "as shown by a preponderance

or greater weight of the evidence" are a statement by the court that the facts recited are shown by the evidence and that the instruction in substance tells the jury that such facts have been proven. While we think that the words objected to should have been omitted from the instruction, we are, nevertheless, of the opinion that no reversible error was committed. The Supreme Court, in the case of C. & N. W. Ry. Co. v. The Calumet Stock Farm, 194 Ill. 9 affirmed a judgment where the jury were given an instruction containing very similar wording.

It is further said that the instruction ignores the defense of the defendant and is erroneous in that regard. The instruction sets forth all the elements necessary to constitute plaintiff's cause of action. We do not see that in such case it is necessary that the instruction shall set forth the defense offered. The defendant was at liberty to and did present instructions upon that feature of the case. (Heldmaier v. Cobbs, 195 Ill. 172).

Objection is made to the second instruction given on behalf of the plaintiff, because it contains the wording in the first instruction on preponderance of the evidence. What we have said in relation thereto applies to this instruction as well.

It is complained that the court erred in refusing to give defendant's instructions 1, 3 and 4. The first instruction tendered by the plaintiff was as follows: "You are instructed that if you believe from the greater weight of the evidence that Mr. Gerdes, the manager of the defendant company, notified the plaintiff on October 22, 1921, that the plaintiff's salary would terminate on November 1st, 1921, then the plaintiff cannot recover for any salary due him after November 1, 1921." The court modified this instruction by inserting, after the words "on November 1, 1921" "And that he had authority so to do." It is apparent that if Mr. Gerdes did not have authority to discharge the plaintiff then his action in giving notice could be of no avail. The instruction was properly modified. Instructions 3 and 4 were properly refused because there was no evidence in the case upon which to base them.

The defendant also contends that a new trial should have been

or greater weight of the evidence" are a statement by the court that the facts recited are shown by the evidence and that the instruction in substance tells the jury that such facts have been proven. While we think that the words objected to should have been omitted from the instruction, we are, nevertheless, of the opinion that no reversible error was committed. The Supreme Court, in the case of C. & N. W. Ry. Co. v. The Calumet Stock Farm, ~~XXX~~ 194 Ill. 9 affirmed a judgment where the jury were given an instruction containing very similar wording.

It is further said that the instruction ignores the defense of the defendant and is erroneous in that regard. The instruction sets forth all the elements necessary to constitute plaintiff's cause of action. We do not see that in such case it is necessary that the instruction shall set forth the defense offered. The defendant was at liberty to and did present instructions upon that feature of the case. (Heldmaier v. Cobbs, 195 Ill. 172).

Objection is made to the second instruction given on behalf of the plaintiff, because it contains the wording in the first instruction on preponderance of the evidence. What we have said in relation thereto applies to this instruction as well.

It is complained that the court erred in refusing to give defendant's instructions 1, 3 and 4. The first instruction tendered by the plaintiff was as follows: "You are instructed that if you believe from the greater weight of the evidence that Mr. Gerdes, the manager of the defendant company, notified the plaintiff on October 25, 1921, that the plaintiff's salary would terminate on November 1st, 1921, then the plaintiff cannot recover for any salary due him after November 1, 1921." The court modified this instruction by inserting, after the words "on November 1, 1921" "and that he had authority so to do." It is apparent that if Mr. Gerdes did not have authority to discharge the plaintiff then his action in giving notice could be of no avail. The instruction was properly modified. Instructions 3 and 4 were properly refused because there was no evidence in the case upon which to base them.

The defendant also contends that a new trial should have been

granted because of newly discovered evidence, which was presented to the court in the form of two affidavits, each setting forth a statement made by the plaintiff to the affiants that he had quit the insurance business and was going to Chicago medical school. This evidence, if true was purely of an impeaching character. As we understand the rule, it is that contrary statements made by a witness out of court are not sufficient to warrant a new trial. (C. & N. W. Ry. Co. v. Calumet Stock Farm, supra.)

There being no reversible error in the record, the judgment will be affirmed.

Judgment affirmed.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Rehearing Denied
Oct. 8, 1924.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On APR 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7272 Agenda Number 39

Charles Backer, Appellee :
vs.
Charles F.Brandt,
appellant,

Appeal from the City Court of Sterling

233

Jones, J:

The appellee, Charles Backer, filed a suit in assumpsit in the city court of Sterling, Illinois, against the appellant Charles F. Brandt, to recover the sum of $300 which appellee claimed he loaned appellant on or about July 11, 1922. The declaration consisted of the common counts. The parties, who were both farmers living near each other, had been acquainted for about ten years. According to the testimony of the appellee he had a conversation with the appellant at the latter's place on July 11, 1922, in which he told the appellant he was going to buy 1000 bushels of wheat; that appellant told him he would like to buy some too but that he did not have the money; that the appellee loaned the appellant $300 and also gave him $300 of his own money with which to buy 2000 bushels of wheat, 1000 bushels for appellant and 1000 bushels for appellee, with the understanding that the appellant would go to the commission firm in Sterling make the purchase and look after the deal; that appellee went to the bank, got $600 which he gave to appellant; that the two of them then went to the commission firm where the appellant purchased not 2000 bushels but 4000 bushels of December wheat. The price of wheat declined and the $600 put up as margin was lost. The commission firm notified Brandt that the order was sold out.

The appellant denied having had any interest in the transaction but claimed on the contrary that he had purchased the wheat for the appellee in his own name at the appellee's request, because the latter desired to conceal from his family the fact that he was engaged in such a transaction, and appellant contends that even if this was a joint venture, and the entire story of the appellee was true, the appellee could not recover because money was advanced for gambling

General Number 7272 Agenda Number 39

Charles Becker, Appellee :
vs. Appeal from the City Court
Charles F.Brandt, of Sterling
appellant,

233 I.A. 657

Jones, J:

The appellee, Charles Becker, filed a suit in assumpsit in the city court of Sterling, Illinois, against the appellant Charles F. Brandt, to recover the sum of $300 which appellee claimed he loaned appellant on or about July 11, 1922. The declaration consisted of the common counts. The parties, who were both farmers living near each other, had been acquainted for about ten years. According to the testimony of the appellee he had a conversation with the appellant at the latter's place on July 11, 1922, in which he told the appellant he was going to buy 1000 bushels of wheat; that appellant told him he would like to buy some too but that he did not have the money; that the appellee loaned the appellant $300 and also gave him $300 of his own money with which to buy 2000 bushels of wheat, 1000 bushels for appellant and 1000 bushels for appellee, with the understanding that the appellant would go to the commission firm in Sterling make the purchase and look after the deal; that appellee went to the bank, got $600 which he gave to appellant; that the two of them then went to the commission firm where the appellant purchased not 2000 bushels but 4000 bushels of December wheat. The price of wheat declined and the $600 put up as margin was lost. The commission firm notified Brandt that the order was sold out.

The appellant denied having had any interest in the transaction but claimed on the contrary that he had purchased the wheat for the appellee in his own name at the appellee's request, because the latter desired to conceal from his family the fact that he was engaged in such a transaction, and appellant contends that even if this was a joint venture, and the entire story of the appellee was true, the appellee could not recover because money was advanced for gambling

purposes. The appellant denied throughout his testimony that he borrowed any money from the appellee or that he had any interest in the wheat purchased.

The appellant admits in the brief and argument that the evidence is directly conflicting with respect to whether the appellant borrowed $300, from the appellee, and that in such state of record, the verdict of the jury is conclusive of that question in the absence of any error of law on the part of the court effecting that issue.

It is conceded by both parties that if the transaction were a gambling transaction, and the appellee advanced money to the appellant for the purpose of enabling him, with the knowledge of the appellee, to engage in a gambling transaction, the money cannot be recovered back. It is clearly the law that to make a transaction in futures, a gambling transaction, within the prohibition of the statute, both parties must intend not to accept delivery but to settle upon differences in the price at the time of settlement. (Pratt & Co. vs. Ashmore 224 Ill. 587.) In this case the gambling transaction would not be between Backer and Brandt, but between Brandt and the commission company, and the inability of Backer to recover, must rest upon the knowledge of the latter concerning the transaction. The evidence shows that neither Backer nor Brandt had before dealt with the commission merchants from whom the purchase was made and indeed were not even acquainted with the broker who made the sale. It further shows that the only conversation had with the broker at the time was that Brandt desired to buy 4,000 bushels of December wheat and that he put up $600 and received a receipt therefor, which stated that the actual delivery of the grain was contemplated. Whatever the intention of the Commision Company may have been, the intention of Brandt is concealed throughout because he denies any interest whatever in the transaction whether the transaction was a gambling transaction or not was a question of fact for the jury. (Pope vs. Harke 155 Ill.617.) That question was submitted to the jury, upon instructions tendered by the appellant who tendered no instructions upon the question of a loan. It is to be noted that the record does not contain any instructions tendered by the appellee. We cannot say that the verdict of the jury is manifestly against the weight of the evidence, and we cannot reverse

subpoena. The appellant denied throughout his testimony that he borrowed any money from the appellee or that he had any interest in the wheat purchased.

The appellant admits in the brief and argument that the evidence is directly conflicting with respect to whether the appellant borrowed $500, from the appellee, and that in such state of record, the verdict of the jury is conclusive of that question in the absence of any error of law on the part of the court effecting that issue.

It is conceded by both parties that if the transaction were a gambling transaction, and the appellee advanced money to the appellant for the purpose of enabling him, with the knowledge of the appellee, to engage in a gambling transaction, the money cannot be recovered back. It is clearly the law that to make a transaction in futures, a gambling transaction, within the prohibition of the statute, both parties must intend not to accept delivery but to settle upon differences in the price at the time of settlement. (Pratt & Co. vs. Ashmore 224 Ill. 587.) In this case the gambling transaction would not be between Backer and Brandt, but between Brandt and the commission company, and the inability of Backer to recover, must rest upon the knowledge of the latter concerning the transaction. The evidence shows that neither Backer nor Brandt had before dealt with the commission merchants from whom the purchase was made and indeed the broker who made the sale. It further shows that the only conversation had with the broker at the time was that Brandt desired to buy 4,000 bushels of December wheat and that he put up $500 and received a receipt therefor, which states that the actual delivery of the grain was contemplated. Whatever the intention of the Commission Company may have been, the intention of Brandt is concealed throughout because he denies any interest whatever in the transaction or but was a question of fact for the jury. (Cope vs. Doole 156 Ill.517.) That question was submitted to the jury, upon instructions tendered by the appellant who tendered no instructions upon the question of a loan. It is to be noted that the record does not contain any instructions tendered by the appellee. We cannot say that the verdict of the jury is manifestly against the weight of the evidence, and we cannot reverse

the case upon that ground. (Grain vs. Wright 46 Ill. 107; Brown vs. Berry 47 Ill. 175; Hollenback vs. Cook 180 Ill. 65.)

We are unable to see how the question of the appellee's intent in loaning the money can in any wise be material to the issues in the case as the same were presented to the jury, when we consider the position of appellant upon the trial. Since the appellant denies throughout the case that he had any interest whatever in the transaction, but was merely acting as agent for the appellee in making the purchase, we cannot see how he can now be heard to say that there was a mutual intent to gamble to which he was a party and by reason thereof not required to refund the money. Then again the intent of the appellee must be shown to have been communicated to the appellant in order to make the direct testimony of the appellee admissible. (Dunbar vs. Armstrong 115 Ill. App. 549; Scanlan vs. Warren 169 Ill.142.) The appellant testified to every conversaiton between him and the appellee with respect to the transaction and there is nowhere any hint that the appellee communicated to him any intention to settle on differences only.

The record being free from error the judgment must be affirmed.

Judgment Affirmed.

the case upon that ground. (Grain vs. Wright 45 Ill. 191; Brown vs. Berry 47 Ill. 175; Hollenbeck vs. Cook 180 Ill. 65.)

We are unable to see how the question of the appellee's intent in loaning the money can in any wise be material to the issues in the case as the same were presented to the jury, when we consider the position of appellant upon the trial. Since the appellant denies throughout the case that he had any interest whatever in the transaction, but was merely acting as agent for the appellee in making the purchase, we cannot see how he can now be heard to say that there was a mutual intent to gamble to which he was a party and by reason thereof not required to refund the money. Then again the intent of the appellee must be shown to have been communicated to the appellant in order to make the direct testimony of the appellee admissible. (Dunbar vs. Armstrong 115 Ill. App. 549; Scanlan vs. Warren 169 Ill.142.) The appellant testified to every conversation between him and the appellee with respect to the transaction and there is nowhere any hint that the appellee communicated to him any intention to settle on differences only.

The record being free from error the judgment must be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson
Clerk of the Appellate Court.

(36112)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7279 · Agenda Number 42

Charles D. Savage, Appellant)
vs.) Appeal from Circuit Court of La Salle County.
Charles S. Gibson, Appellee)

233 I.A. 657

Jones J:

The appellant began a suit in assumpsit in the circuit court of La Salle county, against the appellee to recover damages for breach of contract to deliver 3000 tons of coal sold by the appellee to the appellant. It is admitted that 713.7 tons of coal were delivered under the contract. The damages were alleged to be about $1.00 per ton, together with some other small items. The appellee filed a set off for coal delivered amounting to $341.18, and the verdict and judgment were against appellant for $300 on this set off. Appellee contends that the contract was made to sell the coal to one Harvey for whom appellant was agent and the contract was made in the name of appellant because the appellee was not willing to risk Harvey for payment.

The appellee was the owner of a coal mine and the appellant was a coal dealer. J.W.Savage, father of the appellant worked for appellee. The appellant claims that in May 1917, he entered into a contract with the appellee through his father J.W.Savage, as agent, for the purchase of 3000 tons of coal. This contract consisted of ~~telephone~~ telephone conversations and letters, which passed between the parties. Upon an examination of the evidence we are of the opinion that a contract was entered into between the appellant and the appellee; that under the contract, certain deliveries of coal were made and part of it was paid for and that certain monthly statements of account were rendered to the appellant by the appellee. It is difficult to see how the jury reached any other conclusion.

General Number 7379 — Agenda Number 42

Charles D. Savage, Appellant
vs.
Charles S. Gibson, Appellee

Appeal from Circuit Court of La Salle County.

233 I.A. 657

Jones J:

The appellant began a suit in assumpsit in the circuit court of La Salle county, against the appellee to recover damages for breach of contract to deliver 3000 tons of coal sold by the appellee to the appellant. It is admitted that 715.7 tons of coal were delivered under the contract. The damages were alleged to be about $1.00 per ton, together with some other small items. The appellee filed a set off for coal delivered amounting to $341.18, and the verdict and judgment were against appellant for $300 on this set off. Appellee contends that the contract was made to sell the coal to one Harvey for whom appellant was agent and the contract was made in the name of appellant because the appellee was not willing to risk Harvey for payment.

The appellee was the owner of a coal mine and the appellant was a coal dealer. J.W.Savage, father of the appellant worked for appellee. The appellant claims that in May 1917, he entered into a contract with the appellee through his father J.W.Savage, as agent, for the purchase of 3000 tons of coal. This contract consisted of telephone conversations and letters, which passed between the parties. Upon an examination of the evidence we are of the opinion that a contract was entered into between the appellant and the appellee; that under the contract, certain deliveries of coal were made and part of it was paid for and that certain monthly statements of account were rendered to the appellant by the appellee. It is difficult to see how the jury reached any other conclusion.

The appellant produced his father J.W.Savage, as a witness in his behalf to prove the negotiation of the contract with the appellee. Upon cross examination, counsel for appellee asked him whether he had ever been indicated and then asked him several other questions along the same line. Objections were made to part of it, but not to all of it. The objections were sufficient, however to show that the appellant desired to exclude the entire examinations upon that subject. This cross examination was highly improper and counsel for appellee must have known it when the examination was being conducted. The only proof concerning criminal offenses which may be shown in either civil or criminal cases is proof of the conviction of an infamous offense. (People vs. Newman 261 Ill. 11; Katzenbaugh vs People 194 Ill. 108; Pioneer Fire Proofing Co. vs. Clifford 125 Ill. App. 352.) The rule respecting the method of proof differs in criminal and civil suits. In criminal suits it can be shown by the record only while in civil suits it may be shown upon cross examination of the witness. But it has never been held that it is proper in any case to show, mrerly for the purpose of impeachment, either by the record or by oral proof, that a witness has been arrested or indicted. (People vs. Newman, Supra). In this state of the record this error alone would require us to reverse and remand this case. If counsel desire to sustain their judgments they should refrain from such conduct in the trial of cases.

Complaint is also made that over the objection of appellant, the appellee was permitted to show that previous to the making of the contract in question appellant's father had acted as agent in selling to appellee the coal mine appellee owned and the father had also acted as agent in the disposal of it after the making of the contract sued upon, for which the father recieved total commissions amounting to $ 5500 and that ap-

The appellant produced his father J.T.Davis, as a witness in his behalf to prove the negotiation of the contract with the appellee. Upon cross examination, counsel for appellee asked him whether he had ever been indicted and then asked him several other questions along the same line. Objections were made to part of it, but not to all of it. The objections were sufficient, however to show that the appellant desired to exclude the entire examinations upon that subject. This cross examination was highly improper and counsel for appellee must have known it when the examination was being conducted. The only proof concerning criminal offenses which may be shown in either civil or criminal cases is proof of the conviction of an infamous offense. (People vs. Newman 261 Ill. 11; Katzenbaugh vs People 194 Ill. 108; Pioneer Fire Proofing Co. vs. Clifford 148 Ill. App. 254.) The rule respecting the method of proof differs in criminal and civil suits. In criminal suits it can be shown by the record only while in civil suits it may be shown upon cross examination of the witness. But it has never been held that it is proper in any case to show, merely for the purpose of impeachment, either by the record or by oral proof, that a witness has been arrested or indicted. (People vs. Newman, Supra). In this state of the record this error alone would require us to reverse and remand this case. If counsel desire to sustain their judgments they should refrain from such conduct in the trial of cases.

Complaint is also made that over the objection of appellant, the appellee was permitted to show that previous to the making of the contract in question appellant's father had acted as agent in selling to appellee the coal mine appellee owned and the father had also acted as agent in the disposal of it after the making of the contract sued upon, for which the father recieved total commissions amounting to $ 5500 and that ac-

pellant received these commissions for use in his business. The purpose of the introduction of this evidence was to show that the witness J.W.Savage was interested in appellant's business. While it is proper to show that he had a financial interest in the business, if such be the fact, still we do not see how the fact that J.W.Savage earned from appellee the money he put into appellant's business can be ~~xxxxxxx~~ material. That would not tend to discredit the witness but might tend to prejudice the jury. It is the fact of financial interest that would effect the weight of the testimony of the witness and not the source of the money he invested. The testimony objected to was in part inadmissible and in part admissible.

Appellant also objects to the giving of appellee's instructions 5,6,7 and 12. The contract in question, if made, was in part written and in part by telephone conversation. The construction of the written portion was for the court but by instructions 5 and 7, the court left that to the jury. Said instructions were therefore erroneous. (Dunn vs. Critchfield 214 Ill. 292.) Instructions number 6 told the jury that the burden of proof was upon the appellant without telling them that the burden of proof upon the set off was upon the appellee. This instruction was erroneous in that regard, but in view of the fact that the appellant admitted liability to the extent claimed in the set off, this error was harmless.

Instruction number 12 is in part, as follows: "The Court instructs the jury that if you believe, from the evidence, that the defendant Charles S. Gibson did not promise to sell to the plaintiff, Charles D. Savage 2000 tons of coal....." It is urged that this portion of the instruction mislead the jury into believing that, in order to be a valid contract, the promise of Charles S. Gibson must have been made in person and could not have been made by his agent J.W.Savage. Upon an examination of all of the instructions

pellant received these commissions for use in his business. The purpose of the introduction of this evidence was to show that the witness J.W.Savage was interested in appellant's business. While it is proper to show that he had a financial interest in the business, if such be the fact, still we do not see how the fact that J.W.Savage earned from appellee the money he put into appellant's business can be xxxxxxx material. That would not tend to discredit the witness but might tend to prejudice the jury. It is the fact of financial interest that would effect the weight of the testimony of the witness and not the source of the money he invested. The testimony objected to was in part inadmissible and in part admissible.

Appellant also objects to the giving of appellee's instructions 5,6,7 and 13. The contract in question, if made, was in part written and in part by telephone conversation. The construction of the written portion was for the court but by instructions 5 and 7, the court left that to the jury. Said instructions were therefore erroneous. (Dunn vs. Crittenfield 214 Ill. 292.) Instructions number 6 told the jury that the burden of proof was upon the appellant without telling them that the burden of proof upon the set off was upon the appellee. This instruction was erroneous in that regard, but in view of the fact that the appellant admitted liability to the extent claimed in the set off, this error was harmless.

Instruction number 13 is in part, as follows: "The Court instructs the jury that if you believe, from the evidence, that the defendant Charles E. Gibson did not promise to sell to the plaintiff, Charles D. Savage 2000 tons of coal....." It is urged that this portion of the instruction mislead the jury into believing that, in order to be a valid contract, the promise of Charles E. Gibson must have been made in person and could not have been made by his agent J.W.Savage. Upon an examination of all of the instructions

we are of the opinion that the jury could not have misled in that particular. The appellant was entitled to and did tender instructions, which were given to the jury informing them that the promise of the agent on behalf of his principal became the promise of the principal.

For the errors indicated the cause must be reversed and remanded.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct 8, 1924

AT A TERM OF THE APPELLATE COURT,

37611

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7280 Agenda No. 63

Antone Eschbach,

appellant, Appeal from Circuit Court

vs. of Kane County

Bernard Giertz, et al,

appellees,

233 I.A. 657

Jones, J:

The appellant Antone Eschbach, a taxpayer of Kane County, filed his bill of complaint in the circuit court of Kane county against the appellees Bernard F. Giertz, J. A. Blomquist, Chairman of the Road and Bridge Committee of the Board of Kane County, Illinois, Claude L. Hanson, County Superintendent of Highways, Charles Lowry, County Clerk and D. D. Ricker, County Treasurer, all of Kane County, Illinois, to enjoin the letting of a contract for the construction of a stretch of hard road in that county known as Section Y-15d on Route Number 7 to the appellee Giertz upon the ground that Giertz was not the lowest responsible bidder. The McCall Construction Company bid the sum of $87,334.65; the Illinois Hydraulic Stone & Construction Company bid the sum of $91,824.57; and the appellee, Giertz bid $88,533.88. The bids of the McCall Construction Company and of Giertz were subject to the alternative proposition that if their personal bonds were accepted, their bids could each be reduced 1½%. It will thus be seen that the successful bidder, Giertz, underbid the Illinois Hydraulic Stone & Construction Company, but was higher than the bid of the McCall Construction Company.

After due notice given, the appellant asked for a temporary injunction. The defendants entered their appearance to the bill. Upon the hearing the court denied the application for a temporary injunction, sustained a demurrer of all of the defendants to the bill and entered an order dismissing the bill for want of equity. From these three rulings and orders of the lower court the appellant has taken this appeal.

The question before the court is whether or not the bill of

General No. 7280 Agenda No. 63

Antone Eschbach,
appellant,
vs.
Bernard Gierts, et al,
appellees.

Appeal from Circuit Court of Kane County

233 I.A. 657

Jones, J:

The appellant Antone Eschbach, a taxpayer of Kane County, filed his bill of complaint in the circuit court of Kane county against the appellees Bernard E. Gierts, J. A. Blomquist, Chairman of the Road and Bridge Committee of the Board of Kane County, Illinois, Claude L. Hanson, County Superintendent of Highways, Charles Lowry, County Clerk and D. D. Ricker, County Treasurer, all of Kane County, Illinois, to enjoin the letting of a contract for the construction of a stretch of hard road in that county known as Section Y-15d on Route Number 7 to the appellee Gierts upon the ground that Gierts was not the lowest responsible bidder. The McCall Construction Company bid the sum of $67,334.65; the Illinois Hydraulic Stone & Construction Company bid the sum of $91,854.57; and the appellee, Gierts bid $88,533.88. The bids of the McCall Construction Company and of Gierts were subject to the alternative proposition that if their personal bonds were accepted, their bids could each be reduced 1½%. It will thus be seen that the successful bidder, Gierts, underbid the Illinois Hydraulic Stone & Construction Company, but was higher than the bid of the McCall Construction Company.

After due notice given, the appellant asked for a temporary injunction. The defendants entered their appearance to the bill. Upon the hearing the court denied the application for a temporary injunction, sustained a demurrer of all of the defendants to the bill and entered an order dismissing the bill for want of equity. From these three rulings and orders of the lower court the appellant has taken this appeal.

The question before the court is whether or not the bill of

complaint states a good cause of action. There is no allegation in the bill that the appellee Giertz is not fully able to carry out the contract awarded to him. Neither is there any allegation of fraud or favoritism upon the part of any of the officials or of the appellee Giertz in awarding the contract. The bill does allege that the McCall Construction Company is a responsible company fully able to perform all of the conditions of the contract sought to be awarded to the appellee Giertz. The bill further alleges that the McCall Construction Company and not the appellee Giertz is the lowest responsible bidder, but this allegation is in the nature of a conclusion of the pleader. There is nothing in the bill from which it can be said that the Board did not honestly exercise its judgment. Neither is there anything from which a comparison of the relative ability of the bidders to fully perform the contract can be made.

It has been held in numerous cases that the mere fact that one bidder is lower than the other so far as money value is concerned does not make such bidder the lowest responsible bidder and as such entitled to the award of the contract. (Kelly v. City of Chicago, 62 Ill. 279; People v. Kent, 160 Ill. 655.) The officials authorized to award the contract may take into consideration other facts and circumstances in determining who is the lowest responsible bidder. They may take into consideration the character of the bidders, the kind of work they do, their personal fitness for the work to be done, and any other circumstances tending to show the character of work likely to be done by them, and from these facts determine who is the lowest responsible bidder. It is not sufficient to show that the contract was not awarded to the lowest bidder. (Haslett v. City of Elgin, 254 Ill. 343.) The County Board of Kane County was vested with the exercise of official judgment, in the awarding of the contract. The courts have no right to interfere with the exercise of that judgment, in the absence of fraud or favoritism. (Kelly v. City of Chicago, Supra, Johnson v. Sanitary District, 163 Ill. 285.)

Since the bill neither charges fraud nor favoritism in the exercise of the discretion vested in the County Board by the law,

complaint states a good cause of action. There is no allegation in the bill that the appellee Giertz is not fully able to carry out the contract awarded to him. Neither is there any allegation of fraud or favoritism upon the part of any of the officials or of the appellee Giertz in awarding the contract. The bill does allege that the McCall Construction Company is a responsible company fully able to perform all of the conditions of the contract sought to be awarded to the appellee Giertz. The bill further alleges that the McCall Construction Company and not the appellee Giertz is the lowest responsible bidder, but this allegation is in the nature of a conclusion of the pleader. There is nothing in the bill from which it can be said that the Board did not honestly exercise its judgment. Neither is there anything from which a comparison of the relative ability of the bidders to fully perform the contract can be made.

It has been held in numerous cases that the mere fact that one bidder is lower than the other so far as money value is concerned does not make such bidder the lowest responsible bidder and as such entitled to the award of the contract. (Kelly v. City of Chicago, 62 Ill. 279; People v. Kent, 160 Ill. 655.) The officials authorized to award the contract may take into consideration other facts and circumstances in determining who is the lowest responsible bidder. They may take into consideration the character of the bidders, the kind of work they do, their personal fitness for the work to be done, and any other circumstances tending to show the character of work likely to be done by them, and from these facts determine who is the lowest responsible bidder. It is not sufficient to show that the contract was not awarded to the lowest bidder. (Haslett v. City of Elgin, 254 Ill. 343.) The County Board of Kane County was vested with the exercise of ~~xxxx~~ official judgment, in the ~~xxxxxx~~ awarding of the contract. The courts have no right to interfere with the exercise of that judgment, in the absence of fraud or favoritism. (Kelly v. City of Chicago, Supra, Johnson v. Sanitary District, 163 Ill. 285.)

Since the bill neither charges fraud nor favoritism in the exercise of the discretion vested in the County Board by th law,

and sets up no facts other than that the bid of the McCall Construction Company was lower than the bid of the appellee Giertz and these were the only facts relied upon to show that the appellee Giertz was not the lowest responsible bidder, the bill did not, upon its face, state a cause of action. The decree of the court denying the application for the injunction, sustaining the demurrer and dismissing the bill for want of equity was correct. It will therefore be affirmed.

Decree Affirmed.

and sets up no facts other than that the bid of the McCall Construction Company was lower than the bid of the appellee Giertz and these were the only facts relied upon to show that the appellee Giertz was not the lowest responsible bidder, the bill did not, upon its face, state a cause of action. The decree of the court denying the application for the injunction, sustaining the demurrer and dismissing the bill for want of equity was correct. It will therefore be affirmed.

Decree Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four.

Justus L. Johnson

Clerk of the Appellate Court.

37634

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7286 Agenda No. 45

M.T.Lee, Appellee
vs.
Charles W. Rabbit, Appellant

Appeal from Circuit Court of Lee County.

233 I.A. 657

Jones J:

The appellee took judgment by confession in the Circuit Court of Lee County, for $1128.67 on a note executed by appellant and payable to L.M.Fairbanks. It was endorsed by Fairbanks to Samuel Wetzel and by Samuel Wetzel negotiated to the appellee. Upon the petition of the appellant the judgment was opened up and the appellant permitted to plead. There was a trial before the court without a jury. Judgment was entered in favor of the appellee.

The question before the Court as stated by appellant in his argument is, "The sole question to be considered in this case is as to the good faith of the plaintiff in purchasing this note." The appellant was the owner of a farm in Wisconsin, which he contracted to convey to L.M.Fairbanks in exchange for a farm owned by the latter in Lee County, Illinois. The appellant gave five notes, one for $3,000 and three for $1,000 payable to L.M.Fairbanks. Four of the notes were delivered on the date of the contract and the fifth was handed by Fairbanks to Samuel Wetzel in payment of his commissions for selling Fairbank's land. The first four notes were afterwards surrendered to the appellant. Wetzel sold the note delivered to him to the appellee for $900.

The appellee is a cousin of Wetzel's by marriage, and had loaned Wetzel $400. At the time of taking the note the appellee inquired of two banks with respect to the financial responsibility of the appellant, and learned that he was financially responsible. He also wrote to a bank at Amboy making a similar inquiry, but he took and paid for

General No. 7455 — Agenda No. 45

M.T.Lee, Appellee,
vs.
Charles W. Babbitt, Appellant

: Appeal from Circuit Court of Lee County.

233I.A. 657

Jones J:

The appellee took judgment by confession in the Circuit Court of Lee County, for $1128.67 on a note executed by appellant and payable to L.M.Fairbanks. It was endorsed by Fairbanks to Samuel Wetzel and by Samuel Wetzel negotiated to the appellee. Upon the petition of the appellant the judgment was opened up and the appellant permitted to plead. There was a trial before the court without a jury. Judgment was entered in favor of the appellee.

The question before the Court as stated by appellant in his argument is, "The sole question to be considered in this case is as to the good faith of the plaintiff in purchasing this note." The appellant was the owner of a farm in Wisconsin, which he contracted to convey to L.M.Fairbanks in exchange for a farm owned by the latter in Lee County, Illinois. The appellant gave five notes, one for $3,000 and three for $1,000 payable to L.M.Fairbanks. Four of the notes were delivered on the date of the contract and the fifth was handed by Fairbanks to Samuel Wetzel in payment of his commissions for selling Fairbank's land. The first four notes were afterwards surrendered to the appellant. Wetzel sold the note delivered to him to the appellee for $900.

The appellee is a cousin of Wetzel's by marriage, and had loaned Wetzel $400. At the time of taking the note the appellee inquired of two banks with respect to the financial responsibility of the appellant, and learned that he was financially responsible. He also wrote to a bank at Amboy making a similar inquiry, but he took and paid for

the note before he received a reply. This reply informed the appellee that the consideration for the note had failed and the note was therefore not good.

It is contended by appellant that the circumstances were such as to put the appellee upon notice of the infirmity in the note. Appellant contends that, "Good faith" means "free from knowledge of circumstances, which ought to put a person upon inquiry," or as stated by appellant in another ~~xxyy~~ way; "Without knowledge of fraud and without intent to assist in fraudlent or otherwise unlawful scheme". Appellant cites Corpus Juris and authorities from other jurisdictions to support this claim. The cases of Bradwell vs Pryor 221 Ill. 602 and Kavanaugh vs Bank of America 239 Ill. 404 state the law in Illinois. The former case was decided in 1906 prior to the passage of the Negotiable Instruments Law and holds: "The rule now is that the endorsee or assignee of commercial paper, who takes the same before maturity for a valuable consideration, without knowledge of any defects and in good faith, will be protected against the defenses of the maker, and mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part at the time of the transfer, will not defeat his title. In other words, the only thing which will defeat his title is bad faith, on his part and the burden of proof is upon the person assailing his right to establish that fact by apreponderance of the evidence." Section 56 of the Negotiable Instruments Act provides; " To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amountd to bad faith."

the note before he received a reply. This reply informed the appellee that the consideration for the note had failed and the note was therefore not good.

It is contended by appellant that the circumstances were such as to put the appellee upon notice of the infirmity in the note. Appellant contends that, "Good faith" means "free from knowledge of circumstances, which ought to put a person upon inquiry," or as stated by appellant in another way; "Without knowledge of fraud and without intent to assist in fraudulent or otherwise unlawful scheme ". Appellant cites Corpus Juris and authorities from other jurisdictions to support this claim. The cases of Bradwell vs Pryor 221 Ill. 602 and Kavanaugh vs Bank of America 239 Ill. 404 state the law in Illinois. The former case was decided in 1906 prior to the passage of the Negotiable Instruments Law and holds: "The rule now is that the endorsee or assignee of commercial paper, who takes the same before maturity for a valuable consideration, without knowledge of any defects and in good faith, will be protected against the defenses of the maker, and mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part at the time of the transfer, will not defeat his title. In other words, the only thing which will defeat his title is bad faith, on his part and the burden of proof is upon the person assailing his right to establish that fact by a preponderance of the evidence." Section 56 of the Negotiable Instruments Act provides; " To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same , the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Subsequent to the passage of this Act the Court de-
dided Cavanaugh vs Bank of America, Supra and in that case
held: "Only bad faith will defeat the title of the endorsee
of commercial paper taken before maturity for value and with-
out knowledge of any defense thereto. Mere suspicion of de-
fect of title or the knowledge of circumstances calculated to
excite suspicion or even gross negligence of the endorsee
in acquiring the paper will not defeat his title. (Bradwell
vs. Pryor 221)" It will thus be seen that the passage of the
Negotiable Instruments Act did not effect the rule with respect
to good faith.

We have carefully examined all the evidence in the
light of the authorities above quoted and we are unable
to say that there is, in the record, sufficient proof of bad
faith on the part of the appellee to warrant the court in
giving judgment for the appellant. While the facts shown
might be sufficient to raise some suspicion in the mind of
the appellee at the time of the transfer of the note, still
they were not enough to show actual bad faith, upon his
part. We would not be justified in reversing this case, un-
less we were satisfied that the judgment of the court is
clearly against the weight of the evidence. (Smith vs.
Brown 48 Ill. 186; Burgett vs. Osborne 172 Ill. 227; Kuhne
vs. Malach 286 Ill 130; Anglo-Wyoming Oil Fields vs. Miller
117 Ill. App. 552.) This we cannot say. The judgment will
therefore be affirmdd.

Judgment Affirmed.

Subsequent to the passage of this Act the Court decided Cavanaugh vs Bank of America, Supra and in that case held: "Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity for value and without knowledge of any defense there to. Mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion or even gross negligence of the indorsee in acquiring the paper will not defeat his title. (Bradwell vs. Pryor 221)" It will thus be seen that the passage of the Negotiable Instruments Act did not effect the rule with respect to good faith.

We have carefully examined all the evidence in the light of the authorities above quoted and we are unable to see that there is, in the record, sufficient proof of bad faith on the part of the appellee to warrant the court in giving judgment for the appellant. While the facts shown might be sufficient to raise some suspicion in the mind of the appellee at the time of the transfer of the note, still they were not enough to show actual bad faith, upon his part. We would not be justified in reversing this case, unless we were satisfied that the judgment of the court is clearly against the weight of the evidence. (Smith vs. Brown 46 Ill. 185; Forsyth vs. Osborn [illegible] Ill. [illegible]; [illegible] vs. [illegible] 206 Ill 140; Anglo-[illegible] [illegible] vs. [illegible] 117 Ill. App. 552.) This we cannot say. The judgment will therefore be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

B163-4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On 924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7293 Agenda No. 54

Lydia Hoffman,

appellee,

vs.

George R.S. Hoffman,

appellant,

Appeal from the Circuit Court of Winnebago County

233 I.A. 658

Jones, J:

This is a suit for separate maintenance filed in the circuit court of Winnebago county by the appellee against the appellant. The parties were married November 17, 1921. The appellant is 74 years of age and the appellee is 53 years of age. The appellee filed a former suit for separate maintenance against the appellant at the April Term, 1922, of the circuit court. That cause was tried and concluded on June 27, 1922. The court dismissed appellee's bill for want of equity. The present suit was begun to the November 1922 Term of the Circuit Court.

Immediately after the entry of the decree in the former suit and on the same day, the appellee went back to the appellant's home, from which she had been absent since their separation in February, 1922. She gave no information to the appellant that she desired to return to him but entered the house as she testified by using a key that she had kept in her possession, although appellant's testimony indicates that she broke the glass out of a back door, so she could reach through and unfasten the door and so gained entrance. The appellee retired about ten o'clock that night in a room she had not occupied when they were living together. The appellant came in sometime later. According to her testimony she said to him "Hello George, I have come back. I have come back to live with you George. I have come back and I want to get along if we can." To which he made no reply. Appellant testified that she said nothing to him.

The next morning, appellant arose and went downstairs. Appellee soon followed and according to her testimony, talked to him again

General No. 7293

Agenda No. 54

Lydia Hoffman,
appellee,
vs.
George R.S. Hoffman,
appellant,

Appeal from the Circuit Court
of Winnebago County

233 I.A. 658

Jones, J:

This is a suit for separate maintenance filed in the circuit court of Winnebago county by the appellee against the appellant. The parties were married November 17, 1921. The appellant is 74 years of age and the appellee is 53 years of age. The appellee filed a former suit for separate maintenance against the appellant at the April Term, 1922, of the circuit court. That cause was tried and concluded on June 27, 1922. The court dismissed appellee's bill for want of equity. The present suit was begun to the November 1922 Term of the Circuit Court.

Immediately after the entry of the decree in the former suit and on the same day, the appellee went back to the appellant's home, from which she had been absent since their separation in February, 1922. She gave no information to the appellant that she desired to return to him but entered the house as she testified by using a key that she had kept in her possession, although appellant's testimony indicates that she broke the glass out of a back door, so she could reach through and unfasten the door and so gained entrance. The appellee retired about ten o'clock that night in a room she had not occupied when they were living together. The appellant came in sometime later. According to her testimony she said to him "Hello George, I have come back. I have come back to live with you George. I have come back and I want to get along if we can." To which he made no reply. Appellant testified that she said nothing to him.

The next morning, appellant arose and went downstairs. Appellee soon followed and according to her testimony, talked to him again

about living with him as his wife. Appellant denies that he heard anything that she said and says that he received no communication from her during that day. She left the house sometime that day.

It is evident from the testimony that appellee took steps to secure interviews with the appellant for the purpose of discussing her return to live with him. There is nothing to be gained by reciting these conversations in detail, or reviewing the evidence at great length. That part above quoted, is sufficient to disclose its conflicting nature. Both parties were advised by counsel with respect to their actions in the matter. It is clear, however, that the appellant did finally refuse to receive the appellee as his wife.

There are no errors of law urged. The law is that even though a wife is living separate and apart from her husband, through her own fault, nevertheless, if she, in good faith, and for the purpose of carrying out the marriage contract by the full performance of the duties resulting from the marriage relation, returns or offers to return to her husband, he is in duty bound to receive her. (Thomas v. Thomas, 152 Ill. 577; Haley v. Haley, 209 Ill. App. 153). And if he refuses to receive her, under such circumstances, the wife is thereafter considered as living separate and apart from her husband without any fault on her part within the meaning of Section 1 of the Separate Maintenance Act. (Pratt v. Pratt, 197 Ill. App. 530.) Such refusal upon his part will entitle her to sue for alimony. (Modjeski v. Modjeski, 209 Ill. App. 313).

In this case the only question is one of fact, and it is urged that the chancellor erred in finding that the appellee was living separate and apart from the appellant through his fault and without fault on her part. We have reviewed enough of the evidence to show that it is highly conflicting on all material issues. In such a case, where the chancellor had the opportunity of seeing the witness and hearing them testify, this court will not reverse a decree upon an appeal, unless the finding of the

about living with him as his wife. Appellant denies that he heard anything that she said and says that he received no communication from her during that day. She left the house sometime that day.

It is evident from the testimony that appellee took steps to secure interviews with the appellant for the purpose of discussing her return to live with him. There is nothing to be gained by reciting these conversations in detail, or reviewing the evidence at great length. That part above quoted, is sufficient to disclose its conflicting nature. Both parties were advised by counsel with respect to their actions in the matter. It is clear, however, that the appellant did finally refuse to receive the appellee as his wife.

There are no errors of law urged. The law is that even though a wife is living separate and apart from her husband, through her own fault, nevertheless, if she, in good faith, and for the purpose of carrying out the marriage contract by the full performance of the duties resulting from the marriage relation, returns or offers to return to her husband, he is in duty bound to receive her. (Thomas v. Thomas, 152 Ill. 577; Haley v. Haley, 209 Ill. App. 153). And if he refuses to receive her, under such circumstances, the wife is thereafter considered as living separate and apart from her husband without any fault on her part within the meaning of Section 1 of the Separate Maintenance Act. (Pratt v. Pratt, 197 Ill. App. 530.) Such refusal upon his part will entitle her to sue for alimony. (Modjeski v. Modjeski, 208 Ill. App. 213).

In this case the only question is one of fact, and it is urged that the chancellor erred in finding that the appellee was living separate and apart from the appellant through his fault and without fault on her part. We have reviewed enough of the evidence to show that it is highly conflicting on all material issues. In such a case, where the chancellor had the opportunity of seeing the witnesses and hearing them testify, as this court will not reverse a decree upon an appeal, unless the finding of the

Chancellor is manifestly against the weight of the evidence. (Johnson v. Johnson, 125 Ill. 510; Porter v. Porter, 162 Ill. 398; McCarthy v. McCarthy 319 Ill. App. 369.) He was in a much better position than we are to determine whether or not the appellee's offer to return and live with appellant was made in good faith. We cannot say the finding is against the manifest weight of the evidence.

The decree of the court will therefore be affirmed.

Decree Affirmed.

Chancellor is manifestly against the weight of the evidence. (Johnson v. Johnson, 125 Ill. 510; Porter v. Porter, 162 Ill. 398; McCarthy v. McCarthy 219 Ill. App. 369.) He was in a much better position than we are to determine whether or not the appellee's offer to return and live with appellant was made in good faith. We cannot say the finding is against the manifest weight of the evidence.

The decree of the court will therefore be affirmed.

Decree Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

Rehearing Denied
Oct. 8, 1924

AT A TERM OF THE APPELLATE COURT,

5763

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On APR 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7299 Agenda No. 57

J.M.Davidson, et al, Appelles :

vs. : Appeal from Circuit Court of Peoria County

The California Insurance Co. of San Francisco :

233 I.A. 658

Jones J:

The appellees, J.M.Davidson, and the Cadillac Motor Sales Company, filed their bill of complaint in the circuit court of Peoria County asking for the reformation of a certain policy of insurance issued upon a Hudson automobile. The bill set forth that the complainant J.M.Davidson was the owner of the car; that it was mortgaged to the Cadillac Motor Sales Company to secure $1200 of the purchase price; that W.B.Davidson, a brother of the appellee, J.M.Davidson, signed both the note and the mortgage as surety for him; that thereupon the appellee J.M.Davidson, in company with W.B. Davidson, went to J.H.Holtman, agent of the appellant and requested the issuance of the insurance policy in question to J.M.Davidson, as owner, with the loss payable to the Cadillac Motor Sales Company as its interest might appear; that he agreed to extend credit to Davidson for the payment of the premium; and that Davidson paid $20.58 on November 21, 1921, and $30.00 on November 24, upon the premium.

The bill further alleges that Holtman, by error inserted the name of W.B.Davidson, as owner of the car, in the policy instead of J.M.Davidson; and that the auto was destroyed by fire on December 14, 1921, while the policy was in force.

The prayer of the bill is that the policy by reformed by changing the name of W.B.Davidson to J.M.Davidson and that the appellant be required to make full payment of the loss incurred.

General No. 7299 — Agenda No. 57

J.M.Davidson, et al, Appellees :

vs. : Appeal from Circuit Court of Peoria County.

The California Insurance Co. of San Francisco :

233 I.A. 658

Jones J:

The appellees, J.M.Davidson, and the Cadillac Motor Sales Company, filed their bill of complaint in the circuit court of Peoria County asking for the reformation of a certain policy of insurance issued upon a Hudson automobile.

The bill set forth that the complainant J.M.Davidson was the owner of the car; that it was mortgaged to the Cadillac Motor Sales Company to secure $1300 of the purchase price; that W.B.Davidson, a brother of the appellee, J.M.Davidson, signed both the note and the mortgage as surety for him; that thereupon the appellee J.M.Davidson, in company with W.B. Davidson, went to J.H.Holtman, agent of the appellant and requested the issuance of the insurance policy in question to J.M.Davidson, as owner, with the loss payable to the Cadillac Motor Sales Company as its interest might appear; that he agreed to extend credit to Davidson for the payment of the premium; and that Davidson paid $30.58 on November 21, 1931, and $30.00 on November 24, upon the premium.

The bill further alleges that Holtman, by error inserted the name of W.B.Davidson, as owner of the car, in the policy instead of J.M.Davidson; and that the auto was destroyed by fire on December 14, 1931, while the policy was in force.

The prayer of the bill is that the policy by reformed by changing the name of W.B.Davidson to J.M.Davidson and that the appellant be required to make full payment of the loss incurred.

The answer of the appellant sets up that the mistake was not mutual in that the appelant company intended to insure not J.M.Davidson, but W.B.Davidson; that the premium upon said policy was not paid at the time of the issuance thereof; that on October 20th, 1921, following the issuance of the policy on July 2nd, of that year, the appellant company cancelled said policy in writing by notification to the said W.B.Davidson and that the policy was not in force at the time of the loss alleged. The answer further denies that there were any payments made upon said premium after the cancellation of said policy by the appellee J.M.Davidson, but alleges that the two payments made by J.M.Davidson were to be applied upon an old account of W.B.Davidson with said appellant amounting to $150 or $200. The answer, however, admits that at the time J.M.Davidson and the Cadillac Motor Sales Company offered to make proof of loss and demanded payment of the loss sustained, that J.H.Holtman, agent of the appellant, refused to supply blanks for the making of proofs to pay the loss upon the sole ground that the policy had been cancelled and was not in force and effect at the time of the loss. The Master found all of the contested issues in favor of the appellees and that there was due the Cadillac Motor Sales Company the sum of $1,002.44 and to the owner J.M.Davidson the sum of $358.85. He recommended that a decree be rendered reforming the policy and requiring the payment, of said sums by the appellant.

The decree was rendered by the Court in conformity with the findings and recommendations of the Master from which decree this appeal is taken. The main contentions of the appellant are, first, that the evidence does not show a mutual mistake of the parties in that the appellant intended to insure W.B.Davidson, named in the policy; second that the appellees are barred by laches in their failure to discover the error during the period from July 2nd, 1920 to the

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time of the filing of their bill; third, that the policy was not in force at the time of the alleged loss, and; fourth, that the evidence shows the paymnts made by J.M.Davidson to have been made upon the account of W.B.Davidson and not for the payments of the premiums upon the policy.

An instrument will be reformed only upon a mutual mistake of fact of the parties (Salurian Oil Co. et al vs. Neal 277 Ill. 45; German Fire Insurance Co. vs Gueck 130 Ill. 345; Purvines et al vs. Harrison, et al 151 Ill. 219)and upon clear and convincing evidence of such mistake. (Salurian Oil Company vs Neal Surpa and Sutherland vs Sutherland 69 Ill. 481) Upon an examination of the evidence we have reached the conclusion that the proof of the mutuality of the mistake in this case, meets the requirements of the law. While the appellee J.M. Davidson is to some extent, impeached, nevertheless, he is corroborated in the essential points of his testimony and there are strong impeaching circumstances attending the testimony of ~~J.M.Davidson~~ J. H. Holtman, agent for the appellant who is the only witness in its behalf upon that point. We cannot disturb the decree upon this question of fact.

It is shown by the evidence that the policy was delivered to the Cadillac Motor Sales Company by a Clerk in its office, who received it in the course of the mail in the absence of the agent, Wood. The policy was never inspected until the loss occurred and both J.M.Davidson and the appellee relied upon Holtman in writing the policy. No delay is shown after the error was brought to their attention. Moreover, the refusal to adjust the loss was not placed upon the ground that J.M. Davidson was not properly insured, but solely upon the ground that the policy had been cancelled. In the case of German Fire Insurance Company vs. Gueck, Supra, a delay

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of years did not ~~bear~~ bar the reformation of a policy although the complainants had the policy in their possession during all that time. It is ~~said~~ there said that when the company places its refusal to pay upon one ground, it cannot afterwards urge another defense. Upon this rule see also-- Life Ins. Co. vs. Pierce 75 Ill. 426; Home Ins. Co. of New York vs. Bethel 142 Ill. 537; Phenix Ins Co. vs. Stocks 149 Ill. 319.

It is urged that the policy was cancelled by notice in writing to W.B.Davidson and that the payments afterwards accepted from J.M.Davidson were made on a long standing account of W.B.Davidson. It is conceded the amounts paid exceed the earned premium on the policy. The determination of the fact with respect to the payments determines the rights of the parties. If, from the evidence, the finding of the master that the payments were made on the premium is correct, then the cancellation was waived. (Am. Acc. Co. vs. Rehacek 123 Ill. App. 219; Penn Mutual Ins. Co. vs. Keach 32 Ill. App. 427.) The evidence of either party upon this point standing alone is sufficient to sustain the respective contentions. The Master, however, found in favor of the complainants. The Court has approved the findings of the Master, We do not feel, under these circumstances, that upon the question of fact, the decree should be disturbed and since the law is as indicated above, the decision of this court must be in favor of the appellees.

Indeed the whole case might be decided upon the single determination of fact that the appellant had waived all grounds of defense except cancellation of the policy and that after having cancelled the policy the company waived that defense by receiving premiums in excess of the earned premium upon the policy.

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Indeed the whole case might be decided upon the single determination of fact that the appellant had waived all grounds of defense except cancellation of the policy and that after having cancelled the policy the company waived that defense by receiving premiums in excess of the earned premium upon the policy.

Since there is no error in the record the decree of the circuit court will be affirmed.

Decree Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-four,

Justus L. Johnson

Clerk of the Appellate Court.

(3/6/4-)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On APR 10 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7303 Agenda No. 60

Warren Williamson, et al, Appellees
vs.
Leo P. Baird, Trustee of the Estate of George Williamson, Bankrupt,
Appellant

: Appeal from Circuit Court of Knox County

233 I.A. 658

Jones J:

This is a bill for partition filed in the Circuit Court of Knox County by the devisees, under the last will of John Warren deceased, for the partition of real estate located in Knox and Warren Counties against George Williamson, another devisee and co-tenant and Leo P. Baird, trustee in bankruptcy for said George Williamson and G. A. Shipplett, The suit involves only the one fifth interest of George Williamson in the premises and the controversy is over the disposition of the proceeds of the sale of his interest. On October 11, 1919, George Williamson made and delivered to the defendant G. A. Shipplett his quit claim deed of his undivided one fifth interest in the real estate. It is admitted by all of the parties to the suit that his deed was in fact mortgage and not an absolute conveyance. Williamson was declared a bankrupt on December 23, 1920 and the appellant Baird was appointed trustee of his estate.

The bill set up that the deed was given to secure the payment to Shipplett of certain sums of money which had been advanced to Williamson, and other sums which were to be advanced in the future including among them a certain store account in the sum of $625.00, and that there was due Shipplett $5,825, exclusive of interest.

Shipplett answered the bill admitting that the deed was a mortgage, claiming all of the amounts set up in the bill of complaint and averring that in addition thereto there was due him the sum of $305.60, with interest, which he had paid on a note of George Williamson to the First National Bank of Abingdon and that this latter sum was secured by said deed.

General No. 7303 Agenda No. 60

Warren Williamson, et al, Appellees :

vs. : Appeal from Circuit Court of Knox County

Leo P. Baird, Trust$e of the Estate of George Williamson, Bankrupt, :

Appellant

233I.A. 658

Jones J:

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The bill set up that the deed was given to secure the payment to Shipplett of certain sums of money which had been advanced to Williamson, and other sums which were to be advanced in the future including among them a certain store account in the sum of $625.00, and that there was due Shipplett $5,825, exclusive of interest.

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The appellant Baird answered admitting that the deed was a mortgage but setting up that there was no further or other sum than $5,000 with interest, due Shipplett, There was a stipulation between the parties that this sum should be allowed to Shipplett together with such other sums not included therein as the Court should find to be secured by said deed. Upon a hearing, the Court found that the store account and note above mentioned were secured by the deed in addition to the sum of $5,000 and there was a decree for the payment of all three sums with interest to the defendant Shipplett, Shipplett, however, admits that there was an error of $80.40 in his favor in the computation of interest. He offers to remit that sum.

It is first contended by appellant that Shipplett could have no relief even to the ~~extand~~ extent of the $5,000 stipulated because he filed no cross bill and could have no affirmative relief, In this appellant is in error, The statute makes it the duty of the complainants in a partition suit to set forth the interests of all the parties in the premises and the duty of the Court to find and declare such interest. It has been held that in such case no cross bill is necessary (Prichard vs. Littlejohn 128 Ill. 123; Renfro vs. Hanon 279 Ill. 353.) In this case the allegations of the bill, the answer of Shipplett, and of the trustee Baird, with replications to the answers were sufficient to authorize the court to determine the amount due on the mortgage, and after the sale, to decree payment to Shipplett of the amount due him out of the proceeds of the sale, (Spencer vs. Wiley 149 Ill. 56).

Appellant cites several cases to support his contention that a cross bill is necessary. Of the cases cited, however, Nietert vs. Blank 199 Ill. App. 28 supports the views herein expressed. The cases Purdy vs. Henslee 97 Ill. 389 and Howe vs. Park Commissioners 119 Ill. 101 which are partition suits to some extent support appellant's contention, but the cases of Prichard vs. Littlejohn and Renfro vs. Hanon, Supra, since decided, are cases in which it was held that in partition proceedings a cross bill is not necessary in order to litigate questions arising between co-defendants, even though the complainants are

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not interested in such issues. We are bound to follow these latter cases. The remaining cases cited by appellant are not partition suits.

It is next insisted that there is a variance between the pleadings, proof, and the decree. This is the only substantial objection raised on this appeal but we find, upon an examination of the record, that the question was not raised in the trial court and since that is true, it cannot be raised here. (Bonner & Marshall Co. vs. Hansell 189 Ill. App. 474; 22 Ency. Pleadings & Practice 629, 632, and 633.) For this reason, we cannot consider the objection.

It is further urged by the appellant that the items above noted and allowed in the decree were not subjects of the contract between Williamson and Shipplett. We do not think that this contention is sustained by the evidence. Inasmuch as the appellee Shipplett admits error of $80.40 in computation of interest he will be required to remit the amount and upon such remittitur the decree will be affirmed.

Decree Affirmed.

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It is further urged by the appellant that the items above noted and allowed in the decree were not subjects of the contract between Williamson and Shipplett. We do not think that this contention is sustained by the evidence. Inasmuch as the appellee Shipplett admits error of $60.40 in computation of interest he will be required to remit the amount and upon such remittitur the decree will be affirmed.

Decree Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson

Clerk of the Appellate Court.

80

(39652)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7305 Agenda Number 48

Lillie Redlinger, Appellant
vs.
Jacob Henk and John Henk,
Appellees.

Appeal from Circuit
Court of Lake County

233 I.A. 658

Jones J:

The appellant brought suit against the appellee for assault and battery alleged to have been committed on May 30, 1919. The defendants filed separate pleas of the general issue only. The appellant and her mother, sister and brother were in a dispute with the appellees concerning the true division line between their adjoining farms. The appellees placed a fence on what they claimed to be the line. The appellant, her mother, brother and sister took out the fence after the appellees had left and were placing it where they claimed the true line to be. The appellees returning undertook to pull up the fence so placed by the appellant and her relatives. An altercation ensued, which was ~~thereafter~~ followed by some violence. Appellant claims that John Henk struck her in the face, knocked her down and afterwards kicked her. Her relatives testify to somewhat similar violence. Appellant also claims that Jacob Henk choked her and she is supported to some extent by her rlatives. On the other hand, the appellees deny having struck the appellant at any time and claim that they merely warded off her blows. Jacob Henk admitted laying his hands on the appellant, but, as he says, to raise her up from the ground. The appellees are corroborated by John Eilers, who accompanied them. It will thus be seen that there was a direct conflict on all important issues in the case.

The appellant contends that defendant's instruction number 2 incorrectly stated the law. We have examined

General Number 7969   Agenda Number 48

Lillie M[illegible], Appellant
vs.
Jacob Henk and John Henk,
Appellees.

Appeal from Circuit
Court of Lake County

233I.A. 658

Jones J:

The appellant brought suit against the appellee for assault and battery alleged to have been committed on May 30, 1919. The defendants filed separate pleas of the general issue only. The appellant and her mother, sister and brother were in a dispute with the appellees concerning the true division line between their adjoining farms. The appellees placed a fence on what they claimed to be the line. The appellant, her mother, brother and sister took out the fence after the appellees had left and were placing it where they claimed the true line to be. The appellees returning undertook to pull up the fence so placed by the appellant and her relatives. An altercation ensued, which was xxxxxxxx followed by some violence. Appellant claims that John Henk struck her in the face, knocked her down and afterwards kicked her. Her relatives testify to somewhat similar violence. Appellant also claims that Jacob Henk choked her and she is supported to some extent by her relatives. On the other hand, the appellees deny having struck the appellant at any time and claim that they merely warded off her blows. Jacob Henk admitted laying his hands on the appellant, but, as he says, to raise her up from the ground. The appellees are corroborated by John Filers, who accompanied them. It will thus be seen that there was a direct conflict on all important issues in the case.

The appellant contends that defendant's instruction number 8 incorrectly stated the law. We have examined

this instruction carefully and while the law is not as accurately stated as it might have been, nevertheless, no reversible error was committed in the giving of it.

Objection is also made to the defendant's instruction Number 3, which told the jury in substance that if the jury believed that the conduct of the appellant was violent, abusive and menacing and that the defendants used no more force than reasonably prudent and careful men would use under the circumstances, the jury should find them not guilty. This instruction was tendered in the case of The Illinois Steel Company vs. Waznuis 191 Ill. App. 536 and refused by the Court in a similar case. The cause was reversed and remanded for error in refusing the instruction. We believe the law to be correctly stated in that opinion. With respect to the second instruction, it may be well to note that a case will not be reversed even though improper instructions have been given, or proper instructions refused, if substantial justice has ben done. (Beifield vs. Paese 101 Ill. App. 539 and cases therein cited.)

We have examined the evidence in this case carefully in view of the fact that the case has been passed upon by three juries. The first disagreed and the last two found for the defendants. We feel constrained to say that the jury was justified by the evidence in returning the verdict upon which judgment was entered.

Appellant ~~also~~ complains of the refusal of the Court to give instruction number 3 for the appellant. This instruction told the jury in substance that if the defendants assaulted the plaintiff and at the same time plaintiff assaulted the defendants, that then the assault by the plaintiff upon the defendants could only be considered by them in diminution of damages to be awarded the plaintiff against the defendants.

this instruction carefully and while the law is not as accurately stated as it might have been, nevertheless, no reversible error was committed in the giving of it.

Objection is also made to the defendant's instruction Number 5, which told the jury in substance that if the jury believed that the conduct of the appellant was violent, abusive and menacing and that the defendants used no more force than reasonably prudent and careful men would use under the circumstances, the jury should find them not guilty. This instruction was tendered in the case of The Illinois Steel Company vs. Wiznuis 191 Ill. App. 536 and refused by the Court in a similar case. The cause was reversed and remanded for error in refusing the instruction. We believe the law to be correctly stated in that opinion. With respect to the second instruction, it may be well to note that a case will not be reversed even though improper instructions have been given, or proper instructions refused, if substantial justice has been done. (Briffield vs. Pease 101 Ill. App. 558 and cases therein cited.)

We have examined the evidence in this case carefully in view of the fact that the case has been passed upon by three juries. The first disagreed and the last two found for the defendants. We feel constrained to say that the jury was justified by the evidence in returning the verdict upon which judgment was entered.

Appellant xxxxx complains of the refusal of the Court to give instruction number 3 for the appellant. This instruction told the jury in substance that if the defendants assaulted the plaintiff and at the same time plaintiff assaulted the defendants, that then the assault by the plaintiff upon the defendants could only be considered by them in mitigation of damages in an assault the plaintiff against the defendants.

The instruction makes no reference to a finding by the jury with respect to which of the parties might be the aggressor. Clearly if the plaintiff were the aggressor and the defendants acted only to the extent made necessary by such aggression, they would not be liable and the instruction as worded is erroneous and properly refused.

It is last contended by the appellant that the verdict is against the manifest weight of the evidence; in that a technical assault is shown, which would warrant the jury in finding nominal damages in any event. It is contended by the defendants, and there is evidence in the record, to support their contention, that neither of them made any unlawful assault upon the plaintiff. The weight of the evidence is for the jury and unless we can say that the verdict of the jury is manifestly against the weight of the evidence, we would not be justified in setting the verdict aside. This we cannot say. (Lewis vs. Chicago & Northwestern Railway Co. 199 Ill. App. 438.)

There being no reversible error in the record, the judgment will be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

233 I.A. 58

BE IT REMEMBERED, that afterwards, to-wit: On APR 16 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7345 Agenda No. 18.

PEOPLE OF THE STATE OF ILLINOIS.
DEFENDANT IN ERROR

V S.

FRANK WILSHER,
PLAINTIFF IN ERROR.

ERROR TO COUNTY COURT OF HENDERSON COUNTY.

233 I.A. [illegible]

Jones J.

The plaintiff in error was convicted of the charge of manufacturing intoxicating liquor, contrary to the provisions of the Prohibition Act, and was sentenced to imprisonment in the county jail, for a term of sixty days and to pay the costs of suit.

The count of the information upon which the plaintiff in error was convicted, charges that he, on September 13, 1923, "unlawfully did then and there manufacture intoxicating liquor contrary to the form of the statute, in such case made and provided and against the peace and dignity of the same People of the State of Illinois."

On September 13, 1923, at about eleven o'clock at night, the City Marshall of Stronghurst, in Henderson County, Illinois, went with a search warrant to the home of plaintiff in error and his sister in Stronghurst; and found the plaintiff in error in the backyard of the premises.

The City Marshall made a search of the premises, and in a wood-shed thereon, found a fifteen gallon keg, containing liquor, in which there were grapes, corn, rye, raisins and fresh grape seed. He also found some jugs, one of which contained liquor, with sugar in the bottom thereof. At the same time and place he found a stone jar, and a number of bottles, which bottles contained a strong odor of whiskey.

The plaintiff in error was arrested by the marshall and taken to the city jail, where he remained until the next day. The keg, and one jar, containing liquor, were taken in charge by the officer, and later a portion of this liquor was analyzed by a chemist, and found to contain fourteen and four tenths per cent grain alcohol, by volume, and the chemist testified that the liquor, delivered to him, and which he analyzed, was fit for beverage purposes, and that it was pure, grain alcohol.

The day following his arrest, plaintiff in error was taken to the County Seat of Henderson County in an automobile, and a jar of the liquor was taken in the same car. On the way to the county seat the plaintiff in error stated that he made the stuff contained in the jar which they had in the car. Plaintiff in error was informed that the liquor in the jar had been taken out of the keg, and he said he made what was in the keg. Plaintiff in error was placed in the county jail, and shortly thereafter he called for the keeper of the jail and had a conversation with him, in which plaintiff in error stated that "they had got him with the goods." The jailer then inquired if it would make him drunk and plaintiff in error replied "hell, yes". Plaintiff in error was then informed by the jailer that he was not the right man for him to talk to and the plaintiff in error replied "Call Nolan." Nolan was the State's Attorney. Nolan was called and plaintiff in error told him, in substance, what he had said to the jailer. On the trial of the case plaintiff in error did not take the witness stand to testify and the statements and admissions made by him were not controverted nor contradicted. There is no material conflict in the testimony.

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It is insisted by plaintiff in error that the venue was not proven as charged in the information. The ingredients found at the place where plaintiff inerror was arrested were in Stronghurst, and the evidence shows that Stronghurst is in Henderson County. The venur may be established and proven by facts and circumstances, from which it can reasonably be inferred. The fact that the liquor and the various containers were found at the home of the plaintiff in error in Stronghurst, Henderson County, and that he was arrested immediately following thesearch, and that the containers were open vessels, part of the liquor in process of making, and that the grape seeds were fresh, coupled with the admissions of the plaintiff in error that he made the liquor, and that they had caught him with the goods on him, leaves no other reasonable inference than that the liquor was manufactured in Stronghurst, in said Henderson County.

Plaintiff in error contends that the record fails to disclose that the liquor was manufactured by the plaintiff in error subsequent to July 1, 1921. It was not incumbent upon the people to prove by the statement of any witness or witnesses that the liquor was manufactured subsequent to July 1, 1921. This fact also could be established by facts and circumstances. It will be remembered that the search and arrest were made on September 12, 1922. At the time the liquor was being manufactured; the grape seeds were fresh, and liquor was found in open containers. These facts, when considered in connection with the admission of the plaintiff in error, were sufficient to establish the fact that the offense was committed subsequent to July 1, 1921.

It is strenuously urged by the plaintiff in error, that instruction number six, given on the part of the prosecution is erroneous. While we cannot approve this instruction, we are not prepared to say that it constituted reversible error.

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Plaintiff in error contends that the record fails to disclose that the liquor was manufactured by the plaintiff in error subsequent to July 1, 1931. It was not incumbent upon the people to prove by the statement of any witness or witnesses that the liquor was manufactured subsequent to July 1, 1931. This fact also could be established by facts and circumstances. It will be remembered that the search and arrest were made on September 12, 1932. At the time the liquor was being manufactured; the grape seeds were fresh, and liquor was found in open containers. These facts, when considered in connection with the admission of the plaintiff in error, were sufficient to establish the fact that the offense was committed subsequent to July 1, 1931.

It is strenuously urged by the plaintiff in error, that instruction number six, given on the part of the prosecution is erroneous. While we cannot approve this instruction, we are not prepared to say that it constituted reversible error.

In view of the facts as they appear in this record, in our opinion this instruction did not work any harm to the plaintiff in error.

Plaintiff in error argues that there is no evidence to show that the liquor, which he was charged with having manufactured, was fit for beverage purposes. The chemist who made an examination of the liquor, and analyzed it, testified that the alcohol was pure grain alcohol, and was fit for beverage purposes. We have examined the suggestions made by plaintiff in error, relative to the information, and we are of the opinion it was sufficient to charge the offense of manufacturing intoxicating liquor and the Violation of the Illinois Prohibition Law.

After a careful examination of the record in this cause, we are unable to say that reversible error was committed in the trial of the case.

The judgment of the County Court of Henderson County, will be affirmed, which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and twenty-four

Justus L. Johnson
Clerk of the Appellate Court.

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